AN ABRIDGMENT

OF

CASES

ARGUED AND DETERMINED

IN

THE COURTS OF LAW.

227 i 2

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DURING THE REIGN OF HIS PRESENT MAJESTY,

KING GEORGE THE THIRD.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

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AUTHOR OF

THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE.

VOLUME THE SECOND.

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AN

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ERRATA.

In page 129, ſide note, inſtead of *Halſe* read *Hulſe*.
——— 400, line 12, inſtead of iſſued at, read iſſued *it* at.
——— 421, line 12, *dele* the word *But*.
——— 438, ſide note, inſtead of *Brown* read *Bacon* v. *Searles*.
——— 615, line 36, inſtead of *fee ſocage* read *free ſocage*.
——— 739, line 17, inſtead of *of it bonâ fide*, read *if it be bonâ fide*.
——— 749, line 41, inſtead of C. R. read B. R.
——— 794, line 36, inſtead of *Juſtices* read *Juſticies*.

MEMORANDUM.

In the caſe of *Hornblower* and *Maberley* v. *Boulton* and *Watt**, in error, from C. B. 8 Ter. Rep. 95. The Court of King's Bench, after a ſolemn argument, decided that the patent for "*a method of leſſening the conſumption of ſteam and fuel in five engines*," is valid.—Vide the caſe of *Boulton* and *Watt* v. *Bull*, in Vol. I. p. 96, when the Court of C. B. were equally divided in opinion on the queſtion.

* This and other caſes that may be decided during the time this work is at preſs, will be inſerted in a general appendix.

A TABLE

AN ABRIDGMENT

OF

CASES

ARGUED AND DETERMINED

IN

THE COURTS OF LAW.

Bankrupt.

I. *What Perſons may become Bankrupt.*

A Feme covert who is a ſole trader, and carries on a ſeparate trade within the city of London, according to the cuſtom of the ſaid city, is liable to a commiſſion of bankruptcy.—This was a caſe reſerved upon a trial at *niſi prius* in an action of trover, brought by the aſſignees of *Jane Cox*, a ſole trader in London, and a bankrupt, againſt the aſſignees of *John Cox* her huſband, who was alſo a bankrupt. The action was brought to try whether the plaintiffs had a right, as aſſignees of *Jane*, to certain goods in the millinery trade, carried on by her after her marriage; which goods had been ſeized by the perſons acting under the commiſſion iſſued againſt *John Cox*, her huſband. A verdict was given for the plaintiffs, ſubject to the opinion of the court, on the following caſe: "1ſt. The commiſſion of "bankruptcy iſſued againſt *John Cox*, the huſband, on 13th "March, and the commiſſion againſt *Jane*, his wife, on "26th April, 1764. 2dly. The cuſtom of London is as "follows: *where a feme covert of a huſband uſeth any craft "in the ſaid city, on her ſole account, whereof the huſband med-"dleth nothing; ſuch a woman ſhall be charged as a feme "ſole, concerning every thing that toucheth the craft; and if "the huſband and wife ſhall be impleaded, in ſuch caſe the wife "ſhall plead as a feme ſole, and if ſhe is condemned ſhe ſhall be "committed to priſon till ſhe has made ſatisfaction; and the "huſband and his goods ſhall not, in ſuch caſe, be charged or "impeached.* 3dly. This Jane Cox, the wife, was a ſole "trader, and carried on a ſeparate trade within the ſaid city,

Lavie *et al.* aſſignees of Jane Cox v. Phillips and others, aſſignees of John Cox. Mic. Ter. 6 Geo. 3. B. R. 3 *Burr.* 1776, 1 *Black.* 570.

" city, according to the cuſtom of the ſaid city of London. " 4thly. The goods for which this action was brought were " part of the effects of her ſole trade. 5thly. The aſſignees " of the huſband's commiſſion ſeized theſe goods on the day " the commiſſion iſſued againſt him." The queſtion was put as a ſingle one; but was in effect double: namely, FIRST, *Whether the aſſignees of* John, *the huſband, had a right to take the ſeparate effects of* Jane, *his wife, who was a ſole trader, and apply them towards ſatisfaction of the debts of the huſband, under the commiſſion awarded againſt him, in prejudice of the ſeparate creditors of the wife?* SECONDLY, *Whether a commiſſion of bankruptcy may iſſue againſt a married woman, being a ſole trader?* The caſe was fully argued: and Per Lord *Mansfield*, Ch. J. I have no doubt in this caſe: in the argument on the part of the defendants, the queſtion has been put, " whether the huſband is totally excluded from all power over the effects of the wife." But the queſtion is not between the huſband and wife, but between his and her creditors: ſhe is no party to this caſe, therefore it is not neceſſary to go into that queſtion; but taking it for granted, *argumenti gratiâ*, " that the huſband might put a ſtop to the wife's ſeparate trade *in future*; and after paying her debts, be intitled to the reſidue of her effects" —yet he certainly cannot do it with a retroſpect: he cannot take to himſelf what belongs to her creditors: for this would deſtroy the cuſtom totally, by rendering it nugatory and ineffectual; and if he himſelf cannot prejudice her creditors, his aſſignees cannot do it. The feme ſole trader in London, under this cuſtom, muſt indeed bring her action in London: but ſuch cuſtom would be allowed in any other court in a defence by the huſband. Perhaps there might be a difficulty in the wife's having a remedy *herſelf* againſt her huſband: but there is none as to the creditors of the wife; they are intitled to a remedy for the ſeizure of her effects, out of which they were to be paid their juſt debts. The ſeparate effects of the wife are, in the firſt place, liable to her ſeparate creditors: but if they were liable, in the firſt place, to the huſband, this would deſtroy the cuſtom.—As to the ſecond point, " *Whether ſhe be liable to a commiſſion?*" The ſtatutes of bankruptcy extend to the city of London; and the words of the ſtatutes take in this caſe: and it is for the benefit of the wife " that ſhe ſhould be liable to a commiſſion," becauſe otherwiſe ſhe would be liable to perpetual impriſonment: it is alſo for the benefit of creditors, who cannot, by reaſon of this cuſtom, come at the huſband: there is no reaſon to take this caſe out of the acts relating to bankruptcy: the huſband himſelf was not liable to the wife's creditors; nor had he any demand upon them: the conſequences of her bankruptcy, as a ſole trader, concern only the relation in which

which ſhe ſtands to her creditors, and they to her: as to ſuppoſed inconveniences; this cuſtom affects no Rights but ſuch as are the ſubject of the cuſtom; not marital or any other Rights. It has been argued, that ſome of the ſtatutes relating to bankrupts are penal, and even capital; and, therefore, that they muſt relate to free agents, which married women are not, being under the coercion of their huſbands, who may prevent them from ſurrendering: but the anſwer is, that the wife can never be liable to the guilt of a capital offence, where ſhe is under an invincible neceſſity: I am, therefore, of opinion, that a commiſſion may be taken out againſt her as a ſole trader, with reſpect to her ſeparate effects in trade. *Wilmot*, J. This is a conſequence of the cuſtom: the cuſtom eſtabliſhes her being a ſole and ſeparate trader: it follows, of courſe, that theſe goods, in her ſeparate trade, may be taken and ſeized under a commiſſion of bankruptcy againſt her: this cuſtom ſubjects the wife to an execution, to which ſhe is not liable at common law: theſe cuſtoms, though local, are to be conſidered as allowable under the general law of the land, when they come in queſtion in other courts. The ſecond point is of conſequence; it muſt be confined to her *debts in the way of trade*; and as to this ſhe is within the words and meaning of the bankruptcy acts: and her aſſignees ſtand juſt in her place: the huſband's aſſignees cannot take her effects; nor her aſſignees his: but the commiſſion againſt her ought to be confined to matters in the way of her trade. *Yates*, J. An action upon the cuſtom can only be brought in the mayor's court of London: but the cuſtom may be pleaded in bar in a ſuperior court: it may be uſed in a ſuperior court by way of defence; and in ſuch caſes the ſuperior court will take notice of the cuſtom. The only queſtion here is, whether the effects of the wife belonged to her aſſignees under the commiſſion which iſſued againſt her: the property in theſe goods was transferred to them: and they certainly had a right to recover them: a commiſſion being iſſuable againſt her is a conſequence of the cuſtom for her ſole trading. *Aſton*, J. Remembered a caſe in C. B. in the manor of Harweil, where this cuſtom of feme covert ſole trader was eſtabliſhed: and ſaid that her perſon and her effects in trade were anſwerable to her creditors; that the huſband was bound by an implied conſent: and that the ſtatutes of bankruptcy were but as a ſtatute execution *upon her effects in trade*, ſo far as they are liable in law.—Judgment for the plaintiffs.

In this caſe the queſtion was "Whether *a butcher* was a perſon who ſought his living by buying and ſelling within the meaning of the acts concerning bankrupts." AND *The Court*, though they expreſſed themſelves very ſenſible of the inconvenience of extending the bankrupt laws to artificers

Daley *v.* Smith; Hil. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2148.

whoſe living is ſubſtantially gotten by mechanical labour, with a mixture of buying and ſelling; yet thought, upon the authority of caſes, that they muſt hold a butcher to be within that deſcription which makes a man liable to a commiſſion of bankruptcy.

Port *v.* Turton, Tr. Ter. 3 Geo. 3. C. B. 2 *Wilſ.* 372.

In this caſe, *Pratt*, Lord Ch. J. ſaid a brickmaker might be a bankrupt; becauſe the earth is manufactured and turned quite into another thing; but that was not the queſtion then before the court. However, from a ſubſequent caſe, it ſeems to be clear that a perſon who rents a brick ground, and makes bricks thereon for public ſale is ſubject to the bankrupt laws.

Wells *v.* Parker, in error from C B. Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 34.

An action of treſpaſs was brought in C. B. for the purpoſe of trying whether *Wells* was liable to a commiſſion of bankruptcy, and at the trial, before Lord *Loughborough*, at Guildhall, the jury found a ſpecial verdict: "That *Parker* "was the occupier of a certain farm, containing, among "other things, 800 acres of land in the pariſh of Croydon "in Surry, as tenant thereof, for a term of years not yet "expired, to the Archbiſhop of Canterbury, at the yearly "rent of 22*l.* 6*s.* 8*d.* That *Parker*, the father, for more "than twenty years before the year 1768, and long afterwards, held this farm. This farm deſcended to the ſon, "who has renewed. That one *William Berand*, for twenty "years and more before the year 1768, *had rented a certain "brick ground, parcel of the ſaid farm of the ſaid* J. Parker, "*the father, the former tenant of the ſaid farm, and made and "ſold bricks there.* That *Berand* died in the year 1768; and, "upon his death, the preſent plaintiff, who had for ſome "time before been in the joint occupation of the ſaid farm "with his father, took the brick-ground into his own poſſeſſion; and then and there bought certain materials and "neceſſary things belonging to the ſaid *Berand*, who had "alſo been uſed to make bricks; and that the ſaid *Parker* "continued to make bricks and tiles of the earth and clay "ariſing from part of the land, ſo uſed as a brick-ground, "at the time of the demiſe, *and bought ſand and fuel, which "were neceſſary ingredients for converting the earth and clay "into bricks and tiles.* And that during the time the within "named *J. Parker* ſo made and ſold bricks and tiles, he "was erecting buildings and making repairs unto the ſaid "farm, *in which a part of the bricks and tiles ſo made were "expended.* That the ſaid *J. Parker* continued to ſell bricks "and tiles ſo made by him until the time of his abſconding. "That on the 17th January, 1783, *Parker* abſconded. "That a commiſſion of bankrupt iſſued againſt him; that "on the 10th March, 1783, *Parker* was declared a bankrupt, *&c.*; that the commiſſioners ſeized all his effects, "&c.; that aſſignees were choſen. That *Wells* was "the meſſenger under the ſaid commiſſion duly appointed;

"and

" and that he, by order of the aſſignees, ſeized the ſaid " goods, *&c.* mentioned in the declaration, being then in " the poſſeſſion of the ſaid *J. Parker.*"—" If *Parker* be " not within the ſtatutes againſt bankrupts, then they con- " vict *Wells* of the treſpaſs: but if the court ſhall be of " opinion that he came within the bankrupt laws, then a " verdict for the defendant." The Court of Common Pleas were of opinion that he was not ſubject to the bankrupt laws; and gave judgment for the plaintiff. It was then removed into B. R. by writ of error, and fully argued. From the argument and the judgment delivered by Lord *Loughborough*, in the Common Pleas, it appeared, that the idea was, that *if this trade be carried on as the mode of enjoying the land, the party is not ſubject to the bankrupt laws: but if the land be taken as the means of carrying on trade, or for the purpoſes of manufacture, then he may be a bankrupt.* SED PER CUR. (after time taken to conſider) there are two queſtions:—1ſt, Whether, on this verdict, *William Berand* was to be conſidered as a trader within the ſtatutes? 2dly, If *William Berand* were a trader, whether on this verdict the caſe of the plaintiff can be diſtinguiſhed, ſo as to make him no trader? As to the firſt, brick-making for ſale, abſtractedly conſidered, is in fact carrying on a trade, and ſeeking to live by the profits. Many things are neceſſary to be bought, which can only be paid for by the ſale of the bricks. The credit is given to no viſible fund, but merely on the ſpeculation of the profits expected to ariſe from the ſale of the bricks. But the objection is, that *William Berand* rented the brick-ground, and conſequently that the bricks were the produce of his own land. Now the true diſtinction is this: If a man exerciſe a manufacture from the produce of his own land, as a *neceſſary or uſual mode of reaping or enjoying that produce*, and bringing it advantageouſly to market, he ſhall *not be conſidered as a trader*, though *he buy the neceſſary ingredients* and materials *to fit it for market*; as in the caſe of a farmer, who makes cheeſe on his own land, and who buys runnet and ſalt; or as in a caſe mentioned at the bar, where a man makes his own apples into cyder, though there be an expence attending the operation, and though many things are to be bought, and ſome mixture, yet he is no trader; for it is the uſual mode of enjoying land in the cyder counties. So in the alum works, as determined, where the operation was proved to be the neceſſary and conſtant mode practiſed by the proprietors of alum works. Or like the caſe of the coal mines, where raiſing them out of the pit is as neceſſary to the enjoyment of the land, as threſhing corn, &c. But where the *produce of the land is merely the raw material of a manufacture* and uſed as ſuch, and *not*

according to the uſual mode of *enjoying* the land; in ſhort, *where the produce of the land is an inſignificant article* in compariſon of the whole expence of the manufacture, there *he ought to be conſidered as a trader.*—As this diſtinction turns on the nature and manner of exerciſing the manufacture, and the motive with which it is carried on; it depends ſo much on the light in which the jury ſee the tranſaction, and the law and the fact are ſo blended together, that it is hardly poſſible to diſtinguiſh them. The jury were directed, that if they thought that *Parker* made bricks for *his own conſumption*, though he ſold the ſurplus, *they ought not to find him a trader:* but if they thought he carried on the trade *for public ſale*, then they ſhould find him a trader. And the jury upon that trial found him a trader. In this caſe *William Berand* took the brick ground with a view and for the purpoſe of making bricks, and carrying on the trade for public ſale. The land produced nothing. The leaſe was merely a purchaſe of the clay, the ſame as if he had bought it at ſo much per load. He had nothing to do as a farmer; his ſole object was making bricks for ſale: therefore we think he ought to be conſidered as a trader. As to the ſecond queſtion, viz. If *Berand* were a trader, then whether the plaintiff's caſe can be diſtinguiſhed from his? It ſtands thus: in 1708, on *Berand*'s death, the plaintiff took poſſeſſion of the brick ground. He paid for the ſtock; he carried on the trade in like manner; he made bricks for public ſale; he lived with his father, and had a joint occupation of his farm with the father, who was leſſee, and who ſuffered the plaintiff to take the brick ground *ſolely*. The father had no concern with the brick ground; was liable to none of the ſon's debts on that account; and therefore the farm was as diſtinct from the brick ground then, as when *Berand* had it. The plaintiff had no intereſt in the farm till 1780, when it devolved on him. But from the year 1768 he was permitted by his father, on *Berand*'s death, to come in his place, and to carry on the trade of brick-making for ſale, as *Berand* had done for many years. The leaſe in 1780 was immaterial: if he traded from 1768 till then, it was ſufficient; for during that time he occupied only the brick ground, and made and ſold bricks for public ſale. The plaintiff acted as *Berand* had done. *Berand* rented the brick ground as a mode of buying the clay. And whether the plaintiff rented the clay, or had it by gift from his father, makes no difference: on this verdict he muſt be conſidered as a trader. —Judgment reverſed.

15th May, 1786. *Dom. Proc.* 1 *Ter. Rep.* 783. Upon a writ of error from the above judgment, *Parker* v. *Wells* in error, the following queſtions were put to the judges, by order of the houſe of lords: 1ſt, Whether the finding

finding on this verdict be ſufficient whereupon to give final judgment? 2dly, If the finding be inſufficient, what award ought to be made on ſuch finding? 3dly, If the finding be ſufficient, whether upon ſuch finding the plaintiff in error appears to be a trader within the true intent and meaning of the ſtatutes concerning bankrupts? The Lord Chief Baron *Eyre* delivered the unanimous opinion of the judges preſent, upon the firſt queſtion, in the negative: and upon the ſecond queſtion that a writ of *venire facias de novo* ought to be awarded; whereupon it was adjudged accordingly, that the court of King's Bench do award a *venire facias de novo*.

The plaintiff, *Parker*, did not proceed upon the *venire de novo*, but, by agreement, brought a new action in the court of King's Bench: and at the trial the jury, under the direction of the judge, found 1ſt, That *Parker* did carry on the trade of making bricks and tiles for ſale for the purpoſe of drawing a profit therefrom: 2dly, That he carried on the trade from 23d June, 1768, when *William Berand* died, to Michaelmas, 1778: that he ceaſed to make bricks on Michaelmas-day, 1788; and he alſo ceaſed to ſell them on the ſame day: 3dly, That the father had the ſole management of the farm until the time of his death. This finding was to have been drawn up as a ſpecial verdict; but as it appeared that *Parker* had left off brick-making before the petitioning creditor's debt accrued due, the defendants waived the ſpecial verdict and conſented that a general one ſhould be entered for the plaintiff. Thus the event of this caſe has been ſuch as to prevent the parties obtaining the final diciſion of the houſe of lords. 1 Cooke's Bankrupt Laws, 66.

Any perſon trading to England, whether native, denizen, or alien, though never reſident as a trader in England, may be a bankrupt, if he comes over here occaſionally, and during his occaſional reſidence commits an act of bankruptcy.—This was an action of treſpaſs againſt the meſſenger for ſeizing books, &c. in order to try whether the plaintiff was ſubject to the bankrupt laws: the defendant pleaded, 1ſt, not guilty: 2dly, a juſtification under the ſtatute 13 Eliz. c. 3.: 3dly, a juſtification under a commiſſion of bankruptcy:—to the laſt plea *the plaintiff replied*, that he was *not a merchant and trader*, and a perſon within the deſcription of the bankrupt laws. At the trial there was a general verdict taken for the plaintiff; and afterwards, upon a motion for a new trial, it appeared from the judges report of the caſe, that "the plaintiff, who was a native of Scotland, reſided there, and had a great houſe of trade at Edinburgh: that beſides this buſineſs he was concerned with *Bell* and Co. in a great brewery: that in both characters he might be conſidered as one of the greateſt traders in Europe; and he traded to all parts of the world: that he came to England, and being Alexander *v.* Vaughan, Hil. Ter. 16 Geo. 3. B R. *Coſp.* 398.

there *occaſionally*, was arreſted and laid in priſon two months, which was an act of bankruptcy." THE QUESTION was, Whether by the Engliſh ſtatutes againſt bankrupts, a perſon to come within the meaning and deſcription of a trader there named, muſt not be *a reſident trader*; that is, whether, as the act of bankruptcy muſt be local in England, the trading ſhould not be ſo likewiſe; or whether ſuch a perſon as the plaintiff, coming occaſionally to England, is liable to the Engliſh laws againſt bankrupts. The defendant, however, inſiſted, that whatever the general queſtion might be, the plaintiff, in fact, had traded in England after his coming; and Lord *Mansfield*, who tried the cauſe, ſaid, that ſeveral inſtances were given in evidence, and left to the jury. But, his lordſhip obſerved, that they were not neceſſary to be moved till the court had decided the firſt point: and, therefore, he ordered the rule to be *to ſhew cauſe why a nonſuit ſhould not be entered, with liberty to move for a new trial*, if the court ſhould be of opinion with the plaintiff.—On ſhewing cauſe, the caſe was fully argued and conſidered. PER CUR. The circumſtance of a trader being a natural born ſubject, or a foreigner, makes no difference: the laſt ſection of ſtat. 21. Jac. 1. c. 19. expreſsly declares, that ſtrangers as well as natural born ſubjects and denizens, ſhall be ſubject to the bankrupt laws, and therefore it puts that point out of the caſe: but it ſtill leaves the queſtion, whether both natives and foreigners muſt not be traders in England. There may be great objections, upon principles of juſtice, to the idea of a foreigner occaſionally coming here, being ſubject to the bankrupt laws: whoever gives credit, gives it upon the property a man has in the country where the credit is given: very inconvenient conſequences may alſo ariſe in different parts of our dominions from a trader coming over here behind the back of his creditors, hurrying through a commiſſion and obtaining his certificate, before his creditors abroad can ever know the commiſſion has iſſued: on the other hand, it appears, that there is a locality in the deſcription of the act of bankruptcy; and that the trader, whether a native or a foreigner, muſt be in England when he commits an act of bankruptcy: but whatever objection there may be, as it ſtands upon general principles; yet we are bound by ſeveral authorities: the caſes of *Dodſworth* v. *Anderſon*, Raym. 375, and *Sedgwick* v. *Bird*, 1 Salk. 110, are ſtrong authorities upon the ſubject: the firſt goes a great way: the Court ſay "though it be found that the bankrupt bought and ſold *but once in England*, it is not neceſſary that he ſhould do ſo; for many merchants do only buy beyond ſea, and ſell here: it is trading that makes a man capable of being a bankrupt; and it is plain that *Grice* did trade *in* England." From what the court had juſt ſaid before, this muſt

muſt mean *to* England. The caſe of *Sedgwick* v. *Bird*, is much ſtronger, becauſe the bankrupt in that caſe never did any act of trade *in* England.—But the moſt material authority is the caſe *ex parte*, *Smith* in *Canc.* Dec. 25, 1737:—There "one *Aſhley* went from England in 1720, and reſided in Barbadoes till 1735, where he was a factor and planter, *and traded to* England, by ſending goods from his plantations, and receiving goods back again, bought in England; and diſpoſed of goods ſent from England to Barbadoes, for merchants in England; and being greatly indebted, came to England in 1737, and committing an act of bankruptcy a commiſſion iſſued:" there the bankrupt had neither been *reſident in England*, nor had ever *traded in* England. He came over on purpoſe to get the commiſſion taken out againſt him. The opinion given by Lord *Hardwicke*, in that caſe, is much ſtronger, becauſe he had no doubt that the commiſſion was fraudulent; and therefore he gave his opinion both againſt his inclination and againſt what he thought the juſtice of the caſe. The words of his opinion are very ſtrong: "The new laws relating to bankrupts have turned the edge of commiſſions of bankruptcy from being, as they were *originally*, *remedial* to the creditor, and in the nature of puniſhments to the bankrupt, whom they conſidered as an offender, to be the accidental occaſion of great frauds. This has been the caſe here, and, I will, as far as I can, prevent the extending them to other parts of the world. If the act of bankruptcy had been committed abroad, no commiſſion ought to go againſt him for that act: the affidavits only ſpeak of his *trading to* England, while he reſided at Barbadoes. If this point had not been determined in *Sedgwick*'s caſe, I ſhould have doubted of it: but that caſe is in point, and muſt govern this: however, I will ſuſpend the allowance of the certificate till the creditors abroad have an opportunity to ſend over proofs of their debts." This doctrine was again recognized in the caſe, *ex parte*, *Williamſon* v. *Fry*. Lord *Hardwicke*, in the year 1750, who appears to have continued of the ſame opinion then, though the ſame point was not immediately in queſtion before him at that time: here the plaintiff *traded to England*, and never was a reſident trader in England; but came hither only occaſionally.—*Per Curiam.*—Verdict ſet aſide, and nonſuit entered.

So where it appeared that one *Campbell* had reſided at Calcutta, and during the time of his reſidence there, was an inſurer, with others, of ſhips, from and to different parts of India to France; and was, until the time of his returning to England, a trader in opium and woollen cloths, the produce and manufacture of India; many of which things were ſent to France: that he alſo, by the remittance of bills of

Inglis *v.* Grant, Hil. Ter. 34 Geo. 3. B R. 5 *Ter. Rep.* 530.

of exchange, in return for which he received goods from Europe, which he carried on to a great extent, gained conſiderable ſums of money, by the difference of exchange between India and France, and India and England; and that he alſo contracted ſeveral debts payable in England: the queſtion was, WHETHER there was a ſufficient trading in this caſe within the meaning of the bankrupt laws, whereon to found a commiſſion of bankrupt, upon an act of bankruptcy committed by him in England, after he had quitted India? And on this point THE COURT were clearly of opinion that there could be no doubt.

Saunderſon *v.* Rowles, Ea. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2064.

Neither a victualler nor an inn-keeper, merely as ſuch, is within the bankrupt laws:—Upon the trial of an action of trover, brought by a creditor of a *victualler*, claiming under a bill of ſale made to him by the victualler, before the victualler had committed any act of bankruptcy, againſt the defendant, who claimed the ſame goods, under the aſſignment of the commiſſioners, as part of the bankrupt's eſtate and effects: a verdict was found for the plaintiff, for 31*l.* damages, ſubject to the opinion of the court, on a motion for a new trial. The facts, according to the report of the judge, were theſe, "*Shrowder* was a publican, that is, an alehouſe keeper or "victualler: he bought wine, brandy, beer, and ſold it in "his houſe; *and might occaſionally ſell them out of the houſe,* "*in ſmall retail quantities, by the pot or mug*, as all publicans "do: and he kept an ordinary: he had a licence to ſell "wine, and alſo to ſell brandy and other ſpirituous liquors." THE QUESTION referred to the conſideration of the court was, "WHETHER a victualler who ſells liquors in his houſe, and only ſells them out of the houſe in ſmall retail quantities, as every publican does, is a trader within the idea of the bankrupt laws, ſo as to be liable to a commiſſion of bankruptcy?" PER CUR, there can be no doubt but that if a victualler deals as a merchant, and ſells large quantities of liquor out of doors, he may be within the bankrupt laws; but the queſtion is here reduced to the very ſame caſe as that of an inn-keeper: and it has been ſolemnly determined, more than once, "that an inn-keeper (1) is not as ſuch (*quatenus* inn-keeper) within thoſe laws: the analogy between the two caſes of an inn-keeper and a victualler is ſo ſtrong, that it cannot be got over: and we are all clear that this man is not within theſe laws, upon the authority of the determined caſe of an inn-keeper, and alſo upon the reaſon of the thing. He makes no particular contract like a

(1) *Criſp*, v. *Pratt*, Cro Car. 549. Sir *W. Jones*, 437. March 34. *Newton*, v. *Trigg*, 3 Mod 327. 1 Salk. 109. 3 Lev. 309. 1 Show. 96. 268. Carth. 149. Comb. 181.

trader:

trader: he cannot be ſaid to get his living by buying and ſelling as a trader does: he buys only to ſpend in his houſe: and when he utters it again, it is attended with many circumſtances additional to the mere ſelling price: he cannot be conſidered as a trader at large. The only authority againſt this, is the doctrine of Lord Chief Juſtice *Holt*; that though an inn-keeper cannot be a bankrupt, yet a victualler may; reported in 1 Lord *Raym.* 287. but that is an obiter ſaying only, and not a reſolution or determination of the court; or a direct ſolemn opinion of the great judge from whom it dropped! however, even this authority is croſſed by the caſe of *Newton* v. *Trigg*; therefore this mere obiter opinion ought not to weigh againſt the *ſettled direct authority* of the caſes which have been deliberately, and upon argument, determined the other way: as to the licence, there is no ſtreſs to be laid on that; it is only a mode of laying on a duty. This dealing of a victualler, in the ordinary courſe of his buſineſs, is not ſuch a contract as is made amongſt merchants and ſhopkeepers, or other dealers in the ordinary courſe of trade and commerce. The inconvenience would be very great if theſe perſons were liable to commiſſions of bankruptcy; it would be very miſchievous that commiſſions ſhould be taken out, at 70*l.* or 80*l.* expence, in every caſe where a victualler ſhould be unable to pay his debts: his whole effects might ſcarce ſuffice to anſwer the expence of the commiſſion: we are all, therefore, clearly of opinion, that the verdict muſt ſtand for the plaintiff.

To decide whether a trader is within the bankrupt laws, it was formerly held to be material to conſider the extent of his trading:—thus, where one *Thickpenny*, who was an inn-keeper, not only ſold liquor to his gueſts, in his inn, but alſo ſent great quantities of wine, rum, and brandy, by four, five, and ſix gallons at a time to ſeveral perſons living two or three miles diſtant from his inn, for them to retail and ſell out again: and had done this for ſome years. *Parker*, Lord Ch. Bar. at *niſi prius*, was of opinion, that this was not a ſufficient trading to make him a bankrupt, and nonſuited the plaintiff. But The Court of Common Pleas, on a motion to ſet aſide the nonſuit, and for a new trial; ſaid, it not appearing what proportion *Thickpenny*'s trade in his inn bore to his trading abroad, and out of doors; they could not judge whether he was liable to be a bankrupt or not. And it was ſaid by *Wilmot*, Ch. J. that if *Thickpenny*'s trade and profits in his inn were much larger than his trade and profits abroad, out of the inn, he ſhould incline to think he was not liable to be a bankrupt: if it ſhould come out in evidence that *Thickpenny* got 600*l. per annum* by his inn, and not 600*s. per annum* by ſending out and ſelling liquors abroad,

Buſcall v. Hogg, Mic. Ter. 11 Geo. 3. C. B. 3. *Wilſ.* 146.

abroad, he was clear in opinion that he could not be a bankrupt.

Patman *v.* Vaughan, Hil. Ter. 37 Geo. 3. B.R. 1 *Ter. Rep.* 572.

But in ſubſequent caſes it has been held that the extent of the dealing is not material; and that it is ſufficient to ſubject the party to the bankrupt laws if he ſells with a view to profit, although the extent of his dealings and the profits ariſing therefrom may be very inconſiderable.—The plaintiff was an inn-keeper, and brought this action againſt the defendant, who was a meſſenger under a commiſſion of bankrupt, for ſeizing and taking his goods. Upon the trial it appeared in evidence, that "the plaintiff had kept a public-"houſe for nine months, during which time *he had ſold to* "*three or four perſons about ſix gallons of ſpirits altogether.* "One of the inſtances was, that having bought five gal-"lons of ſpirits of one *Bennett*, he had deſired him to ſend "two of the five into the country to a perſon who had "ordered it of him: and it was alſo ſaid by his own ſervant, "that if any perſon had ſent for liquor, he might have had "it." The Judge left the queſtion to the jury, with this direction; that if they were of opinion that the plaintiff had endeavoured to make a profit of his trading, and was ready to ſell to any perſon who applied to him, and not merely as a matter of favor, that then the quantum and extent of the trading were immaterial, and they ſhould find for the defendant. The jury having found for the defendant accordingly; a rule to ſhew cauſe why there ſhould not be a new trial, was afterwards moved for but refuſed: FOR *Per Cur.* The queſtion of law is not now to be governed by the *quantum* of the trading. The rule is this, that *where it is a man's common or ordinary mode of dealing, or where if any ſtranger, who applies, may be ſupplied with the commodity in which the other profeſſes to deal,* and it is not ſold as a favor to any particular perſon, there the perſon ſo ſelling is ſubject to the bankrupt laws.—The plaintiff lived in the public-houſe only nine months, during the courſe of which time there could not be many inſtances adduced in evidence of his having ſold ſpirits out of the houſe; but there was not any one inſtance of any perſon, who had applied to buy liquor, having been refuſed. That is the great point; for *as to the extent of the dealing, and the profit which he made,* it is immaterial. For if a man make a conſiderable profit, he is not likely to become a bankrupt; it is only in caſes where the profits of the trade are inconſiderable, that ſuch an event is likely to take place.

Bartholemew *v.* Sherwood, Mic. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 573. (*n. a.*)

So in this caſe, on a motion for a new trial, the only queſtion was, whether *Davis*, the ſuppoſed bankrupt, was a trader within the meaning of the ſtatutes concerning bankrupts. It was contended that he was a dealer in horſes;

horſes; as to which it appeared in evidence, that *Davis* at this time, and for a few years paſt, had rented a conſiderable farm at *Whitchurch:* and that he kept two, and occaſionally three teams of horſes for the farming buſineſs.—That, previous to his taking this farm, he had lived with an uncle, during which time he attended ſeveral different fairs, and *occaſionally bought and ſold horſes*; that after he took this farm there were ſeveral inſtances of his attending fairs, and of every now and then buying a horſe, which was not calculated for the farming buſineſs, and which he conſtantly ſold again. It appeared that *during the courſe of two years he had bought and ſold five or ſix horſes in this manner*, two of which had been ſold directly after he had bought them for the ſake of a guinea profit, and another was ſold again within three days. *Per Cur.*—The general principle is right, that a farmer, as ſuch, is not an object of the bankrupt laws; and if a farmer in the courſe of his buſineſs buy a horſe, and after uſing him for ſome time ſell him again, that will not ſubject him to the bankrupt laws. But in this caſe the evidence is, that he bought horſes *for the expreſs purpoſe of gaining by it.* There were many inſtances of the bankrupt's buying horſes which he could not uſe in his farming buſineſs, and others which he bought for the expreſs purpoſe of ſelling again. It is like the caſe of a vintner, who, if he ſell only a few dozen of liquor to particular friends, cannot be made a bankrupt; but *if he be deſirous to ſell to every perſon who applies*, that will ſubject him to the bankrupt laws. But in all theſe caſes the queſtion is, *whether the perſon buy and ſell with a view to make a profit by it*; and that is proper to be left to the conſideration of the jury. Here it was left to them, and they have found that *Davis* was a trader.—Rule diſcharged.

Neither the owner nor farmer of an intereſt in land, by buying and ſelling the ſame, or the profits thereof, are liable to the bankrupt laws:—Therefore, where in an action of trover for a certain quantity of coals, there was a verdict for the plaintiff, ſubject to the opinion of the court: the caſe appeared to be as follows, "*J. S.* in conſideration of 1600l. grants, bargains and ſells to *Sparrow*, his executors, adminiſtrators, and aſſigns, a certain mine of coals, reſerving a rent and a certain quantity of coals to be delivered to the ſaid *J. S.* every year, with power of re-entry in caſe of non-payment: there is no limitation of time or term, but it is a ſale and purchaſe of the whole mine ſo long as any coals are to be gotten therein. *Sparrow* worked the mine and ſold the coals, and then committed an act of bankruptcy: afterwards he aſſigned all the coals he had got to the plaintiffs; the defendants, as aſſignees of *Sparrow*, under a commiſſion of bankruptcy, claimed and took away the coals: and WHETHER the buying the coal-mine, working it, and ſelling the coals can

Port v. Turton, Tr. Ter. 3 Geo. 3. C. B. 2 *Wilſ.* 169.

can make him liable to be a bankrupt within any of the ſtatutes concerning bankrupts, was the queſtion? *The Court* ſaid, the ſingle queſtion was, whether *Sparrow* could be deemed to be a trader within the true meaning of any of the ſtatutes concerning bankruptcy. The ſtat. 21 Jac. 1. c. 19. is the ruling ſtatute whereby this matter muſt be determined. The perſon who ſhall be deemed a bankrupt is there deſcribed: viz. Firſt he muſt be a perſon uſing trade or merchandize. 2dly. One ſeeking his living by buying and ſelling; by buying and ſelling what? ſurely not by buying an intereſt in land, and ſelling the profit thereof; this can never come within the idea of uſing the trade of merchandize, or getting a living by buying and ſelling, in the ſenſe of the legiſlature. From the idea we have of merchandize the line may be drawn between the landholder and the merchant: one would wonder there could have ever been any doubt about a farmer; for if every buyer and ſeller was liable to be a bankrupt, many of the firſt perſons in the kingdom would be liable to be ſo. Whatever the owner of the land in fee may do, ſurely he who rents it may do the ſame. If the former may be a buyer and ſeller, and not be liable to be a bankrupt, why may not the farmer do ſo alſo? his tilling the land, huſbandry, and ſtock on his farm, are known to every body; yet he ſeeks his living by buying and ſelling: ſo an innkeeper, a victualler, and an alehouſe keeper, get their living by buying and ſelling; but their way of buying and ſelling is not within the meaning of any of the ſtatutes of bankrupts. The buying and ſelling which is within theſe ſtatutes is to be confined to perſons who live by a credit gained on an uncertain capital ſtock. There is no difference between a leaſe for ſeven years and this caſe of the coal mine. *Sparrow* clearly had a chattee intereſt in the land; like an *elegit*. Though a mine be an inheritance, yet it may be ſevered from the inheritance by the grant now made; but it is certainly an intereſt in the land. If *Sparrow* was neither the farmer nor owner of this coal mine, what was he? he muſt be one or the other; *and neither the owner, nor farmer of an intereſt in land, by buying and ſelling the ſame, or profits thereof, are liable to bankruptcy*. The caſe of a brickmaker is very different; the earth is manufactured and turned into quite another thing, but coals carried to market are the ſame as they were found in the earth: upon the whole it is impoſſible to make this man a trader within the meaning of the ſtatutes concerning bankrupts. (2)

(2) Lord Chancellor *Cowper* had before determined the ſame point, that a *buyer of coals, or the mine*, is not a trader within the ſtatutes; but if he ſells them, together with others that is bought at market, then he becomes a trader liable to a commiſſion. 2 *Wilſ.* 170.

Alſo

Alſo drawing bills of exchange for a particular purpoſe will not render a man liable to the bankrupt laws:—Thus on an iſſue directed by the court of Chancery to try whether the defendant was a bankrupt; at the trial there was a verdict taken for the plaintiff on the following caſe: "the defendant, a clergyman, being poſſeſſed of lands in the Iſle of Ely, and engaged in expenſive works of cultivating and draining ſuch lands; to raiſe money for that purpoſe and his other occaſions, did, before the year 1774, but more particularly in 1774, 1775, and 1776, draw very many bills in number, and to a very large amount in value, which were accepted by different perſons. The defendant, in order to provide money for the payment of the ſaid bills, ſent caſh and other remittances to the acceptors, and allowed to ſome of his bankers a quarter per cent for paying his bills; and alſo in many inſtances paid a quarter per cent to the perſons who got them diſcounted, beſides 5l. per cent. The defendant alſo borrowed accommodation bills to a large value, in lieu of which he gave his own bills or notes to the ſame amount. THE QUESTION for the opinion of the Court was, whether this were a trading within the true intent and meaning of the bankrupt laws? PER CUR. This is a queſtion upon the conſtruction of the ſtatutes concerning bankrupts. By the ſtat. 13 *Eliz.* c. 7. the deſcription of a bankrupt is this, "any *merchant* or other perſon *uſing* or exerciſing the *trade* of *merchandize* by way of bargaining, exchange, re-change, bartry, cheviſance or otherwiſe, in groſs or by retail, or ſeeking his or her trade of living by buying and ſelling." The ſtat. 27 *Jac.* 1. c. 19. gives a fuller deſcription, "all and every perſon or perſons uſing, or that ſhall uſe *the trade of merchandize*, by way of bargaining, exchange, bartry, cheviſance or otherwiſe in groſs, or by retail; or ſeeking his or her living by buying and ſelling, or that ſhall uſe *the trade or* profeſſion of a *ſcrivener*, receiving other mens' monies and eſtates into his truſt or cuſtody." Theſe are the deſcriptions of a bankrupt. And the facts neceſſary to ſhew what was the nature of the buſineſs carried on by the party being laid before the Court, whether they come within any of the deſcriptions enumerated in the ſtatutes, is a queſtion of law upon the conſtruction of the ſtatutes themſelves: it is not uſing an act of merchandize: every man does that: every man buys: but that does not bring a man within the deſcription of a perſon liable to become a bankrupt. He muſt uſe the trade of merchandize. He muſt therefore ſell as well as buy; nor will every act of ſelling do, for there are various ſpecies of ſelling, which are no trading within the meaning of the acts; as where a farmer buys in ſheep and ſells them again. The queſtion in this caſe is, whether the circumſtance of a man borrowing money on his own bills for his own

Hankey *v.* Jones, Hil. Ter. 18 Geo. 3. *B.R. Coup.* 745.

own occaſions makes him an object of the bankrupt laws. In *Richardſon* v. *Bradſhaw*, 1 Atk. 128. one *Wilſon* was an agent to 26 regiments, and lived in London: *Johnſon*, his correſpondent, was alſo agent to many regiments and lived in Dublin. The troops were occaſionally in England and Ireland; and when the troops that were in *Wilſon*'s department were in Ireland, *Johnſon* remitted money to pay them, and ſo *vice verſa*. *Wilſon*, from the year 1745 to 1757, drew on *Johnſon* to the amount of 280,000l. and *Johnſon* drew on *Wilſon* for 290,000l. they took no commiſſion, and there was no reaſon why they ſhould, for the advantage was equal: but what was the purpoſe of this re-drawing? they drew for the money of many thouſand perſons, officers, widows, and ſoldiers together; and there was a viſible gain ariſing from the exchange. What was the determination of the jury? though it was not the province of the jury to ſay, it was a very ſenſible one. "Drawing and re-drawing may or may not be exerciſing trade and merchandize"—it depends on circumſtances —ſuppoſe a perſon in Yorkſhire, with a large eſtate, has occaſion for money to pay a debt on mortgage, or any other ſecurity, in the city of London: he draws on his banker for it, and to repay him tells the banker to draw on him by bills —would that be drawing and re-drawing ſo as to conſtitute a trading within the meaning of the bankrupt laws? certainly not.—But take it the other way, that the perſon has the caſh of other people to the amount of many hundred thouſand pounds, and the benefit of the exchange ariſing from the remittance of it; this is merchandizing: and that was the ground upon which the jury went in the caſe of *Wilſon*. There is no greater fault in citing caſes, than that of drawing general concluſions from particular premiſes. In *Wilſon*'s caſe it was ſaid that drawing and re-drawing was merchandize. It does not follow that all drawing and re-drawing is merchandize. The words of the jury in *Wilſon*'s caſe were, that drawing and re-drawing for ſuch large ſums of money is trafficking in exchange. But there was no re-drawing in the preſent caſe. Nobody re-drew on the defendant, and all the drawing was to his loſs; for he paid a quarter per cent commiſſion beſides intereſt on every bill he drew: with regard to what paſſed on the trial in *Wilſon*'s caſe, the jury aſked the Lord Chief Juſtice (Lee) a very proper queſtion; whether this drawing and re-drawing was in point of law a trading in merchandize within the ſtatutes concerning bankrupts; and as the note is taken he might have directed them, as it is there ſaid he did. But the report ſays, he told them it was a queſtion of fact and not of law. With all deference to this opinion, it was a queſtion of law upon the fact. It may be proper to leave it to the jury, whether the perſon gets a profit, or remits other people's

ple's money; but the fact being eſtabliſhed, the reſult is matter of law. In *Wilſon*'s caſe he had vaſt ſums of other people's money: but this caſe is ſtript of every circumſtance of this kind: merely a drawing by a perſon, for the purpoſe of improving his own eſtate, and he pays diſcount on what he draws: therefore there is no colour for ſaying he is within the deſcription of the bankrupt laws.

Perkin v. Proctor and Green, Tr. Ter 8. Geo. 3. C.B. 2 *Wilſ.* 382.

Treſpaſs lies at the ſuit of a perſon againſt whom a commiſſion of bankruptcy has been iſſued (he not being an object of the bankrupt laws), againſt *the aſſignees* under the commiſſion, for taking poſſeſſion of his houſe and goods; for the commiſſion is void, and of no avail.—This was an action of treſpaſs for entering the plaintiff's houſe, and diſturbing him in his poſſeſſion thereof: and the ſecond count was for expelling him from the poſſeſſion thereof. Upon the general iſſue, there was a verdict for the plaintiff, with 40*l.* damages. The evidence at the trial was, that the plaintiff, on 8th April, 1763, purchaſed of one *Goodall*, a publican, his intereſt in a term of years in a houſe, which he the ſaid *Goodall* was then in poſſeſſion of, and held by leaſe; but which leaſe had been depoſited by him in the hands of the defendants, who were brewers, as a ſecurity for a debt due to them: that *Goodall* granted to the plaintiff an under-leaſe; and the plaintiff paid him 40*l.* for the good-will, and 35*l.* for the goods in the houſe: that upon 26th April, 1763, a commiſſion of bankrupt iſſued againſt *Goodall*; and he being thereupon declared bankrupt, *the meſſenger ſeized all the goods in the houſe*, which were bought by the plaintiff of *Goodall, with the knowledge, and upon the recommendation of the defendants:* that the plaintiff continuing in poſſeſſion under his under-leaſe; and the defendants, being aſſignees of *Goodall*, brought an ejectment, as aſſignees, againſt the plaintiffs, and having recovered, put one of their ſervants in poſſeſſion of the houſe: that the juſtices, upon conſideration of the caſe, removed the licence to another houſe taken by the plaintiff; and the defendants, within twelve months afterwards, ſurrendered their poſſeſſion, under the judgment in ejectment, to the original landlord; by which the plaintiff's intereſt in the houſe was loſt: that the court of King's Bench having determined (1) that a victualler, or common alehouſe-keeper, is not liable to a commiſſion of bankrupt; the plaintiff (the commiſſion of bankruptcy having been ſuperſeded) brought trover for the goods, and recovered 35*l.* the ſum he paid for the ſame; and now brought treſpaſs and recovered 40*l.* damages, the amount of the ſum paid for good-will.—On a motion for a new trial, it was contended, that treſpaſs *vi et armis* doth not lie in this caſe. SED PER CUR. The preſent action is againſt the perſons themſelves

(1) See page 10, ſupra.

who ſued out the commiſſion of bankrupt, who are bound to ſupport the legality of their acts, and is not like the caſe of an officer executing a writ of execution upon a judgment which is afterwards vacated: we are all of opinion that the commiſſion of bankruptcy is void and of no avail: the juriſdiction concerning bankrupts is confined to particular perſons and caſes; as that the perſon ſubject to a commiſſion muſt be a trader; muſt be indebted in ſuch a ſum; muſt do ſome particular act. The Court of Chancery acts herein ſolely upon the application of the party petitioning, at whoſe peril the commiſſion iſſues; and if he ſues it out upon any falſe ſuggeſtion, the law gives a remedy againſt him to the party whoſe liberty and property is thereby invaded (1). There are a variety of commiſſioners, whoſe power and juriſdiction are limited and confined; which, if they exceed, the law will give a remedy againſt them; and where courts of juſtice aſſume a juriſdiction which they have not, an action of treſpaſs lies againſt the officer who executes the proceſs, becauſe the whole proceeding was *coram non judice*.—In ſupport of this doctrine, the Court mentioned the caſe of the *Marſhalſea*, 10 *Rep.* 76. *a. b.* *Nicholas* v. *Walker*, Cro. Car. 395. *Terry* v. *Huntington*, *Hard.* 480. *Turner* v. *Felgate*. 1 Lev. 95. 1 Sider, 272. *Carthew*. 275. 2 Strange, 509. 994. *Hob.* 68.—In the preſent caſe we lay the ſuperſeding the commiſſion of bankruptcy entirely out of the caſe, as if it had never been ſuperſeded at all; the commiſſioners had no more power to act under the commiſſion of bankrupt againſt *Goodall*, who was a victualler, than if he had been a divine, a lawyer, or a phyſician: although it may be thought hard to adjudge a man a treſpaſſer in a caſe heretofore doubtful, yet the law cannot bend to particular caſes; and it is more for the general utility to ſuffer particular hard caſes, than to give uſurped authority any effect at all: the hardſhip of particular caſes is thereby moſt amply compenſated to the public.

II. *Act of Bankruptcy.*

Balkett *et al.* Aſſignees of Falch v. Freeman *et al.* Mic. Ter. 28 Geo. 3 B.R. 2 *Ter. Rep.* 59.

1. *Keeping Houſe.*] If a trader be denied in the morning, by expreſs order, to the holder of a bill which is due, it is a complete act of bankruptcy, though he afterwards pay the bill, according to the cuſtom of merchants, before five o'clock in the afternoon of the ſame day.——Thus, upon a motion for a rule to ſhew cauſe why a new trial in an action of trover ſhould not be granted, it appeared

(1) See alſo, the caſe of *Brown* v. *Chapman*, in Vol. I. p. 31, where it was held, that an action *on the caſe* will lie for maliciouſly ſuing out a commiſſion of bankruptcy, notwithſtanding the Chancellor is authoriſed by the ſtatute, in ſuch a caſe, to award to the party grieved the ſpecific ſum of 200*l*.

SEE ALSO the caſe of *Smith* v. *Broomhead*, infra.

that

that at the trial the only queſtion that aroſe was concerning the act of bankruptcy alleged to have been committ d by *Falch*; as to which the following were the facts: *Falch*, being in bad circumſtances, on the evening of the 7th of January, 1786, expreſſed his concern to his clerk, and his fears that he ſhould not be able to anſwer a bill which would become payable the next day; and deſired him to come earlier than uſual the next morning, and be in the way, *and in caſe the holder of that bill ſhould enquire for him to deny him.* The bill-holder did call the next morning before nine o'clock, and preſented a bill for payment; the clerk gave him the anſwer, as he was directed, that his maſter was not at home. Afterwards, however, in the courſe of the day, *Falch* appeared in public, and having procured ſome money from a friend whom he met, he ſent for the bill and paid it before five o'clock on that day. The judge, who tried the cauſe, directed the jury to find their verdict for the plaintiffs, inaſmuch as the act of bankruptcy was complete by the denial of a creditor with intent to delay him; notwithſtanding ſeveral of the jury, which was a ſpecial one, ſuggeſted to him at the time, that by the practice of merchants in the city of London the payer of a bill has the whole of the day on which it becomes due, till five o'clock, to pay it in. However, upon the judge's repeating to them his opinion, upon the point of law, they found their verdict accordingly. PER CUR. The general rule is, that *where a trader commits an unequivocal act of bankruptcy, nothing that paſſes afterwards can purge or explain it away.* Where indeed the act done is in itſelf equivocal, there it may be explained by ſubſequent acts: as by the bankrupt's afterwards appearing in public, or the like. Then the only queſtion here is, whether the act, at the time it was done, was a clear unequivocal act of bankruptcy? From the facts which have been ſtated it appears that the bankrupt could only order himſelf to be denied with a view to delay his creditor; for he himſelf thought that his circumſtances were in a deſperate ſituation at that time, and that he ſhould not be able to fulfil his engagements; and directed his clerk to deny him when the bill-holder called, which was accordingly done early the next morning. This was a clear act of bankruptcy, and whatever might happen afterwards could not alter the caſe. It is true that if the payer of a bill of exchange diſcharge it before five o'clock on the day when it becomes due, that will be a ſufficient payment in law in order to prevent a proteſt: but that is not the queſtion here; what we are now to conſider is, *whether the denial to a creditor with a view to delay him, though but for an hour, is not an act of bankruptcy?* For though the words of the

act (1) are "*begin to keep house*," yet on the conſtruction of them it has always been held that a denial to a creditor with a view to delay him was an act of bankruptcy. At the trial, a gentleman at the bar mentioned a caſe which had come before Lord *Mansfield* a few years ago, the circumſtances of which were theſe: A bill having become due, and the drawer, being preſſed for payment, deſired the holder to call upon him the next morning at a friend's houſe in Bridge-ſtreet, and he would pay him; the holder went accordingly, and was denied at the drawer's requeſt. Upon being aſked by his friend if he was aware that he had been committing an act of bankruptcy, he anſwered with ſurpriſe in the negative, and ſaid that he did not mean to do ſo; and went afterwards and paid the bill. Lord *Mansfield*, in his directions to the jury, told them, that if they were ſatisfied that *the denial had been with a view to delay the creditor at the time*, it was an act of bankruptcy; and if ſo, it could not be purged by paying the bill afterwards. It is the province of the jury to determine whether the denial was with a view to delay the creditor: and having, in the preſent caſe, found that, it would be a loſs of time and an unneceſſary increaſe of expence to grant even a rule to ſhew cauſe.—Rule refuſed.

Garret *et al.* Aſſignees of Moule, *v.* Moule Ea. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 575.

And in order to conſtitute an act of bankruptcy the debtor *muſt be denied* to a creditor, with intent to defraud or hinder that creditor: "keeping houſe" with that intent is not alone ſufficient.—This caſe was as follows: On *Tueſday*, the 4th of *June*, 1793, the bankrupt being in inſolvent circumſtances, and being in expectation of having ſeveral bills, that were due, preſented to him for payment, was adviſed by his friends to keep out of the way of his creditors; and accordingly he gave orders to his clerk to be denied to every perſon. He retired up ſtairs with his account books, where he remained ſeveral days, and was denied to ſeveral perſons, but it did not appear that they were creditors. On the 7th of *June*, one *Ryder*, a creditor of the bankrupt to the amount of 100l. on two bills of exchange, called at the bankrupt's houſe reſpecting other matters, but *he did not aſk for the bankrupt, underſtanding he was from home*. *Ryder* continued in the houſe half an hour with the knowledge of the bankrupt; and in the courſe of converſation with the clerk, he aſked if the bankrupt's wife could not let him have part of his demand: but this was refuſed. THE COURT held, that no act of bankruptcy was proved by this evidence. *For, per* LORD KENYON, Ch. J. On trials in caſes of this kind the queſtion has always been aſked, *whether or not the debtor was denied to the creditor?* which ſhews in what light the ſtatute has been

(1) 13 Eliz. c. 7.

conſidered.

conſidered. I will not preſume to ſay whether or not this conſtruction ſhould have been put on the ſtatute at firſt: but that conſtruction having obtained, I am afraid now to diſturb it.

2. *Departing from his dwelling-houſe.*] In order to conſtitute an act of bankruptcy by a trader, in departing from his dwelling-houſe, it is not alone ſufficient that a creditor ſhould be thereby delayed, but the departure muſt alſo have been with that intent.—In treſpaſs for breaking and entering the plaintiff's houſe, and taking and converting his goods, the defendant juſtified under the bankrupt laws: and on the trial, the only queſtion was, whether the plaintiff had committed an act of bankruptcy?—The facts were theſe: "The "plaintiff was a trader at Mancheſter, and having received "intelligence that one *Smith*, in London, who was indebted "to him to a large amount, was in a failing condition, left "his houſe early on the 17th of April, and went to London "for the purpoſe of arranging his affairs with *Smith*, and "getting ſecurity for his demands: having received of *Smith* "goods of a conſiderable value, and a bill of exchange for "129l. he returned to Mancheſter, after an abſence of ten "days; during which time ſeveral creditors called at his "houſe in Mancheſter for payment of their reſpective debts, "which were not ſatisfied, the bankrupt not having made "any proviſion for them, nor left any perſon in charge to "conduct his buſineſs during his abſence: among theſe cre-"ditors were the holders of ſeveral bills, which became due "on the day after his departure, and whom he expected to "call on him for payment. After his return to Mancheſter, "ſome of his creditors compounded with him, and received "10s. in the pound: but a commiſſion of bankrupt was "taken out againſt him by the defendant and his partner.— "The jury found a verdict for the plaintiff; and declared in "anſwer to a queſtion put to them by the judge, that they "thought *the intent of the plaintiff in going to London was* "*laudable*; *that he had no intent to defraud or delay his credi-*"*tors*; but that delay did actually happen to ſome creditors." A rule to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial had having been obtained, cauſe was ſhewn againſt ſuch rule. PER CUR. Bankruptcy is conſidered as a crime; and a bankrupt, in the old laws, is called an offender; but it is a principle of natural juſtice, and of our laws, that *actus non facit reum niſi mens ſit rea*; the intent and the act muſt both concur to conſtitute the crime. The words of the ſtatute, 1 Jac. 1. *c.* 15. (after repeating the ſeveral acts of bankruptcy declared by the former ſtatutes, and adding others which are all premeditated frauds) are theſe, "to the intent, OR WHEREBY his creditors may be "defeated or delayed." Now if we read AND for the word OR, which is frequently done in the conſtruction of legal

Fowler v. Padget, Hil. Ter. 28 Geo. 3. B. R. 7 *Ter. Rep.* 509.

inſtruments, where the ſenſe requires it, all difficulty will be removed: and we ought to adopt that conſtruction which will be attended with the leaſt inconvenience. If the words of the ſtatute are to be taken in their literal ſenſe, any perſon who happens to go from home only for an hour, any one who leaves his houſe with the intention of benefitting his creditors, may become a bankrupt if any one of his creditors call in the mean time, and be thereby delayed, though but for an hour; and it would be no anſwer to ſay that the trader left word where he was gone: ſuch a rule might affect the richeſt man in the kingdom. The legiſlature never could have meant to extend criminality to a perſon who leaves his houſe only for the purpoſe of tranſacting his legal concerns: and this conſtruction ſeems conſonant to the deciſions on another part of this ſtatute; for *if a trader begin to keep houſe*, and give orders to be denied to his creditors it has been decided that that is not an act of bankruptcy, unleſs in point of fact he be denied to a creditor. This ſhews that the intent and the act muſt concur in order to conſtitute an act of bankruptcy. We do not wiſh to impeach the authority of *Woodier's* caſe(1), or that of *Raikes* v. *Poreau*(2), becauſe in both the parties went abroad under circumſtances that rendered it highly probable that they would not return to this country; one had committed murder, and the other was amenable to the laws of his country, for a different offence (*bigamy*); there the parties muſt have known that their creditors would neceſſarily be delayed by the ſteps they took: beſides, thoſe caſes may be ſupported on another ground; for though it was not the immediate object of the parties in thoſe caſes to delay their creditors, by going abroad, yet, as that muſt be the neceſſary conſequence of ſuch an act, it would be evidence of their *intending to delay or defeat* their creditors; and ſo it would come within the conſtruction of the ſtatute now contended for by the defendant.—Rule diſcharged.

Bateman *et al* aſſignees of Howard *v.* Bailey. Hil. Ter. 34 Geo. 3. B. R. 5 *Term. Rep.* 512.

And a declaration by a bankrupt of his motives for abſenting himſelf from home, made at the time, is evidence in order to prove the act of bankruptcy. On the trial of this action, the queſtion was, whether *Howard* had committed an act of bankruptcy prior to 7th of Feb. 1793? On the part of the plaintiffs, it was proved, in ſubſtance, that the bankrupt was arreſted on the 5th, and taken from home; that on the 6th he was diſcharged out of cuſtody about one o'clock; that he did not thereon immediately return to his houſe, but loitered at an inn on the road, apparently avoiding company; that about ten o'clock at night he returned home, and the witneſs aſked him where he had been? *the witneſs*

(1) Bull, N. P. 39. (2) Cooke's Bank. L. 95.

was

was about to relate what the bankrupt ſaid to him in anſwer to that queſtion, but the examination was ſtopped by an objection on the part of the defendant to that evidence, which the judge thought was well founded; and the plaintiffs were nonſuited. A rule, *niſi*, was obtained for ſetting aſide the nonſuit; and afterwards made abſolute; FOR *Per Curiam*. Although the bankrupt cannot be called as a witneſs to prove his own act of bankruptcy, yet what was ſaid by him at the time in explanation of his own act may be received in evidence. An admiſſion by him before his bankruptcy of a debt due to another is ſufficient to charge his eſtate. If he has been abſent from his home, an admiſſion by him that he had been abroad to avoid his creditors is good evidence. Whatever he ſays, in ſhort, before his bankruptcy is evidence explanatory of the act done by him.

3. *Fraudulent Conveyance.*] A fraudulent diſpoſition of a trader's property is void againſt his creditors; and if it is done by deed, it is by force of the ſtatute an act of bankruptcy.—In an action of trover, by the aſſignees of a bankrupt, a verdict was found for the plaintiff; and on a motion for a new trial, the queſtion was, WHETHER, under the particular circumſtances, an aſſignment of a leaſe which had been made by the bankrupt was an act of bankruptcy?—the facts were in ſubſtance theſe: "One *Gaſcoyne* being in inſolvent circumſtances, and not able to pay more than 8s. in the pound, adviſed with his attorney about his affairs, and ſhewed him a decree of the Court of Chancery againſt him; ſtating alſo, that he had been ſerved with a *ſubpœna*, and was threatened with an attachment, but was not able to pay the money: the attorney, upon this, adviſed him to become a bankrupt. He afterwards ſent to the attorney, and then named to him ſome creditors *who had been long great friends to him, and had indorſed bills for him which were not yet due, which would diſtreſs them; and ſaid, that as he could not pay the bills, the only method by which he could ſecure them, would be by an aſſignment of the leaſe in queſtion.* Accordingly, an aſſignment of the leaſe was made to three of his creditors, *Watts*, *Giles*, and *Hall*. The leaſe was worth about 400l. and was only aſſigned to ſecure 250l. and was then to be held in truſt for the bankrupt. The day after the execution of this aſſignment, there was a meeting of the creditors; at which it was agreed, that a commiſſion ſhould be ſued out: ſome of his creditors, at this meeting, mentioned the leaſe as a part of the bankrupt's eſtate; on which the attorney told them of the aſſignment, but did not mention when it was made. The aſſignment recited that *Giles* had become ſecurity for the bankrupt: *Hall* had lent him money: and that ſeveral bills and notes had been indorſed for the bankrupt by *Watts*, *Giles*,

Devon *v.* Watts, Hil. Ter. 19 Geo. 3. 1 *Doug.* 85.

and *Hall*, which remained unpaid; and that he had agreed to assign the lease, in order to secure the payment of those debts." PER CUR. This is a fraudulent deed, and an act of bankruptcy:—it is fraudulent on two grounds, 1st. It is fraudulent against the creditor under the decree: the Court of Chancery would have relieved him against the defendant, and given him the benefit of the lease, notwithstanding the assignment was for a valuable consideration; for if any man, knowing of a judgment or a decree, purchase, though for a full value, the purchase is fraudulent and void (*Gwyne's* case, 3 Co. 80 b.); the creditor, in equity, might have had a sequestration of the lease. 2dly. In the other view, the assignment was a clear fraud against the general creditors under the bankrupt laws: the bankrupt was advised and agreed to have a commission sued out; and after that made an assignment: and although the creditors were told of the assignment, yet the manner in which they were told of it was the worst part of the case; for the bankrupt concealed from them when or how it was made; and they had no reason to suppose that it was not made long before: all amicable commissions are agreed to by the creditors, on the idea that there is to be no preference: 'tis true the preference given to the defendant, and the other two assignees of the lease, was voluntary, for they had not applied to the bankrupt for payment of their debt: the motive, perhaps, was not culpable; but the transaction was contrary to the general policy of the law.——Rule discharged.

Hassells *v.* Simpson, Mic. Ter. 21 Geo. 3. B. R. 1 *Doug.* 88 (*n.* † 39.)

On an issue directed out of Chancery to try whether one *Jackson* was a bankrupt, there was a verdict for the plaintiffs: afterwards a new trial was moved for and ordered. At the second trial, a case was reserved for the opinion of the Court on the following facts:—*Jackson* was, on the 28th of Nov. 1777, being the day on which the commission of bankrupt issued, a trader within the meaning of the statutes: he became indebted to the petitioning creditor in 100l. by bond, bearing date 13th Aug. 1770, and payable on 13th Feb. 1771. Some days previous to 14th Aug. 1773, he applied to one *Child*, an attorney and conveyancer, to propose an indemnity to *Simpson* the defendant, against a bond in which *Simpson* had joined with him to a Mrs. *Bartlom: Child* enquired what property he had, and he answered, that he had the newly-built house (mentioned in the indenture of 14th Aug. 1773), besides his household goods and stock in trade; and on the recommendation of *Child*, he agreed to include the household goods and stock in trade in the indemnity. An indenture, bearing date 14th Aug. 1773, was accordingly prepared, whereby *the bankrupt conveyed to the defendant the said new-built house (which was a copyhold estate)* for

for 500 years, and all his goods(1), *furniture, and ſtock in trade; and all his perſonal eſtate whatſoever and whereſoever*; and a nominal poſſeſſion was given by delivery of a ſilver ſpoon. There was a proviſo in the deed, that till the defendant was damnified, he ſhould not take actual poſſeſſion. This indenture was duly executed by the bankrupt, who at the time was in full credit; and he continued in trade and in credit until the month of Oct. 1776. A commiſſion of bankrupt iſſued againſt him on 28th Nov. 1777, and his eſtate and effects were aſſigned to the plaintiffs on 31ſt Dec. following. —PER CUR. A fraudulent diſpoſition of a trader's property is void againſt his creditors; and if it is done by deed, it is, by force of the ſtatute of *James*, an act of bankruptcy. In the preſent caſe, the aſſignment is by deed: and it has been ſettled over and over again, that if a trader makes a conveyance of all his property, that is inſtantly an act of bankruptcy: it is fraudulent: it deſtroys the capacity of trading. In this caſe, *Jackſon* could not fairly ſell an ounce of merchandize after the aſſignment; the whole belonged to another man: it was a fraud in *Jackſon* to deal with any body as a trader. There is alſo another ground: by the aſſignment, *Jackſon* defeated every other creditor; the petitioning creditor was deprived of the benefit of an action; there was nothing left for him to take in execution if the deed was valid: but it may be ſaid to have been void againſt creditors, and that the goods might ſtill have been taken in execution, under the ſtat. 13 *Eliz.* c. 5. if ſo it was fraudulent; and therefore an act of bankruptcy under the ſtatute of *James:* it makes no difference that the defendant was not a creditor at the time; it was a preference to him when he ſhould become a creditor. If the attorney had only made a conveyance of the copyhold eſtate, it might have been otherwiſe—but it is not neceſſary to decide that point.—*Poſtea* to plaintiffs.

In another caſe, a trader being arreſted for debt, deſired the bailiff to carry him to *Eaſto*'s, a creditor, whom he requeſted to bail him: *Eaſto* refuſed, but the trader propoſing to execute to him a bill of ſale of all his effects for the debt for which he was arreſted, and alſo for his debt to him, he conſented to give a bond payable at the return of the writ, which the ſheriff's officer accepted. On the ſame evening the trader executed a bill of ſale of *all his goods and effects* whatſoever to *Eaſto*, with power to enter and ſell the ſame: the next day *Eaſto* was put into poſſeſſion of the effects; the ſame day he committed an act of bankruptcy by keeping houſe, and ſoon after abſconded. PER CUR. This is a ſtronger caſe than any of the former: the bill of ſale was a fraud on all the

Butcher v. Eaſto, Mic. Ter. 20 Geo. 3. B. R. 1 *Doug.* 294.

(1) Enumerating them ſpecifically and indiſtinct.

bankrupt

bankrupt laws: it was a conveyance of all he had in the world; and for what purpoſe? to pay the man who had arreſted him, but who had no judgment againſt him, and the defendant. Why prefer the perſon who arreſted him to other perſons who had not proceeded with ſo much rigour? He muſt have had the act of bankruptcy, which he committed in twenty-four hours afterwards, in contemplation at the time. Before *Worſley* v. *Demattos*, 1. *Burr.* 467, it had been determined that a conveyance of all the effects is an act of bankruptcy; becauſe it puts an end to all trading: and it was impoſſible for this man to carry on his buſineſs after the bill of ſale had ſwept away all his ſtock and effects.

Law v. *Skinner*, Ea. Ter. 15 Geo. 3. C. B. 2 *Black.* 996.

And though a trader do not aſſign *the whole* of his effects, it will be an act of bankruptcy, if the exception of a part is colourable.—Thus, where one *Appleford* (on 5th Dec. 1769), in conſideration of 300*l.* aſſigned to the plaintiff, *Law*, two leaſehold meſſuages, and all his ſtock in trade, by way of mortgage, for 300*l.* and intereſt; but his houſehold goods and debts (which were very trifling) were not included in this aſſignment: the 300*l.* was not paid at the day, ſo that the mortgage became abſolute: on 9th Aug. 1771, *Appleford*, in conſideration of the ſaid 300*l.* and 40*l.* more, bargained and ſold all his houſehold goods to the ſaid *Law*, by way of mortgage, for the ſaid 340*l.*: but his debts (which were of no value when the commiſſion aforeſaid iſſued) were not included in this bill of ſale: on 17th Sept. 1771, a commiſſion of bankrupt iſſued againſt *Appleford*, and his goods and ſtock in trade were ſeized under the ſaid commiſſion; and the plaintiff permitted them to be ſeized and ſold. *Appleford*, till a ſhort time before the commiſſion iſſued, carried on his trade with credit. PER CUR. This deed, *ipſo facto*, created an inſolvency in the trader.(1) It is an aſſignment of all his ſtock in trade, without which he can carry on no buſineſs: it is of all his ſubſtance, except his houſehold goods and debts, which alone were inſufficient to diſcharge his incumbrances; and therefore made him inſolvent: and if the deed be in itſelf an act of bankruptcy, the mortgage of the houſes in the ſame deed is equally void and fraudulent: the keeping poſſeſſion was hanging out falſe colours to gain a fictitious credit.

Compton v. *Pechell*, Sitt. at Guildhall after Hil. Ter. 1762, 1 *Black.* 362.

So where one *Moore*, finding his circumſtances on the decline, but willing to give a preference to ſome favourite creditor, made an inventory of all his goods and ſtock in

(1) And Lord *Mansfield*, in the caſe of *Devon* v. *Watts*, upon this point being mentioned in argument, ſaid, "A man may be inſolvent without being a bankrupt; and a man may become a bankrupt and yet be able to pay 20*s.* in the pound. The reaſon why a man becomes a bankrupt, who conveys away his property, is, that he thereby becomes totally incapable of trading." 1 *Doug.* 85.

trade,

trade (ſome few particulars excepted, to the amount of 100*l.*), and at midnight made a bill of ſale of them, in truſt to pay thoſe creditors their full debts; leaving debts to the amount of 900*l.* unprovided for. Next morning he abſconded; and a commiſſion of bankruptcy was afterwards taken out: an action being brought by the aſſignees againſt the truſtee to recover theſe goods for the benefit of the creditors in general. Lord *Mansfield*, Ch. J. directed the jury (who found a verdict for the plaintiff) thus:—There is no doubt but that a trader, before an act of bankruptcy committed, may pay a fair and honeſt creditor, not only in money, but in goods; and not only actually pay him, but give him a ſecurity which will be valid: but if the trader aſſign the whole of his ſtock in trade it is void, becauſe the very deed of aſſignment makes him a bankrupt; he not having any thing left to trade upon: the deed itſelf is an act of bankruptcy: in the preſent caſe they have made a deed which creates an inſolvency: the aſſignor muſt go off the next morning, elſe his poſſeſſion will be colourable: *the intereſt which is omitted in the aſſignment is too minute to make a difference*; the aſſignor has given up all his power of trading for the future; his very ſign and ſign-iron make part of the goods aſſigned. And another ſtrong badge of fraud is the ſuſpicious hour at which the tranſaction is done; being only twelve hours before he actually went off: he therefore was clearly of opinion that the deed was fraudulent and void.

So where one *Hooper*, who was *bonâ fide* indebted to his mother, the plaintiff, to the amount of 800*l.* aſſigned one-half of his ſtock in trade to her; and delivered the ſame, together with a bill of parcels and receipt, as if ſold to her in the ordinary courſe of buſineſs; and in the evening of the ſame day called a meeting of his creditors: who, upon examining his circumſtances, agreed that he ſhould immediately commit an act of bankruptcy, by denying himſelf to one of them; which was accordingly done: on the trial of an action of trover, brought by the mother, to recover the value of theſe goods, which the aſſignees had got out of her poſſeſſion by ſtratagem, Lord *Mansfield* directed the jury (who found a verdict for the plaintiff) as follows: The rule of law is clear and eſtabliſhed: if a man, not having previouſly committed any act of bankruptcy, in order to pay even a juſt debt, *aſſigns all his effects* to the creditor; or *all, but ſome colourable part* (which was the caſe of *Compton* and *Beaford*), or all to ſeveral creditors; but in total excluſion of any one or more of them: this in itſelf would make him a bankrupt; it would be the very act of bankruptcy: but a preference to one creditor, eſpecially by aſſigning only part of his goods, and to pay only part of the debt, has been frequently held to be good; particularly in *Cock* and *Goodfellow*,

Hooper v. Smith, ſitt. in Lon. 5 July, 1763, 2 *Black.* 441.

fellow (the caſe of a parent and child); *Small* and *Owdley* (1), and others: indeed if a man makes over ſo much of his ſtock in trade as to diſable himſelf from being a trader, this would be fraudulent: it would be like *Compton* v. *Bedford*, an aſſignment of his ſolvency; an aſſignment of all his houſehold goods would be the ſame; for a man cannot go on without them: but is half ſuch a part of a man's ſtock as muſt neceſſarily have this effect? this would be going beyond any caſe that has yet been determined. Suppoſe he had ſold the goods in queſtion to *John* or *Thomas*, and with that ready-money had paid his mother part of his debt; would that ſale or payment have been void?

Lord *Mansfield*, in this caſe, alſo obſerved, that he much doubted how far an act of bankruptcy, committed by conſent and agreement, is valid, *with reſpect to a third perſon* not privy to ſuch agreement: but he was clear that the bankrupt himſelf, and all thoſe who come in under the commiſſion, are excluded to ſay any thing againſt it: and he added, that the relation of a commiſſion of bankrupt to the time of committing the act, though uſeful to prevent frauds, is ſufficiently hard already upon private perſons; and ought not to be extended further. An act of bankruptcy, in the eye of the law, is conſidered as a crime; but where is the crime of denying one's ſelf to another by previous conſent and agreement?—Verdict for the plaintiff.

Linton v. Bartlett, Hil. Ter. 30 Geo. 3. C.B. 3 *Wilſ.* 57.

But it has been ſince held, that an aſſignment of part, in contemplation of bankruptcy, is fraudulent.—Thus, where a trader, in conſideration of a loan of 120*l.* without intereſt, being in inſolvent circumſtances, aſſigned one-third part of all his effects to the lender, who was his brother; and within two days after the making the deed, the trader abſconded, and a commiſſion was ſued out againſt him; whereupon he was declared a bankrupt: *The Court* held the deed void: for, PER CUR. although this may be a hard caſe upon the brother, who is a *bonâ fide* creditor, yet the giving him the preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and ſay, that all the creditors ſhall come in *pari paſſu*. There is no caſe where ſuch a preference as this was ever allowed: if we ſhould let this deed ſtand, we ſhould tear up the whole bankrupt laws by the roots; it is a bill of ſale made by a trader, at a time when he was inſolvent, and plainly had an act of bankruptcy in contemplation: it is partial and unjuſt to the other creditors.—Judgment for plaintiff.

Clavey *et al.* v. Hayley *et al.* Ea. Ter. 16 Geo. 3. B.R. *Cowp.* 427.

But a fraudulent judgment and execution, though void againſt creditors, is not in itſelf an act of bankruptcy.—A commiſſion of bankruptcy iſſued againſt one *Bloom*, on 4th

(1) 2 Peere *Wms.* 427. 1 *Burr.* 480.

Dec. 1775.—The bankrupt was indebted to the defendnat *John Cockran*, in the ſum of 60*l.* for ſo much money advanced by him to the ſaid bankrupt; and the ſaid *John Cockran*, and the defendant, *James Bramble*, being ſecurity for the ſaid bankrupt, by a note of hand for the ſum of 182*l.* to the plaintiffs, *Clavey* and another; and the ſum of 36*l.* being actually due to the plaintiffs, *Clavey* and another, upon a note, in which the ſaid defendants, *Bramble* and *Cockran*, were joined as ſecurity for the ſaid bankrupt; he the ſaid bankrupt, on the 18th of November, 1775, executed a bond and warrant of attorney for confeſſing judgment to the ſaid *Bramble* and *Cockran*, in the penal ſum of 558*l.* conditioned for the payment of 279*l.*; that judgment was entered up on the ſaid warrant of attorney, the 23d Nov. 1775, and execution iſſued the ſame day, marked to levy 282*l.* 16*s.*:—The queſtion was, Whether this tranſaction conſtituted an act of bankruptcy? PER CUR. A fraudulent conveyance that conſtitutes an act of bankruptcy muſt be by deed. In the caſe of *Harman* v. *Spotſwood*, Hil. Ter. 13. Geo. 3. (1) the whole court held, upon argument, that attachment and ſequeſtration did not include execution; and that a fraudulent execution was not an act of bankruptcy. All the bankrupt acts being in *pari materiâ*, muſt be taken together: the ſtat. 1 Jac. 1. c. 15. defines the different acts that conſtitute an act of bankruptcy; and, amongſt others, is the following: "Any one who ſhall willingly or fraudulently procure himſelf to be arreſted, or his goods, money, or chattels, to be *attached*, or *ſequeſtered*;" now the word *attachment* being coupled with arreſts and ſequeſtration, ſhews the legiſlature meant, that ſort of attachment by which ſuits are commenced; and that they plainly had in view the cuſtoms of London and other towns, where that ſpecies of proceſs is made uſe of. A ſequeſtration in London is a method of proceeding in an action of debt, where the party cannot be found; in which caſe, upon the action being entered, the officer goes to the warehouſe of the defendant where his goods are, and fixes a padlock on the door; and if the defendant does not put in bail in time, judgment is given againſt him, and his goods are ſold in ſatisfaction.—This ſtatute is followed by ſtat. 21 Jac. 1. c. 19. which ſpecifies the different ſecurities of creditors. It firſt enumerates all the common law ſecurities, and then goes on thus: "or having made *attachments* in *London*, or any other place, by virtue of any cuſtom there uſed;" and enacts, "that creditors having ſuch ſecurities, unleſs ſerved and executed, ſhall not come in for more than a rateable part of their debt, without reſpect to any penalty or greater ſum

(1) See Coke's B. L. 126.

contained

contained in ſuch judgment, ſtatute, recognizance, attachment, or other ſecurity:" therefore we adhere to the opinion given in *Harman* v. *Spotſwood*; that a fraudulent execution, though it will not ſtand in the way of creditors, being void as againſt them, yet it does not of itſelf conſtitute an act of bankruptcy.

Inglis *et al.* aſſignees of Campbell, a bankrupt, *v.* Grant, Hil Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 550.

An aſſignment of all his effects, in truſt for creditors, in certain proportions, executed by a bankrupt, while reſident in India, is not an act of bankruptcy within the meaning of the bankrupt laws. Neither is ſuch aſſignment fraudulent and void in itſelf, being intended honeſtly at the time, and aſſented to by the generality of the creditors.—This was an action for money had and received to the uſe of the plaintiffs as aſſignees, and on an account ſtated with them as ſuch, in which a caſe was reſerved for the opinion of the court, ſtating in ſubſtance as follows: The plaintiffs are aſſignees, under a commiſſion of bankrupt iſſued againſt *D. Campbell*, who long before 14th Sept. 1782, and from thence to his coming to England, was reſident at Calcutta, in the Eaſt-Indies; at which place he and one *Thomas Anderſon* were, before and after the ſaid 14th September, and until *Anderſon*'s death, co-partners in trade there. The defendant is a truſtee under certain deeds dated reſpectively at Calcutta on the ſaid 14th September, 1782, and 1ſt January, 1783. By the deed of 14th September, 1782, certain joint creditors of *Campbell* and *Anderſon*, and certain ſole creditors of *Campbell*, covenanted with the latter, that if he would within four months aſſign, &c. they, the creditors, would execute a general releaſe to him. In the other deed of the 1ſt of January, 1783, after certain recitals, *Campbell aſſigned all his eſtate and effects to the defendants, in truſt for all his creditors as well in England as in India.* In this deed were contained proviſoes; "that if the creditors in England ſhould be minded to alter the truſts, the majority of them might, by any deed, make void any of the truſts, ſo that ſuch alteration did not tend to injure the claims of any of the creditors." "Alſo, that if any creditor whoſe debt exceeded the ſum of 1000*l.* ſhould refuſe to execute the deed, and upon requeſt ſhould not execute the ſame before the 1ſt January, 1785, it ſhould be lawful for the ſaid *Campbell*, or the defendants, or either of them, to revoke and make void the ſaid indentures, and the truſts therein contained." In the latter part of the year 1783, or beginning of the year 1784, *Campbell* came to England; and on the 3d July, 1784, a commiſſion of bankrupt iſſued againſt him on the petition of one *John Sabatier*, a bond creditor, then reſiding in England, under which, on the 5th of July, he was found a bankrupt: and the act of bankruptcy on which the commiſſioners proceeded was a denial to *Sabatier* on the 18th June, 1784, in London, at a houſe where

where *Campbell* then lodged. The caſe then ſtated that certain ſums of money of *Campbell*'s eſtate and effects had been received by the defendants under the truſt deeds in India and in England, and that *Campbell* was ſtill indebted to them in certain conſiderable ſums. THE QUESTION was, Whether the plaintiffs were entitled to recover the whole or any part of the ſums which were proved to have come to the hands of the defendant under the truſt deeds? And one point made was, WHETHER the deeds of the 14th of September and 1ſt of January did not of themſelves amount to acts of bankruptcy, *being aſſignments of* all *the bankrupt's effects to certain creditors, for the purpoſe of a peculiar diſtribution*, by which certain creditors were favoured more than others? Upon this point THE COURT ſaid, that no argument could be maintained, inaſmuch as the deed having been executed in India, *could* not be conſidered as an act of bankruptcy in England. Another point contended for was, That the deeds, though not amounting to an act of bankruptcy, were fraudulent and void as againſt creditors; and that the money received by the defendant under them might be recovered by the aſſignees, and applied to the general maſs of creditors under the commiſſion. SED PER CUR. This caſe is too clear for diſcuſſion. The facts are, that *Campbell*, before any act of bankruptcy in England, and during his reſidence in India, conveyed all his property in truſt for all his creditors, according to the ſeveral proportions agreed upon by all parties there. The tranſaction was perfectly fair at the time, and without any fraudulent intention; and *Campbell* acted honeſtly in executing the deeds. It is therefore too much to contend that a commiſſion of bankrupt, which iſſued ſubſequently upon an act of bankruptcy committed after he came to England, can have a retroſpect to, or overhaul an act done fairly and honeſtly at the time by *Campbell*, who was not then in a ſituation in which the bankrupt laws of this country could have any operation either upon him or upon his property.—*Poſtea* to the defendant.

And the parties who are privies and aſſent to a deed of aſſignment cannot ſet it up as an act of bankruptcy.—This was an action of trover, brought by the late ſheriff againſt the defendants, who had ſeized the goods in queſtion, which formerly belonged to *Hayes*, after they had been taken in execution at the ſuit of a creditor, to whom the ſheriff had paid the value. The defendants ſet up two anſwers: 1ſt. An aſſignment dated 16th Auguſt, 1786, by *Hayes*, to two perſons, for the benefit of ſuch of his creditors as would ſign a deed of compromiſe by a certain time; notice whereof had been publiſhed in the country papers. The anſwer given by the plaintiff to this was, that it was agreed that *Hayes* ſhould continue in poſſeſſion till May, 1787; he accounting for the profits

Bamford v. Baron *et al* Eaſt. Ter. 28 Geo. 3 B. R. 2 *Term. Rep.* 594 (*n. a.*)

profits in the mean time to the truſtees; and he accordingly continued in the viſible poſſeſſion of the goods after the aſſignment, and therefore the transfer was void by the ſtat. 13 *Eliz.* To this the defendants replied, by ſhewing an undertaking by *Hayes* to account to thoſe truſtees for all the profits of the trade from the date of the aſſignment. The plaintiff contended, that neither that undertaking, nor the notice in the papers, was ſufficient to ſhew the change of property, and therefore the transfer was void by the aſſignor's continuing in poſſeſſion. *The next defence ſet up by the defendants was a commiſſion of bankrupt taken out againſt* Hayes in January, 1788, *which was at the ſuit of the very perſons who were privy to the deed of aſſignment, and who relied on that deed as an act of bankruptcy, under which commiſſion the two truſtees were choſen aſſignees.* To this the plaintiff had urged that the commiſſion of bankrupt, ſuppoſing it had duly iſſued, did not apply, becauſe from the ſeveral dates it appeared, that the relation did not take place to overhaul the execution; and, ſecondly, that it was not competent to the perſons who had ſigned the deed of aſſignment, and were privies to the tranſaction, to ſet it up as an act of bankruptcy, whatever any other creditor might do who was no party to it. *The Court* were clearly of opinion that the parties, who were privies, and had aſſented to the deed of aſſignment, could not ſet it up as an act of bankruptcy. That the two defences were utterly inconſiſtent; firſt relying on the aſſignment as a *bonâ fide* valid conveyance, and then inſiſting on it as a fraud on the bankrupt laws, and an act of bankruptcy. And they ſaid that Lord *Mansfield* had given it as his opinion in *Hooper* v. *Smith*, 1 *Black.* 441. that thoſe who were privy to a concerted act of bankruptcy could not take advantage of it.

Manton *et al.* Aſſignees of Langwith, a bankrupt, *v.* Moore, Mic. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 67.

The defendant, ſheriff of the county of *Leiceſter*, having on the 19th of January, 1795, taken in execution, at the ſuit of the *Oakham* Canal Company, the goods of the bankrupt, this action was brought by his aſſignees in order to try, amongſt other things, whether a ſecurity given by *Langwith* to the *Oakham* Canal Company (a bill of ſale dated 24th October, 1794), was in itſelf an act of bankruptcy: the cauſe was referred to the arbitration of a gentleman at the bar; and the *Oakham* Canal Company were by conſent made parties to the rule of court. The arbitrator, being deſirous that his opinion on the point of law might be ſubmitted to the reviſion of this Court in caſe either of the parties ſhould be diſſatisfied with his judgment, ſtated at length in his award the facts as they appeared to him upon examination, with the grounds of his judgment thereon. After ſetting forth the parties to the award and their reſpective intereſts, together with the bill of ſale, and the queſtion ariſing thereon,

thereon, as before ſtated, he ſtated that the *Oakham* Canal Company had advanced to *Langwith*, who was employed by them as an engineer, the ſum of 5216*l.* 0*s.* 9*d.* and that the work done by him at that time amounted to 1940*l.* 4*s.* 1*d.* That *Langwith* had beſides expended in articles for the uſe of the canal, and which were then lying upon the banks of it, 1566*l.* 4*s.* That at this period he applied to the Company to advance him 600*l.* more, in order to pay his creditors in Yorkſhire and Lincolnſhire the full amount of their debts: upon which, as he was conſiderably in arrear to them, they required ſome ſecurity from him for the money which he owed to them; and accordingly a bill of ſale of part of his effects was executed and delivered to them by the delivery of one copper halfpenny on the 24th of October 1794. *But this bill of ſale extended only to ſuch parts of his effects as were bought with their money, and were then lying upon the banks of the canal, which were their premiſes.* That the Company, meaning to continue him as their engineer, took no poſſeſſion of thoſe effects by ſeizing them until the 19th January, 1795, when, diſſatisfied with his conduct, they removed him as their engineer, and ſeized the effects; after which he was declared a bankrupt upon another diſtinct and ſubſequent act of bankruptcy. The arbitrator, for reaſons ſet forth in the award, adjudged, that the bill of ſale was no act of bankruptcy. And, PER CUR. (after argument), Lord *Kenyon*, Ch. J. The ſituation of theſe parties was thus: the Canal Company, who were carrying on great works, had employed an engineer, and had advanced money to him with which he had procured the goods in queſtion, and depoſited them on the banks of their canal, fit for the purpoſe of being there uſed; theſe materials were of great bulk; and this engineer, ſo being in arrear to the Company, executed to them a bill of ſale of theſe goods then lying on the banks of their canal which were their property. In caſes of this kind the queſtion whether the act be or be not fraudulent depends on another queſtion, whether the goods be or be not delivered with the inſtrument that profeſſes to convey them. A conveyance of goods, without deed, is fraudulent unleſs poſſeſſion of the goods be given: if it be by deed, it is fraudulent and an act of bankruptcy. But in this caſe no other poſſeſſion could have been given. When the bill of ſale was executed the goods remained on the premiſes of the Canal Company to whom the conveyance was made. It has been admitted in many caſes that there need not be a tranſmutation from hand to hand; where goods are in a warehouſe, the delivery of the key of the warehouſe has been held ſufficient; and yet ſuch a conveyance may be as ſecret as the preſent. It is ſtated in the award, that *Langwith* could not derive any falſe credit from the ſuppoſed poſſeſſion of theſe goods, becauſe

they appeared from the ſituation in which they were placed to belong to the Company, on whoſe ground they were lying. This appears to have been a fair tranſaction; the goods were bought with the money of the Company, and were intended for their uſe. ASHHURST, J. The only queſtion is, Whether poſſeſſion of the goods were or were not given to the Canal Company when the bill of ſale was made? Now the goods were before lying on the premiſes of the Company, and there could have been no other delivery of the goods; it would have been abſurd to have removed the goods from the place where they were lying, ſince they muſt have been afterwards brought back to the very ſame ſpot in order to be uſed. GROSE, J. It has been contended that this deed was an act of bankruptcy, on the ground that it was fraudulent. But it was not fraudulent as far as reſpected *Langwith*'s other creditors; it was for their benefit; for the Canal Company in conſideration of the bill of ſale were to advance him more money, in order to enable him to pay his other creditors, and to carry on his buſineſs. Nor was the deed fraudulent as far as reſpected the Canal Company. Poſſeſſion of the goods was delivered to the Company as far as poſſeſſion under theſe circumſtances could be given; and there was no fraud in the tranſaction.—LAWRENCE, J. It has been ſaid that in this caſe the bankrupt muſt be conſidered by the world as the owner of theſe goods after the bill of ſale, becauſe the goods remained where they were before, and no poſſeſſion of the goods was delivered to the Canal Company. I agree that if the poſſeſſion of the goods by the Company did not accompany the bill of ſale, this would have fallen within thoſe caſes where the want of poſſeſſion was deemed a badge of fraud: but what was the poſſeſſion of the bankrupt himſelf before the bill of ſale? The goods were then apparently in the poſſeſſion of the Company, becauſe they were lying on their banks; the bankrupt had no poſſeſſion of the goods otherwiſe than becauſe he had the property in them: but when he transferred that property to the Company, the law referred the poſſeſſion to the Company who had the property, and in whom the ſole poſſeſſion apparently was before; and conſequently no falſe credit in the bankrupt was held out to the world.

Bowles et al. Aſſ. of James *v.* Langworthy, Tr. Ter. 33 Geo. 3. B.R. 7 *Ter. Rep.* 366.

And the examination of the defendant before the commiſſioners, in which he admitted that the bankrupt executed a deed to him, is ſufficient evidence to prove the execution thereof, and ſuperſedes the neceſſity of calling the ſubſcribing witneſs.—This was an action of trover brought by the aſſignees to recover ſome goods *taken by the defendant under a bill of ſale given to him by the bankrupt of all his effects*; and the only queſtion at the trial was on the execution of this

bill

bill of ſale, which was relied on by the aſſignees to prove the act of bankruptcy. And in order to prove this, *inſtead of calling the ſubſcribing witneſs*, the plaintiffs produced the defendant's examination before the commiſſioners of bankrupt, in which he admitted the execution of this deed. The plaintiffs obtained a verdict; and it was afterwards moved, on the authority of *Abbot* v. *Plumbe* (ſee vol. 1. p. 361), that this verdict might be ſet aſide. SED PER CUR.—There is no objection to the evidence given: If indeed there had been any thing in the defendant's examination before the commiſſioners to do away the effect of the deed, that alſo would have been admiſſible: but nothing of that kind appeared, and the defendant himſelf produced it as having been properly executed. In *Abbot* v. *Plumbe*, the deed was produced againſt a perſon who was no party to it: but here the bill of ſale was produced by the defendant, who was a party to it. The very production of the deed by the defendant before the commiſſioners made it evidence as againſt him.—Rule diſcharged.

3. *To what time the act of bankruptcy ſhall relate.*] The depoſitions of the act of bankruptcy when recorded according to 5 Geo. 2. c. 30. ſ. 41. are evidence, in an action at law, to prove the preciſe time when the act of bankruptcy was committed, if ſpecified therein.—On the trial of a feigned iſſue which had been directed to be brought to try "whether one *Burton* became a bankrupt before the 25th day of Jan. 1779?" At the trial, the plaintiffs proved, that *Ann Wells*, who had proved ſeveral acts of bankruptcy, was dead, and produced an office copy of the record of her depoſition, made according to the ſtatute 5 Geo. 2. c. 30. ſ. 41. in order to ſhew, that *Burton* had committed an act of bankruptcy before the 25th of Jan. It was objected at the trial that it was not the meaning of the ſtatute, that the depoſitions, when entered of record ſhould be evidence of the preciſe time of the party's becoming a bankrupt, but merely that he was ſo before the commiſſion iſſued. The judge who tried the cauſe admitted the evidence, and a verdict was found for the plaintiffs; but the point was reſerved, and the defendant afterwards moved that the verdict might be ſet aſide. PER CUR. (after argument), The point reſerved for the opinion of the Court ſeems clearly determined by the act of parliament itſelf; the witneſs cannot tell his ſtory before the commiſſioners without ſaying when the act of bankruptcy was committed: he muſt mention that naturally and of courſe, and therefore is more likely to ſpeak the truth. In many caſes its being an act of bankruptcy depends on the time. The legiſlature conſidered the commiſſioners as indifferent perſons examining the witneſſes with impartiality, and taking care of the intereſts of all parties. It is very common for

Janſon v. Williſon, Mic. Ter. 20 Geo. 3. B. R. 1 *Doug.* 257.

the enacting part of a ſtatute to extend beyond the evils mentioned in the preamble, and the Engliſh language does not afford more general words than thoſe uſed in the enacting part of this ſtatute. This very point was agitated in *Alderſon* v. *Temple* (1), (though it is not mentioned in either of the reporters); and after conſideration the Court was unanimous that the act is concluſive, and the depoſitions admiſſible evidence to all purpoſes: the preamble of the act does not merely recite the inconvenience ariſing to purchaſers under a commiſſion, but alſo thoſe to which the creditors of a bankrupt were expoſed. Lord *Hardwicke* adviſed commiſſioners to find the bankruptcy generally and not the exact time; and the reaſon hereof was that this might allow all who were creditors prior to the date of the commiſſion to prove their debts: but he was ſpeaking of the *adjudication* by the commiſſioners, not of the depoſitions which muſt mention the time ſo as to fix it after the date of the petitioning creditors debt, and before the iſſuing of the commiſſion. Some acts of bankruptcy depend entirely on the time. Thus keeping houſe on a Sunday cannot make a man a bankrupt.—Rule diſcharged.

King *v.* Leith, Mic. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 141.

If a trader become a bankrupt by lying in priſon two months after an arreſt, the act of bankruptcy ſhall relate to the time of the firſt arreſt.—This was caſe for money had and received to the uſe of the plaintiff, as aſſignee, money paid, laid out and expended, money lent, and on account ſtated. Plea, *Non aſſumpſit*. On a motion to ſet aſide the verdict, which had been given for the plaintiff, and to enter a nonſuit, it appeared that one *Langman*, the bankrupt, was arreſted on the 19th of January laſt at the ſuit of the plaintiff, and that he became a bankrupt by lying two months in priſon, which expired on the 26th of March. On 19th of February the plaintiff's attorney gave notice by a letter to the defendant (who had been employed by *Langman* about the latter end of January as a broker to ſell his effects), not to ſell them, becauſe *Langman* had committed an act of bankruptcy, that a commiſſion of bankrupt would ſhortly be iſſued againſt him, and that *the act of bankruptcy would relate to the day when it was committed*, which was ſome time paſt. The defendant in his anſwer to this, dated the 23d February, ſaid, that as he had adverti ſed the ſale and begun to ſell, and the goods would not produce the ſum for which *Langman* was in priſon, he thought it better to complete the ſale; and that he had ſold the effects without any deſign to defraud. On the 1ſt March the defendant paid *Langman* 120*l.* being the produce of the ſale. The defendant's council objected, firſt, to the form of the action, and that it ſhould have been trover; and ſecondly, that the ſale and payment were good, being before the act of bankruptcy was complete. Per Cur.

(1) See this caſe infra.

Whatever doubt may have been formerly entertained upon this queſtion, it is now clear that the aſſignees of the bankrupt have an election to bring either trover or aſſumpſit in a caſe like the preſent. The only diſtinction attempted to be taken between this and other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themſelves, whereas this is a complicated matter, and is inchoate till the party has lain in priſon two months; and therefore the act of bankruptcy is not complete till the expiration of that time. But that does not make any difference; for *as ſoon as the two months are expired, it relates back to the time of the firſt arreſt, and then operates as if the arreſt were a complete act of bankruptcy in itſelf.* Then if the act of bankruptcy overreach all intermediate acts ſo as to veſt the property in the aſſignees from the time of the act committed, it follows as a neceſſary conſequence that they may either affirm or diſaffirm the act of any party who, after the act of bankruptcy, has converted the trader's effects into money, either by bringing an action for money had and received to their uſe, or by bringing trover; and here they have choſen the former.—And this form of action ſeems to be warranted by the caſe of *Hitchin* v. *Campbell* (2 Black. 827.), which ſays, that the aſſignees have their election to bring either trover or aſſumpſit. And without entering into the caſes we ſhould be diſpoſed to ſupport the latter. For that is moſt beneficial to the defendant; becauſe in trover the plaintiff may recover the full value of the goods, though the ſale may not actually have produced more than half their worth; but in aſſumpſit the aſſignees are only entitled to recover what the party really received, which is only what the ſale of the goods produced. The ſtatute of *George* the Second makes no difference; that only provides that no payment ſhall be ſet aſide which is *bonâ fide* made to the bankrupt in the common courſe of trade: but this cannot be ſaid to be a payment really and *bonâ fide* made in the common courſe of trade, becauſe the defendant had expreſs notice of the bankrupt's ſituation. And though, ſtrictly ſpeaking, at the time of the notice the act of bankruptcy was not complete, yet after that notice the defendant was not warranted in paying the money over to the bankrupt, and it cannot be called a *bonâ fide* payment.

But the Court will not aſſiſt upon motion the relation of an act of bankruptcy.—On a judgment againſt the defendant, who was then a priſoner, a *fieri facias* was ſued out by the plaintiff, and his goods taken and ſold by the ſheriff. The defendant ſtill continued in priſon till two months were elapſed; whereby he became a bankrupt, and a commiſſion iſſued againſt him: AND now it was moved that the ſheriff might pay over the money to the aſſignees, who were entitled (as was inſiſted) thereto by relation to the time, when the

Clarke v. Ryall. Hil Ter. 8 Geo. 3. B R. 1 *Black. Rep.* 642.

defendant firſt went to priſon. Cauſe was ſhewn that before the two months were expired, or the commiſſion iſſued, the ſheriff's officer had paid the money to the plaintiff. Upon this the motion was changed, and the council moved that it might be tried on an iſſue, whether the money was *bonâ fide* paid to the plaintiff, before the commiſſion iſſued; as the juſtice of the caſe was with the aſſignees, in caſe the fact turned out, that it was paid afterwards. SED PER CUR. This is a caſe *ſtrictiſſimi juris*; and the relation of which the aſſignees would take advantage an odious one: therefore we will not aſſiſt it: you could not bring an action againſt the ſheriff for the money; becauſe that would affirm the execution; as therefore you could have no advantage in the regular courſe of law, you ſhall not obtain it upon motion. —Rule diſcharged.

III. *Stoppage of Goods in Tranſitu.*

Lickbarrow v. Maſon, Mic. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 63.

The conſignor may ſtop goods *in tranſitu* before they get into the hands of the conſignee in caſe of the inſolvency of the conſignee: (1) but if the conſignee aſſign the bills of lading to a third perſon for a valuable conſideration the right of the conſignor, as againſt ſuch aſſignee, is diveſted.—An action of trover was brought for a cargo of corn; to which the defendant pleaded the general iſſue. On the trial of the cauſe, the facts given in evidence on the part of the plaintiffs were as follow: That Meſſrs. *Turing* and ſon, merchants at *Middlebourg*, in the province of *Zealand*, on the 22d of July, 1786, ſhipped the goods in queſtion on board *The Endeavour*, for *Liverpool*, by the order and direction, and on the account, of one *Freeman*, of *Rotterdam*. That one *Thomas Holmes*, as maſter of the ſhip, ſigned four ſeveral bills of lading for theſe goods, in the uſual form; two of which were indorſed by *Turing* and ſon in blank, and ſent by them, on the 22d of July, 1786, to *Freeman*, together with an invoice of the goods. The third bill they themſelves retained, and the fourth was kept by *Holmes*. That on the 25th of the ſame month, *Turing* and ſon drew four ſeveral bills of exchange upon *Freeman*, for the value of the goods, amounting to 477*l.* which he afterwards accepted. That on the ſame day, *Freeman* ſent to the plaintiff the two bills of lading, together with the invoice, which he had received from *Turing* and ſon, in order that the goods might be taken poſſeſſion of and ſold by them, on *Freeman*'s account; who

(1) A vendor of goods before actual poſſeſſion by the vendee, has a lien upon the goods he ſends; and if he can get them *in tranſitu*, where the vendee is bankrupt, he has the benefit of that lien. Per Lord *Mansfield*, in *Vale* v. *Bayle*, Ea. Ter. 15 Geo. 3. B. R. *Cowp.* 296.

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at the ſame time drew three ſets of bills of exchange for 520*l.* upon the plaintiffs, which they accepted, and afterwards paid. That the plaintiffs were creditors of *Freeman* to the amount of 542*l.* That on the 15th of Auguſt, 1786, and before the four bills of exchange drawn by *Turing* and ſon on *Freeman* became due, *Freeman* became a bankrupt; whereupon thoſe bills were regularly proteſted, and being afterwards returned under ſuch proteſt, were by them paid. That the price of the goods ſo ſhipped by *Turing* and ſon was wholly unpaid. *That* Turing *and ſon, hearing of* Freeman's *bankruptcy, on the 21ſt of Auguſt*, 1786, *indorſed the bill of lading which they had retained, and tranſmitted it, together with the invoice of the goods, to the defendants, authoriſing them to retain poſſeſſion of the goods, on the account, and for the benefit, of* Turing *and ſon.* That accordingly, on the arrival of the veſſel at *Liverpool*, on the 28th of that month, the defendants applied to *Holmes*, the maſter of the ſhip, for the goods, who on their producing the bill of lading delivered the ſame to the defendants, who afterwards ſold them for the benefit of *Turing* and ſon, for 557*l.* To this evidence the defendant demurred; and the plaintiff joined in demurrer. And after the caſe had been fully argued, THE COURT *were of opinion in favour of the plaintiffs.* BUT as the judgment ſo given was reverſed upon a writ of error in the Exchequer Chamber, and the Houſe of Lords afterwards reverſed ſuch judgment of the Exchequer Chamber, and awarded a *venire de novo*, it ſeems to be neceſſary to ſtate the arguments of the judges at ſome length. PER ASHHURST, J. We may lay it down as a broad general principle, that, *wherever one of two innocent perſons muſt ſuffer by the acts of a third, he who has enabled ſuch third perſon to occaſion the loſs muſt ſuſtain it.* If that be ſo, it will be a ſtrong and leading clue to the deciſion of the preſent caſe. It has been argued, that it would be very hard on a conſignor, who has received no conſideration for his goods, if he ſhould be obliged to deliver them up in caſe of the inſolvency of the conſignee, and come in as a creditor under his commiſſion, for what he can get. That is certainly true; but it is a hardſhip which he brings upon himſelf. When a man ſells goods, he ſells them on the credit of the buyer; if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately becomes a bankrupt. But *where the delivery is to be at a diſtant place, as between the vendor and vendee, the contract is ambulatory, till delivery; and therefore, in caſe of the inſolvency of the vendee in the meantime, the vendor may ſtop the goods* in tranſitu. But as between the vendor and third perſons, the delivery of a bill of lading is a delivery of the goods themſelves; if not, it would enable the conſignee to make the bill of lading an inſtrument of fraud.

The aſſignee of a bill of lading truſts to the indorſement; the inſtrument is in its nature transferrable; in this reſpect therefore this is ſimilar to the caſe of a bill of exchange. If the conſignor had intended to reſtrain the negociability of it, he ſhould have confined the delivery of the goods to the vendee only; but he has made it an indorſable inſtrument, ſo it is like a bill of exchange; in which caſe, as between the drawer and payee, the conſideration may be gone into, yet it cannot between the drawer and an indorſee; and the reaſon is, becauſe it would be enabling either of the original parties to aſſiſt in a fraud. This rule is founded purely on principles of law, and not on the cuſtom of merchants. The cuſtom of merchants only eſtabliſhes that ſuch an inſtrument may be indorſed; but the effect of that indorſement is a queſtion of law, which is, that as between the original parties the conſideration may be enquired into; though, when third perſons are concerned, it cannot. This is alſo the caſe with reſpect to a bill of lading. Though the bill of lading in this caſe was at firſt indorſed in blank, it is preciſely the ſame as if it had been originally indorſed to this perſon; for when it was filled up in his name, it was the ſame as if made to him only. Then what was ſaid by Lord *Mansfield*, in the caſe of *Wright* and *Campbell*, 4 *Burr.* 2046, goes the full length of this doctrine: "If the goods be *bonâ fide* ſold "by the factor at ſea (as they may be where no other de-"livery can be given), it will be good, notwithſtanding the "ſtatute 21 Jac. 1. c. 19. The vendee ſhall hold them by "virtue of the bill of ſale, though no actual poſſeſſion is "delivered; and the owner can never diſpute with the vendee, "becauſe the goods were ſold *bonâ fide*, and by the owner's "own authority." Now in this caſe, the goods were tranſferred by the authority of the vendor, becauſe he gave the vendee a power to transfer them, and being ſold by his authority, the property is altered. And I am of opinion, that this right of the aſſignee could not be diveſted by any ſubſequent circumſtance. BULLER, J. Before I conſider the effect of the ſeveral authorities which have been cited, I will take notice of one circumſtance in this caſe, which is peculiar to it; not for the purpoſe of founding my judgment upon it, but becauſe I would not have it ſuppoſed, in any future caſe, that it paſſed unnoticed, or that it may not hereafter have any effect which it ought to have. In this caſe it is ſtated, that there were four bills of lading; it appears by the books treating on this ſubject, that according to the common courſe of merchants there are only three; one of which is delivered to the captain of the veſſel, another is remitted to the conſignee, and the third is retained by the conſignor himſelf, as a teſtimony againſt the captain, in caſe of any looſe dealings. Now if it be at preſent the eſtabliſhed courſe among merchants

merchants to have only three bills of lading, the circumſtance of there being a fourth in this caſe, might, if the caſe had not been taken out of the hands of the jury by the demurrer, have been proper for their conſideration. I am aware that that circumſtance appears in the bill, on which is written, "In witneſs, the maſter hath affirmed to four "bills of lading, all of this tenor and date." But we all know that it is not the practice, either of perſons in trade, or in the profeſſion, to examine very minutely the words of an inſtrument, which is partly printed, and partly written; and if we only look at the ſubſtance of ſuch an inſtrument, this may be the means of enabling the conſignee to commit a fraud on an innocent perſon. Then how ſtood the conſignee in this caſe? He had two of the bills of lading, and the captain muſt have a third; ſo that the aſſignee could not imagine that the conſignor had it in his power to order a delivery to any other perſon. But I mean to lay this circumſtance entirely out of my conſideration in the preſent caſe, which I think turns wholly on the general queſtion; and I make the queſtion even more general than was made at the bar; namely, *Whether a bill of lading is by law a tranſfer of the property?* This queſtion has been argued upon authorities; and before I take notice of any particular objections which have been made, I will conſider thoſe authorities. The principal one relied on by the defendants is that of *Snee* and *Preſcot*, 1 *Atk.* 245; now, ſitting in a court of law, I ſhould think it quite ſufficient to ſay, that that was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that he who ſeeks equity, muſt firſt do equity. I am not diſpoſed to find fault with that determination as a caſe in equity; but it is not ſufficient to decide ſuch a queſtion as that now before us. Lord *Harkwicke* has, with his uſual caution, enumerated every circumſtance which exiſted in the caſe; and indeed he has been ſo particular, that if the printed note of it be accurate (which I doubt), it is not an authority for any caſe which is not preciſely ſimilar to it. The only point of law in that caſe, is upon the forms of the bills of lading; and Lord *Hardwicke* thought there was a diſtinction between bills of lading indorſed in blank, and thoſe indorſed to particular perſons; but it was properly admitted at the bar, that that diſtinction cannot now be ſupported. Thus the matter ſtood till within theſe thirty years; ſince that time, the commercial law of this country has taken a very different turn from what it did before. We find in *Snee* and *Preſcot*, that Lord *Hardwicke* himſelf was proceeding with great caution, not eſtabliſhing any general principle, but decreeing on all the circumſtances of the caſe put together.

Before

Before that period, we find that in courts of law, all the evidence in mercantile caſes was thrown together; they were left generally to a jury, and they produced no eſtabliſhed principle. From that time, we all know the great ſtudy has been to find ſome certain general principles, which ſhall be known to all mankind, not only to rule the particular caſe then under conſideration, but to ſerve as a guide for the future. Moſt of us have heard theſe principles ſtated, reaſoned upon, enlarged, and explained, till we have been loſt in admiration at the ſtrength and ſtretch of the human underſtanding. And I ſhould be very ſorry to find myſelf under a neceſſity of differing from any caſe on this ſubject, which has been decided by Lord *Mansfield*, who may be truly ſaid to be the founder of the commercial law of this country. I hope to ſhew, before I have finiſhed my judgment, that there has been no inconſiſtency in any of his determinations; but if there had, if I could not reconcile an opinion which he had delivered at *Niſi prius* with his judgment in this court, I ſhould not heſitate to adopt the latter, in preference to the former; and it is but juſt to ſay, that no judge ever ſat here more ready to correct an opinion ſuddenly given at *Niſi prius*. Firſt, as to the caſe of *Wright* and *Campbell*, that was a very ſolemn opinion delivered in this court. In my opinion, that is one of the beſt caſes that we have in the law, on mercantile ſubjects. There are four points in that caſe, which Lord *Mansfield* has ſtated ſo extremely clear, they cannot be miſtaken. The firſt is, what is the caſe as between the owner of the goods and the factor; the ſecond, as between the conſignor and the aſſignee of the factor, *with notice*; thirdly, as between the ſame parties *without notice*; and fourthly, as to the nature of a bill of ſale of goods at ſea, in general. It is to be recollected, that the caſe of *Wright* and *Campbell* was decided by the Judge at *Niſi prius*, upon the ground, that the bill of lading transferred the whole property at law; and when it came before this court, on a motion for a new trial, Lord *Mansfield* confirmed that opinion; but a new trial was granted on a ſuſpicion of fraud; therefore it is fair to infer, that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the ſame as if the queſtion were tried between the conſignor and the original conſignee. According to a note of *Wright* and *Campbell*, which I took in court, Lord *Mansfield* ſaid, that ſince the caſe of *Evans* v. *Martlett*, in 1 Lord *Raymond*, 271, it had always been held, that the delivery of a bill of lading transferred the property at law; if ſo, every exception to that rule ariſes from equitable conſiderations, which have been adopted in courts of law. The next caſe is that of *Savignac* and *Cuff*, at the ſittings at Guildhall,

Guildhall, *coram* Lord *Mansfield*, Tr. Ter. 1778, (3) the note of which is too looſe to be depended upon; but there is a circumſtance in that caſe, which might afford ample ground for the deciſion; for I cannot ſuppoſe that Lord *Mansfield* had forgotten the doctrine which he laid down in this court in *Wright* and *Campbell*. There he obſerved very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods; but in *Savignac* and *Cuff*, the plaintiff had not only the bills of lading and the invoice, but he had alſo the letters of advice, from which the real tranſaction muſt have appeared; and if it appeared to him that *Selvetti* had not been paid for the goods, that might have been a ground for the determination. The caſe of *Hunter* and *Beal*, at the *ſittings* in L. after Trin. Ter. 1785, *cor.* Lord *Mansfield*, does not come up to this point now in diſpute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till the delivery of the goods. With reſpect to the caſe of *Stokes* and *La Riviere*, Hil. 25 Geo. 3. perhaps there might be ſome doubt about the facts of it; however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties; that caſe therefore does not impeach the doctrine laid down in *Wright* and *Campbell*. It has been argued at the bar, that it is impoſſible for the holder of a bill of lading to bring an action on it againſt the conſignor; perhaps that argument is well founded; no ſpecial action on the bill of lading has ever been brought; for if the bill of lading transfers the property, an action of trover againſt the captain for non-delivery, or againſt any other perſon who ſeizes the goods, is the proper form of action. If an action is brought by a vendor againſt a vendee, between whom a bill of lading has paſſed, the proper action is for goods ſold and delivered. Then it has been ſaid, that no caſe has yet decided that a bill of lading does transfer the property; but in anſwer to that it is to be obſerved, that all the caſes upon the ſubject, *Evans* v. *Martlett*, *Wright* v. *Campbell*, and

(1) There *Selvetti*, a merchant in *Italy*, conſigned a quantity of ſkins to *Lingham* reſiding in *London*, and ſent him a bill of lading indorſed in blank. *Lingham*, the conſignee, indorſed it to *Savignac* for a valuable conſideration at the invoice price, ſhewing him at the ſame time the letters of advice and the bills of parcels. The conſignee not accepting the bills of exchange which the conſignor had drawn upon him for the amount of the goods, the conſignor indorſed the bill of lading remaining in his hands to *Cuff*, the defendant, with orders to ſeize the goods before they got into the hands of the conſignee, which he did: and the action was brought againſt him by the indorſee of the conſignee to recover the value of the goods. And it was there argued, that by the indorſement of the bill of lading the property was transferred. But Lord *Mansfield* was of opinion, that the conſignor had a right to ſtop the goods *in tranſitu* in caſe of the inſolvency of the conſignee, and that the plaintiff, ſtanding in the ſame ſituation with the original conſignee, had loſt his lien. 2 *Ter. Rep.* 66.

Caldwell

Caldwell v. *Ball*, and the univerſal underſtanding of mankind, preclude that queſtion. The caſes between the conſignor and conſignee have been founded merely on principles of equity, and have followed up the principle of *Snee* and *Preſcot*; for if a man has bought goods, and has not paid for them, and cannot pay for them, it is not equitable that he ſhould prevent the conſignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardſhip on the vendor; at any rate that is a bad argument in a court of law; but in fact there is no hardſhip on him, becauſe he has parted with the legal title to the conſignee. An argument was uſed with reſpect to the difficulty of determining at what time a bill of lading ſhall be ſaid to transfer the property, eſpecially in a caſe where the goods were never ſent out of the merchant's warehouſe at all; the anſwer is, that under thoſe circumſtances, a bill of lading could not poſſibly exiſt, if the tranſaction were a fair one; for a bill of lading is an acknowledgment, by the captain, of having received the goods on board his ſhip; therefore it would be a fraud in the captain to ſign ſuch a bill of lading, if he had not received the goods on board; and the conſignee would be entitled to his action againſt the captain for the fraud. As the plaintiff, in this caſe, has paid a valuable conſideration for the goods, and there is no colour for imputing fraud or notice to him, I am of opinion, that he is entitled to the judgment of the Court. *Groſe*, J. I conceive this to be a mere queſtion of law, whether, as between the vendor and the aſſignee of the vendee, the bill of lading transfers the property? I think that it does. With reſpect to the queſtion, as between the original conſignor and conſignee, it is now the clear, known, and eſtabliſhed law, that *the conſignor may ſeize the goods* in tranſitu, *if the conſignee become inſolvent before the delivery of them.*— But that was not always the law. The firſt caſe of that ſort was that of *Wiſeman* and *Vandeputt*, 2 Vern. 203, in chancery, when, on the firſt hearing, the Chancellor ordered an action of trover to be brought, to try whether the conſignment veſted the property in the conſignees; and it was then determined in a court of law that it did; but the Court of Equity thought it right to interpoſe and give relief; and ſince that time it has always been conſidered, as between the original parties, that the conſignor may ſeize the goods before they are actually delivered to the conſignee, in caſe of the inſolvency of the conſignee. But this is a queſtion between the conſignor and the aſſignee of the conſignee, who do not ſtand in the ſame ſituation as the original parties. A bill of lading carries credit with it; the conſignor, by his indorſement, gives credit to the bill of lading, and, on the faith of that, money is advanced. The firſt caſe that I find, where

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an attempt was made to introduce the ſame law between the conſignor and the indorſee of the conſignee, is that of *Snee* and *Preſcot*; but as my brother *Buller* has already made ſo many obſervations on that caſe, it would be but repetition in me to go over them again, as I intirely agree with him in them all, as well as in thoſe which he made on the other caſes. Therefore I am of opinion, that there ſhould be judgment for the plaintiff.—Judgment for the plaintiff.

Maſon *et al.* v. Lickbarrow *et al.* in Er. in the Ex. Ch. Hil. Ter. 30 Geo. 3. 1 *Hen. Black.* 357.

The defendants in the above caſe having brought a writ of error in the Exchequer Chamber, after two arguments there, Lord *Loughborough*, Ch. J. delivered the opinion of the court, to the following effect.—The defendants, in this caſe, are not ſtake holders; but they are, in effect, the ſame as *Turings*, and the poſſeſſion they have got is the poſſeſſion of *Turings*. The plaintiffs claim under *Freeman*, but though they derive a title under him, they do not repreſent him, ſo as to be anſwerable for his engagements; nor are they affected by any notice of thoſe circumſtances, which would bar the claim of him or his aſſignees. If they have acquired a legal right, they have acquired it honeſtly; and if they have truſted to a bad title, they are innocent ſufferers.—The queſtion then is, Whether the plaintiffs have a ſuperior legal title to that right which, on principles of natural juſtice, the original holder of the goods not paid for, has to maintain that poſſeſſion of them, which he actually holds at the time of the demand? The argument on the part of the plaintiffs aſſerts, that the indorſement of the bill of lading by the *Turings* is an aſſignment of the property in the goods to *Freeman*, in the ſame manner as the indorſement of a bill of exchange is an aſſignment of the debt. That *Freeman* could aſſign over that property, and, that by delivery of the bill of lading to the plaintiffs, for a valuable conſideration, they have a juſt right to the property conveyed by it, not affected by any claim of the *Turings*, of which they had no notice. On the part of the defendant it is argued, that the bill of lading is not, in its nature, a negotiable inſtrument; that it more reſembles a *choſe in action*; that the indorſement of it is not an aſſignment that conveys any intereſt, but a mere authority to the conſignee to receive the goods mentioned in the bill; and therefore it cannot be made a ſecurity by the conſignee, for money advanced to him; but the perſon who accepted it muſt ſtand in the place of the conſignee, and cannot gain a better title than he had to give. As theſe propoſitions, on either ſide, ſeem to be ſtated too looſely; and as it is of great importance that the nature of an inſtrument ſo frequent in commerce as a bill of lading ſhould be clearly defined; I think it neceſſary to ſtate my ideas of its nature and effect. A bill of lading is the written evidence of a contract,

contract, for the carriage and delivery of goods ſent by ſea, for a certain freight. The contract, in legal language, is a contract of bailment; 2 Lord *Raym.* 912. In the uſual form of the contract, the undertaking is to deliver to the order or aſſigns of the ſhipper. By the delivery on board, the ſhip-maſter acquires a ſpecial property to ſupport that poſſeſſion which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the ſhipper of the goods, until he has diſpoſed of it by ſome act, ſufficient, in law, to transfer property. The indorſement of the bill of lading is ſimply a direction of the delivery of the goods. When this indorſement is in blank, the holder of the bill of lading may receive the goods, and his receipt will diſcharge the ſhip-maſter; but the holder of the bill, if it came into his hands caſually, without any juſt title, can acquire no property in the goods. A ſpecial indorſement defines the perſon appointed to receive the goods; his receipt or order would, I conceive, be a ſufficient diſcharge to the ſhip-maſter; and in this reſpect I hold the bill of lading to be aſſignable. But what is it that the indorſement of the bill of lading aſſigns to the holder or the indorſee? A right to receive the goods, and to diſcharge the ſhip-maſter, as having performed his undertaking. If any further effect be allowed to it, the poſſeſſion of a bill of lading would have greater force than the actual poſſeſſion of the goods. Poſſeſſion of goods is *prima facie* evidence of title; but that poſſeſſion may be precarious, as of a depoſit: it may be criminal, as of a thing ſtolen: it may be qualified, as of things in the cuſtody of a ſervant, carrier, or a factor. Mere poſſeſſion, without a juſt title, gives no property; and the perſon to whom ſuch poſſeſſion is transferred by delivery, muſt take his hazard of the title of his author. The indorſement of a bill of lading, differs from the aſſignment of a *choſe in action*, that is to ſay, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouſe, or on ſhipboard, may all be aſſigned. The order to deliver is an aſſignment of the thing itſelf, which ought to be delivered on demand, and the right to ſue, if the demand is refuſed, is attached to the thing. The caſe in 1 Lord *Raym.* 271. was well determined on the principal point, that the conſignee might maintain an action for the goods; he had either a ſpecial property in them, or a right of action on the contract: and I aſſent to the *dictum*, that he might aſſign over his right. But the queſtion remains, What right paſſes by the firſt indorſement, or by the aſſignment of it? An aſſignment of goods in pawn, or of goods bought, but not delivered, cannot tranſmit a right to take the one without redemption, and

and the other without payment of the price. As the indorſement of a bill of lading is an aſſignment of the goods themſelves, it differs eſſentially from the indorſement of a bill of exchange; which is the aſſignment of a debt due to the payee, and which, by the cuſtom of trade, paſſes the whole intereſt in the debt ſo completely, that the holder of the bill for a valuable conſideration, without notice, is not affected even by the crime of the perſon from whom he received the bill. Bills of lading differ eſſentially from bills of exchange in another reſpect. Bills of exchange can only be uſed for one given purpoſe, namely, to extend credit by a ſpeedy transfer of the debt, which one perſon owes to another, to a third perſon. Bills of lading may be aſſigned for as many different purpoſes as goods may be delivered. They may be indorſed to the true owner of the goods by the freighter, who acts merely as his ſervant. They may be indorſed to a factor to ſell for the owner. They may be indorſed by the ſeller of the goods to the buyer. They are not drawn in any certain form. They ſometimes do, and ſometimes do not, expreſs on whoſe account and riſk the goods are ſhipped. They often, eſpecially in time of war, expreſs a falſe account and riſk. They ſeldom, if ever, bear upon the face of them any indication of the purpoſe of the indorſement. To ſuch an inſtrument, ſo various in its uſe, it ſeems impoſſible to apply the ſame rules as govern the indorſement of bills of exchange. The ſilence of all authors treating of commercial law, is a ſtrong argument that no general uſage has made them negotiable as bills. Some evidence appears to have been given in other caſes, *Snee* v. *Preſcot*, 1 *Atk.* 245. *Fearon* v. *Bowers*, 1 *Hen. Black.* 364. *n.* that the received opinion of merchants was againſt their being ſo negotiable. And unleſs there was a clear, eſtabliſhed general uſage, to place the aſſignment of a bill of lading upon the ſame footing as the indorſement of a bill of exchange, that country which ſhould firſt adopt ſuch a law would loſe its credit with the reſt of the commercial world. For the immediate conſequence would be, to prefer the intereſt of the reſident factors and their creditors to the fair claim of the foreign conſignor. It would not be much leſs pernicious to its internal commerce; for every caſe of this nature is founded on a breach of confidence, always attended with a ſuſpicion of colluſion, and leads to a dangerous and falſe credit, at the hazard and expence of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are aſſignable, what is the conſequence? That the aſſignee by indorſement muſt inquire under what title the bills have come to the hands of the perſon from whom he takes them. Is this more difficult than to inquire into the title by which goods

goods are ſold, or aſſigned? In the caſe of *Hartop* v. *Hoare*, 2 *Stra.* 187. 1 *Wilſon*, 8. jewels depoſited with a goldſmith, were pawned by him at a banker's: Was there any imputation, even of neglect, in a banker's truſting to the apparent poſſeſſion of jewels by a goldſmith? Yet they were the property of another, and the banker ſuffered the loſs. It is received law, that a factor may *ſell*, but cannot *pawn* the goods of his conſignor. *Patterſon* v. *Taſh*, 2 *Stra.* 1178. The perſon therefore who took an aſſignment of goods from a factor in ſecurity, could not retain them againſt the claim of the conſignor; and yet in this caſe, the factor might have ſold them and embezzled the money. It has been argued, that it is neceſſary in commerce to raiſe money on goods at ſea, and this can only be done by aſſigning the bills of lading. Is it then nothing, that an aſſignee of a bill of lading gains by the indorſement? He has all the right the indorſer could give him; a title to the poſſeſſion of the goods when they arrive. He has a ſafe ſecurity, if he has dealt with an honeſt man. And it ſeems as if it could be of little utility to trade, to extend credit by affording a facility to raiſe money by unfair dealings. Money will be raiſed on goods at ſea, though bills of lading ſhould not be negotiable, in every caſe where there is a fair ground of credit; but a man of doubtful character will not find it ſo eaſy to raiſe money at the riſk of others. The concluſions which follow from this reaſoning, if it be juſt, are, 1ſt. That an order to direct the delivery of goods indorſed on a bill of lading, is not equivalent, nor even analogous to the aſſignment of an order to pay money, by the indorſement of a bill of exchange. 2dly. That the negotiability of bills and promiſſory notes is founded on the cuſtom of merchants, and poſitive law; but as there is no poſitive law, neither can any cuſtom of merchants apply to ſuch an inſtrument as a bill of lading. 3dly. That it is therefore not negotiable as a bill, but aſſignable; and paſſes ſuch right, and no better, as the perſon aſſigning had in it. This laſt propoſition I confirm by the conſideration, that actual delivery of the goods does not of itſelf transfer an abſolute ownerſhip in them, without a title of property; and that the indorſement of a bill of lading, as it cannot in any caſe transfer more right than the actual delivery, it cannot in every caſe paſs the property; and I therefore infer, that the *mere indorſement* can in no caſe convey an abſolute property. It may, however, be ſaid, that admitting an indorſement of a bill of lading does not in all caſes import a transfer of the property of the goods conſigned; yet where the goods, when delivered, would belong to the indorſee of the bill, and the indorſement accompanies a title of property, it ought in law to bind the conſignor, at leaſt with reſpect to the intereſt of third

third parties. This argument has, I confeſs, a very ſpecious appearance. The whole difficulty of the caſe reſts upon it; and I am not ſurpriſed at the impreſſion it has made, having long felt the force of it myſelf. A fair trader, it is ſaid, is deceived by the miſplaced confidence of the conſignor. The purchaſer ſees a title to the delivery of the goods, placed in the hands of a man who offers them to ſale. Goods not arrived are every day ſold, without any ſuſpicion of diſtreſs, on ſpeculations of the faireſt nature. The purchaſer places no credit in the conſignee; but in the indorſement produced to him, which is the act of the conſignor. The firſt conſideration which affects this argument is, that it proves too much, and is inconſiſtent with the admiſſion. But let us examine what the legal right of the vendor is, and whether, with reſpect to him, the aſſignee of a bill of lading ſtands on a better ground than the conſignee from whom he received it. I ſtate it to be a clear propoſition, that the vendor of goods not paid for, may retain the poſſeſſion againſt the vendee; not by aid of any equity, but on grounds of law. Our oldeſt books conſider the payment of the price (day not being given) as a condition precedent implied in the contract of ſale; and that the vendee cannot take the goods, nor ſue for them, without tender of the price. If day had been given for payment, and the vendee could ſupport an action of trover againſt the vendor, the price unpaid muſt be deducted from the damages, in the ſame manner as if he had brought an action on the contract, for the non-delivery. *Snee* v. *Preſcot*, 1 *Atk.* 245. The ſale is not executed before delivery; and in the ſimplicity of former times, a delivery into the actual poſſeſſion of the vendee, or his ſervant, was always ſuppoſed. In the variety and extent of dealing which the increaſe of commerce has introduced, the delivery may be preſumed from circumſtances, ſo as to veſt a property in the vendee. A deſtination of the goods, by the vendor, to the uſe of the vendee; the marking them, or making them up to be delivered; the removing them for the purpoſe of being delivered; may all intitle the vendee to act as owner, to aſſign, and to maintain an action againſt a third perſon, into whoſe hands they have come. But the title of the vendor is never intirely diveſted, till the goods are come into the poſſeſſion of the vendee. He has therefore a complete right, for juſt cauſe, to retract the intended delivery, and to ſtop the goods *in tranſitu*. The caſes determined in our courts of law have confirmed this doctrine, and the ſame law obtains in other countries. In an action tried before me at Guildhall, after the laſt Trinity Term, it appeared in evidence, that one *Bowering* had bought a caſk of indigo of *Verrulez* and Co. at Amſterdam, which was ſent from the warehouſe of the ſeller,

and ſhipped on board a veſſel commanded by one *Tulloh*, by the appointment of *Bowering*: the bills of lading were made out and ſigned by *Tulloh* to deliver to *Bowering* or order, who immediately indorſed one of them to his correſpondent in London, and ſent it by the poſt. *Verrulez* having information of *Bowering*'s inſolvency, before the ſhip ſailed from the Texel, ſummoned *Tulloh*, the ſhip-maſter, before the court at Amſterdam, who ordered him to ſign other bills of lading to the order of *Verrulez*. Upon the arrival of the ſhip in London, the ſhip-maſter delivered the goods, according to the laſt bills, to the order of *Verrulez*. This caſe, as to the practice of merchants, deſerves particular attention; for the judges of the court at Amſterdam are merchants of the moſt extenſive dealings; and they are aſſiſted by very eminent lawyers. The caſes in our law, which I have taken ſome pains to collect and examine, are very clear upon this point. *Snee* v. *Preſcot*, though in a court of equity, is profeſſedly determined on legal grounds by Lord *Hardwicke*, who was well verſed in the principles of law: and it is an authority, not only in ſupport of the right of the owner unpaid to retain againſt the conſignee, but againſt thoſe claiming under the conſignee, by aſſignment for valuable conſideration, and without notice. But the caſe of *Fearon* v. *Bowers*, tried before Lord Chief Juſtice *Lee*, is a caſe at law, and it is to the ſame effect as *Snee* v. *Preſcot*. So alſo is the caſe of the *Aſſignees of Burghall* v. *Howard*, before Lord *Mansfield*. The right of the conſignor to ſtop the goods is here conſidered as a legal right: it will make no difference in the caſe, whether the right is conſidered as ſpringing from the original property, not yet transferred by delivery; or as a right to retain the things as a pledge for the price unpaid. In all the caſes cited in the courſe of the argument, the right of the conſignor to ſtop the goods is admitted, as againſt the conſignee. But it is contended, that the right ceaſes, as againſt a perſon claiming under the conſignee for a valuable conſideration, and without notice that the price is unpaid. To ſupport this poſition, it is neceſſary to maintain, that the right of the conſignor is not a perfect legal right in the thing itſelf; but that it is only founded upon a perſonal exception to the conſignee, which would preclude his demand, as contrary to good faith, and unconſcionable. If the conſignor had no legal title, the queſtion between him and the *bonâ fide* purchaſer from the conſignee would turn on very nice conſiderations of equity. But a legal lien, as well as a right of property, precludes theſe conſiderations; and the admitted right of the conſignor to ſtop the goods *in tranſitu*, as againſt the conſignee, can only reſt upon his original title as owner, not diveſted, or upon a legal title to hold the poſſeſſion of the goods till the price is paid, as a pledge for the

the price. It has been aſſerted in the courſe of the argument, that the right of the conſignor has, by judicial determinations, been treated as a mere equitable claim, in caſes between him and the conſignee. To examine the force of this aſſertion, it is neceſſary to take a review of the ſeveral determinations: the firſt is, the caſe of *Wright* v. *Campbell*, 4 *Burr.* 2046; on which the chief ſtreſs is laid. The firſt obſervation that occurs upon that caſe is, that nothing was determined by it. A caſe was reſerved by the judge at *Niſi Prius*, on the argument of which, the court thought the facts imperfectly ſtated, and directed a new trial. That caſe cannot therefore be urged as a deciſion upon the point. But it is quoted, as containing in the report of it an opinion of Lord *Mansfield*, that the right of the conſignor to ſtop the goods cannot be ſet up againſt a third perſon, claiming under an indorſement for value, and without notice. The authority of ſuch an opinion, though no deciſion had followed upon it, would deſervedly be very great, from the high reſpect due to the experience and wiſdom of ſo great a judge. But I am not able to diſcover, that his opinion was delivered to that extent; and I aſſent to the opinion as it was delivered, and very correctly applied to the caſe then in queſtion. Lord *Mansfield* is there ſpeaking of the conſignment of goods to a factor, to ſell for the owner; and he very truly obſerves: 1ſt. That as againſt the factor, the owner may retain the goods; 2dly. That, a perſon into whoſe hands the factor has paſſed the conſignment with notice, is exactly in the ſame ſituation with the factor himſelf; 3dly. That a *bonâ fide* purchaſer from the factor ſhall have a right to the delivery of the goods, becauſe they were ſold *bonâ fide*, and by the owner's own authority. If the owner of the goods entruſts another to ſell them for him, and to receive the price, there is no doubt but that he has bound himſelf to deliver the goods to the purchaſer: and that would hold equally, if the goods had never been removed from his warehouſe. The queſtion on the right of the conſignor, to ſtop and retain the goods, can never occur, where the factor has acted ſtrictly according to the orders of his principal, and where, conſequently, he has bound him by his contract. There would be no poſſible ground for argument in the caſe now before the court, if the plaintiff in the action could maintain, that *Turings* and Co. had ſold to them, by the intervention of *Freeman*, and were therefore bound *ex contractu* to deliver the goods. Lord *Mansfield*'s opinion upon the direct queſtion of the right of the conſignor to ſtop the goods againſt a third party, who has obtained an indorſement of the bill of lading, is quoted in favour of the conſignor, as delivered in two caſes at *Niſi Prius*; *Savignac* v. *Cuff*, 2 *Term Rep. B. R.* 66, in

1788, and *Stokes* v. *La Riviere*, 2 *Term Rep. B. R.* 75. in 1785; obſervations are made on theſe caſes, that they were governed by particular circumſtances; and undoubtedly, when there is not an accurate and agreed ſtate of them, no great ſtreſs can be laid on the authority. The caſe of *Caldwell* v. *Ball*, 1 *Term Rep. B. R.* 205. is properly quoted on the part of the plaintiffs in the action, becauſe the queſtion there was on the priority of conſignments, and the right of the conſignor did not come under conſideration. The caſe of *Hibbert* v. *Carter*, 1 *Term Rep. B. R.* 745. was alſo cited on the ſame ſide, not as having decided any queſtion upon the conſignor's right to ſtop the goods, but as eſtabliſhing a poſition, that by the indorſement of the bill of lading, the property was ſo completely transferred to the indorſee, that the ſhipper of the goods had no longer an inſurable intereſt in them. The bill of lading in that caſe had been indorſed to a creditor of the ſhipper: and undoubtedly, if the fact had been as it was at firſt ſuppoſed, that the cargo had been accepted in payment of the debt, the concluſion would have been juſt: for the property of the goods, and the riſk, would have completely paſſed from the ſhipper to the indorſee: it would have amounted to a ſale executed for a conſideration paid. But it is not to be inferred from that caſe, that an indorſement of a bill of lading, the goods remaining at the riſk of the ſhipper, transfers the property, ſo that a policy of inſurance upon them in his name would be void. The greater part of the conſignments from the Weſt-Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the ſhipper; but they are no diſcharge of the debt by indorſement of the bill of lading; the expence of inſurance, freight, duties, are all charged to the ſhipper, and the nett proceeds alone can be applied to the diſcharge of his debt. That caſe, therefore, has no application to the preſent queſtion. And, from all the caſes that have been collected, it does not appear that there has ever been a deciſion againſt the legal right of the conſignor to ſtop the goods *in tranſitu*, before the caſe now brought into this court. When a point of law, which is of general concern in the daily buſineſs of the world, is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of thoſe who are intereſted. But where no ſuch deciſion has in fact occurred, it is impoſſible to fix any ſtandard of opinion, upon looſe reports of incidental arguments. The rule, therefore, which the court is to lay down in this caſe, will have the effect, not to diſturb, but to ſettle the notions of the commercial part of this country, on a point of very great importance, as it regards the ſecurity and good faith of their tranſactions.

For

For theſe reaſons, we think the judgment of the court of King's Bench ought to be reverſed.

Afterwards this cauſe was removed into the Houſe of Lords, where the judgment of the Exchequer Chamber was reverſed, and a *vénire de novo* awarded.

Lickbarrow v. Maſon in Dom. Proc. 5 *Ter. Rep.* 367, 1 H.B. 211. Lickbarrow *et al.* v. Maſon *et al.* 11 Tr Ter. 35 Geo. 3. B.R. 5 *Ter. Rep.* 683.

At the ſecond trial a ſpecial verdict was found, in ſubſtance as follows: in July, 1786, *James Freeman*, a merchant, reſident at Rotterdam, in Holland, ſent an order to *Turing* and Son, traders at Middleburg, in Zealand, to purchaſe for him the cargo in queſtion: and to hire a veſſel on his account to carry the ſame from thence to Liverpool. *Turing* and Son having received the order on the 22d July, 1786, purchaſed the cargo accordingly, and made out an invoice thereof, and of the charges and commiſſion to the amount altogether of 5,464 guilders and upwards; in which invoice the goods are ſtated to have been ſhipped "per "order, and for account and riſk of Mr. *J. Freeman*, &c. "deliverable to order." The invoice was indorſed "*I.* "*Turing* and Son, 22d July, 1786." The cargo was purchaſed by *Turing* and Son, as agents for *Freeman*, and not on their own account. *Turing* and Son paid for the cargo at the rate mentioned in the invoice; and alſo paid the expences mentioned therein; and charged *Freeman* with commiſſion for buying. The goods were ſhipped at Middleburg on the ſaid 22d of July, for the account and on the riſk of *Freeman*, on board the Endeavour, for Liverpool. On the ſame day, four ſeveral bills of lading of the cargo, of the ſame tenor and effect, were ſigned by the maſter of the veſſel; in which the cargo was ſtated to be ſhipped by *Turing* and Son, to be delivered unto order —— or to —— aſſigns. Two of the bills of lading were indorſed by *Turing* and Son in blank, which on the 23d of July were tranſmitted by them to *Freeman*, together with the invoice ſo indorſed, incloſed in a letter from them to *Freeman*, adviſing him of their having ſhipped the goods on his account; which letter, &c. was duly received. *Turing* and Son retained one of the bills of lading, and the remaining one was kept by *Holmes*, the maſter of the ſhip. On the 25th of July, after the goods were ſhipped, and the two indorſed bills of lading and invoice had been tranſmitted to *Freeman*, *Turing* and Son drew four bills of exchange, dated reſpectively on the 25th of July, 1786, upon *Freeman*, payable ſix weeks after date, to Meſſrs. *Bowye* and *Makien*, for ſeveral ſums amounting to 5,250 guilders [being 477*l.*], which bills were accepted by *Freeman*; and thoſe four bills were ſo drawn and accepted to reimburſe *Turing* and Son the amount of the 5,464-2-0 guilders. On the 25th of July, 1786, *Freeman*, in a letter of that date, tranſmitted to the plaintiff the two indorſed bills of lading and invoice in the ſame ſtate in which

he had received them from *Turing* and Son, thereby directing the plaintiffs, on the arrival of the goods at Liverpool, to take poſſeſſion of, and ſell them on account of and for him, *Freeman*; and adviſing the plaintiffs that he had drawn the bills of exchange after mentioned upon them on account of ſuch goods: and he incloſed in ſuch letter one ſet of ſuch bills of exchange for acceptance, directing the plaintiffs to accept and remit the ſame to Meſſrs. *Harman* and Co.; which letter and bills of lading the plaintiffs received, and, according to the uſage and cuſtom of merchants, filled up the blank indorſements on the two bills of lading, by inſerting thereon theſe words "deliver the within contents to *W. N. Lickbarrow* and *R. Wright*," [the plaintiffs]. On the 25th of July, 1786, *Freeman* drew on the plaintiffs three ſets of bills of exchange to the amount of 520*l.* on account of the cargo in the invoice mentioned, that is, 300*l.* payable at two and an half uſance to Meſſrs. *Hope* and Co.; and for 120*l.* and 100*l.* to his own order, at two uſances; one ſet of which bills the plaintiffs, on 29th of July, 1788, received at Liverpool, together with the two bills of lading ſo indorſed, and the ſaid invoice; and thereupon the plaintiffs immediately accepted one ſet of bills of exchange ſo incloſed in the ſaid letter, and remitted the ſame to Meſſrs. *Harman* and Co. after the ſhip had ſailed from Middleburg, and long before her arrival at Liverpool, and before the bankruptcy of *Freeman*. The plaintiffs afterwards paid the 520*l.* in diſcharge of the three ſets of bills of exchange, drawn on them by *Freeman*, to the reſpective indorſees, when they became due; which ſum has not yet been repaid to the plaintiffs; and *Freeman* is indebted to them to the amount of 542*l.* 16*s.* 6*d.* including the 520*l.* ſo paid by them as acceptors of the bills drawn on them by *Freeman* on account of the cargo in queſtion. *Before the bills, drawn by* Turing *and Son upon* Freeman, *and accepted by him, became due; and after the ſhip had ſailed from Middleburg, and before her arrival at Liverpool, viz. on 15th of Auguſt*, 1786, Freeman *became a bankrupt, and abſconded*; and all the laſt mentioned bills were proteſted for non-payment; and *Turing* and Son, as drawers, have been obliged to take up and pay the ſame; and the amount of the invoice of the cargo in queſtion is ſtill due to them. On the 21ſt of Auguſt, 1786, *Turing* and Son having received advice of *Freeman*'s bankruptcy, ſpecially indorſed the bill of lading retained by them to the defendants, and to no other: and on the ſame day *Turing* and Son tranſmitted the ſaid bill of lading to them accordingly, with an invoice of the goods, and a power of attorney of the ſame date, empowering them to obtain poſſeſſion of the ſaid goods on account of them, *Turing* and Son; all of which were received by the defendants on the 28th of Auguſt. The ſhip with the cargo

cargo ſailed from Middleburg on the 11th of Auguſt, 1786, the fourth bill of lading ſtill remaining in the hands of the maſter, and ſhe arrived at *Liverpool* with the goods on the 28th, and the defendants having applied to the maſter for the delivery of the cargo, the ſame was delivered to them. The ſpecial verdict then ſtated the ſale of the goods by the defendants for 557*l.* 11*s.* 8*d.* and the demand and refuſal, with the tender of freight, &c. And then the jury found that by the cuſtom of merchants, bills of lading, expreſſing goods or merchandizes to have been ſhipped by any perſon to be delivered to order or aſſigns, are negotiable and transferable by the ſhipper to any other perſon, by ſuch ſhipper indorſing ſuch bills, and delivering or tranſmitting the ſame to ſuch other perſon; and that by ſuch indorſement and delivery or tranſmiſſion the property is transferred. And that by the cuſtom of merchants, indorſements of bills of lading in blank, that is to ſay, by the ſhippers with their names only, may be filled up by the perſon to whom they are tranſmitted, with words ordering the delivery of the goods to ſuch perſon; and according to the practice of merchants the ſame, when filled up, have the ſame effect as if the ſame had been done by the ſhipper when he indorſed the bills. *The Court*, underſtanding that it was intended that this caſe was to be carried up to the Houſe of Lords, declined entering into a diſcuſſion of it, merely ſaying, that they ſtill retained the opinion delivered upon the former caſe. And they accordingly gave judgment for the plaintiffs.

If the conſignee of goods, to whom the bill of lading is indorſed in blank, aſſign it over as a ſecurity for acceptances given by the aſſignee, not amounting to the value of the goods, and afterwards by an agreement between them they become partners in the goods, by which agreement it appears that the conſignor has not been paid for them, the aſſignee of the bill of lading cannot maintain trover againſt the conſignor if he ſtop the goods *in tranſitu* upon the inſolvency of the conſignee.—An action of trover was brought to recover the value of a quantity of lead, and on the trial there was a verdict for the plaintiff for 1000*l.* ſubject to the opinion of the Court on the following caſe: *Edward Hague* bought 705 pigs of lead of the defendants in Liverpool on the 1ſt of March, 1787, and ordered them to be ſhipped to Rouen in France. The lead was of the value of 1000*l.* and was accordingly ſhipped on the 10th of March, 1787, by the defendants at Cheſter, on board the Jane: and the bill of lading was indorſed by the defendants in blank, and ſent to *Edward Hague*. The plaintiff on the 16th of March, 1787, gave *Hague* his acceptances for 700*l.* as ſtated in the following note; upon which *Hague* delivered the bill of lading to the plaintiff: "*London*, 16th of March, 1787. Whereas *Jonas Salomons* "has this day accepted for us the ſum of 700*l.* at two months, "on account of a cargo of lead ſent to Rouen, we hereby

Salomons *v.* Niſſen, Mic. Ter. 29 Geo. 3. B. R. 2 *Ter. Rep.* 674.

" promiſe, in caſe the ſaid lead is not remitted for by the time " theſe bills fall due, they ſhall be renewed for two months " longer. *Charles* and *Edward Hague*." The acceptances were paid by the plaintiff when due to the indorſees. On the 21ſt of March, 1787, the following agreement was made between *Edward Hague* (who traded under the firm of *Charles* and *Edward Hague*) and the plaintiff: " Be it known " that it is this day agreed between *Edward Hague*, of, &c. " trading under the firm of *Charles* and *Edward Hague*, of " the one part, and *Jonas Salomons* of the other part, as fol- " lows; that the ſaid *Jonas Salomons* ſhould pay for and ſend " in his name to Meſſrs. *Robert Garvey*, and Co. merchants " at Rouen, a cargo conſiſting of 705 pigs of lead, to be " ſhipped at Cheſter on board the Jane, bound to Rouen, to " be ſold by Meſſrs. *Robert Garvey*, and Co. at the beſt " price and prices that can be obtained for the ſame; and the " net proceeds to be remitted to the ſaid *Jonas Salomons*.— " And it is hereby agreed between the ſaid parties that the " profit and loſs ariſing from the ſaid cargo of lead ſhall be " equally divided between the ſaid *Edward Hague* and *Jonas* " *Salomons*. And the ſaid *Edward* doth hereby promiſe and " agree, to and with the ſaid *Jonas Salomons*, that in caſe the " ſaid cargo of lead is ſold at Rouen by the ſaid *Robert Garvey*, " and Company, upon credit, that then and in ſuch caſe the " ſaid *Robert Garvey*, and Co. ſhall ſtand *del credere* for the " purchaſers; and that he, the ſaid *Edward Hague*, ſhall and " will ſtand guarantee to the ſaid *Jonas Salomons* for the ſo- " lidity of the ſaid houſe of trade of *Robert Garvey*, and Co. " and the due payment by them of the proceeds of the ſaid " cargo of lead: and laſtly it is agreed that the ſaid cargo of " lead ſhall be inſured by the ſaid *Edward Hague*, or by the " ſaid *Jonas Salomons*, to the amount of 1100*l.*; and that the " policy of inſurance ſhall be and remain in the hands and " poſſeſſion of the ſaid *Jonas Salomons*, for him to recover " and receive ſuch loſs and loſſes as may ariſe upon the ſaid " cargo of lead, and ſhould be recoverable from the under- " writers of ſuch policy; and that he, the ſaid *Jonas Salomons*, " ſhall and will account with the ſaid *Edward Hague* for the " monies ſo recovered upon the policy, in caſe of loſs as " aforeſaid." The veſſel ſailed with the lead for Rouen in March, 1787, but was forced back by ſtreſs of weather to Cheſter; and *Edward Hague* having become a bankrupt, and *the defendants not having received the price of the ſaid goods, the defendants, on that account, on the 5th of April, ſtopped the ſaid goods while they were on board the ſhip in England, and took them away.* The goods were never paid for by *Hague* or any other perſon. On the 25th of May, *Jonas Salomons* demanded the 705 pigs of lead of the defendants, who refuſed to deliver them, and converted them to their own uſe. On this caſe the general queſtion was only *how far the aſſignment*

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of a bill of lading by the original conſignee to a third perſon is a tranſfer of the property againſt the original conſignor? PER CUR. (after counſel had been fully heard), It has been uniformly laid down in this court, as far back as we can remember, that good faith is the baſis of all mercantile tranſactions: and therefore it is material in queſtions of this kind to conſider whether the purchaſer has acted fairly and honeſtly, or with a deſign to deceive and defraud. The firſt caſe on this ſubject is that of *Snee* and *Preſcot*, 1 *Atk.* 245, and that has never been impeached in the ſmalleſt degree; but on the contrary it has always been mentioned by the Court with approbation. It came on before Lord *Hardwicke*, who was of opinion, that where a merchant has ſold goods which have not in fact been delivered nor paid for, he may, while they are *in tranſitu*, obtain the poſſeſſion of them again by any means ſhort of abſolute violence. But ſtill it is to be remembered that that caſe only relates to a tranſaction between the buyer and ſeller of the goods; and in the caſe of *Lickbarrow* and *Maſon*, it never was the intention of the Court to uſe a ſingle expreſſion that could impeach that authority. If the tranſaction be between the buyer and ſeller of the goods, and the former has not paid for them, the latter has a right to ſtop them *in tranſitu*, in caſe of the inſolvency of the other. The caſe of *Snee* and *Preſcot* went no farther than that; but in *Lickbarrow* and *Maſon*, and ſome other caſes, the extent of that doctrine has been very properly narrowed; the Court has been obliged to conſider whether in conſcience that rule ought to be extended to other parties; and they have held that it ought not, becauſe it would put it in the power of the conſignor to enable the conſignee to cheat an innocent third perſon. He who contracts on the faith and credit of the bill of lading, ſhall not be diveſted of his right. But ſtill the criterion is, does the purchaſer take it fairly and honeſtly? On that principle it was decided in *Lickbarrow* v. *Maſon*, that if the goods come into the hands of a third perſon for a valuable conſideration, *bonâ fide*, and without notice, he ſhall not be prejudiced, becauſe the conſignor was ſo incautious as to truſt the goods out of his poſſeſſion without payment. So alſo in the caſe of *Wright* and *Campbell*, 4 *Burr.* 2046-2050: the Court thought there was abundance of evidence to be left to a jury to ſhew that the party who took the bill of lading had full notice that the goods had not been paid for. That circumſtance had ſlipped the attention of the learned judge who firſt tried the cauſe: but on a motion for a new trial, the Court thought that they ſaw reaſon to ſuſpect fraud between the factor and the third perſon to cheat the real owner of the goods. So in this caſe, if the plaintiff knew at the time that *Hague* had never paid for the goods, it was an agree-

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ment between thoſe two to obtain poſſeſſion of the goods without paying for them. And the fact of the plaintiff's knowledge appears on the face of the agreement itſelf, for he there agrees to pay for them himſelf. But there is ſtill another ground which would prevent the plaintiff's recovering in this action; for there is no doubt but that under this agreement the plaintiff and *Hague* were partners; and then the plaintiff could not recover in this form of action. This is like the caſe of *Fox* and *Hanbury*, *Cowp.* 445 *(infra)*, where it was held that if one partner became a bankrupt, and the other partner afterwards diſpoſed of the goods, and he then became a bankrupt, the aſſignees of both under a joint commiſſion could not bring trover againſt the vendee of ſuch partnerſhip effects. Now that applies to the preſent caſe. And on both grounds we are of opinion that the *poſtea* muſt be delivered to the defendants.

Ellis *et al. v.* Hunt *et al.* and alſo *v.* Dawes, *et al.* Aſſ. of Moore, a bankrupt, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 464.

Where goods were conſigned to *A.*; and on his becoming a bankrupt, his aſſignee went to the inn, where they were arrived, and put his mark on them, but did not take them away, becauſe they had been attached there by a creditor of the bankrupt; the conſignor could not afterwards ſtop them, becauſe they were not then *in tranſitu*.—On the trial of an action of trover for a quantity of files, a verdict was taken for the plaintiffs, ſubject to the opinion of the Court on the following caſe: "On the 31ſt of October, 1788, *Moore*, the bankrupt, ordered the goods in queſtion from the plaintiffs, at Sheffield; and on the 14th of November following they were ſent by *Royle*'s waggon, directed to the bankrupt in London; the waggon being overloaded, the caſk was taken out at Stamford, in its way to town, and put into the defendant *Hunt*'s waggon, which brought it to the Caſtle and Falcon inn in London, on the 22d of November, 1788. The plaintiffs drew a bill on the bankrupt for part of the value of the goods, which bill was never paid. The caſk and files were, on their arrival in town, immediately attached by Meſſrs. *Fenton*, and Company, creditors of the bankrupt, by proceſs of foreign attachment iſſued out of the Mayor's Court of London; the caſk remained at the inn, charged with ſuch attachment, ſo far as the ſame could charge it. On the 15th of November a docquet was ſtruck againſt *Moore*; and on the 18th a commiſſion of bankrupt iſſued againſt him, on which he was declared a bankrupt, and the other defendants were choſen his aſſignees. On the 24th of November *a proviſional aſſignment was executed by the commiſſioners to* Wells, *the meſſenger, who on the ſame day demanded the goods in queſtion from the carrier, and put his mark upon the caſk, but did not take the goods away.* On the 28th of November the plaintiffs wrote a letter to the agent of *Royle*'s waggon, directing him, in caſe the goods were not delivered,

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to keep them in his warehouſe, as they had heard that *Moore* was become a bankrupt. On the 13th of December the plaintiffs demanded the caſk and files of *Mott*, the maſter of the Caſtle and Falcon, and offered to pay the carriage and to indemnify him, which *Mott* refuſed; and upon the attachment being withdrawn, he delivered up the goods to the defendants, the aſſignees, of whom they have ſince been demanded; but they have refuſed to deliver them up. PER CUR. (after argument), If any caſe had been decided to this extent, namely, that bankruptcy is of itſelf a countermand, the plaintiffs here would be entitled to recover: but that has never yet been decided. The doctrine of ſtopping goods *in tranſitu* is bottomed on the caſe of *Snee* v. *Preſcot*, where Lord *Hardwicke* eſtabliſhed a very wiſe rule, that the vendor might retume the poſſeſſion of goods conſigned to the vendee before delivery, in caſe of the bankruptcy of the vendee: on this all the other caſes are founded. There have indeed been caſes, where nice diſtinctions have been taken on the fact, whether the goods had or had not got into the poſſeſſion of the vendee; but they all profeſs to go on the ground of the goods being *in tranſitu*, when they were ſtopped. As to the neceſſity of the goods coming to the "corporal touch" of the bankrupt, that is merely a figurative expreſſion, and has never been literally adhered to. For there may be an actual delivery of the goods, without the bankrupt's ſeeing them; as a delivery of the key of the vendor's warehouſe to the purchaſer. But there is a diſtinction between an actual and a conſtructive delivery to the vendee. There may be caſes where, as between the buyer and ſeller, if no bankruptcy or inſolvency happen, the goods are conſidered in the poſſeſſion of the buyer the inſtant they go out of the poſſeſſion of the vendor; as if *A.* order goods from *B.* to be ſent by a particular carrier at his own riſk, the delivery to the carrier is a delivery to the vendee to every other purpoſe; but ſtill, if he become a bankrupt before the carrier actually deliver them to him, we ſhould hold that the vendor might ſeize them; becauſe that is only a *conſtructive delivery* to the vendee: but an *actual delivery* is neceſſary to diveſt the vendor's right of ſtopping the goods *in tranſitu*. It is clear that bankruptcy itſelf does not put an end to the contract; and if not, the right of the vendor to ſeize goods *in tranſitu* is founded only on equitable principles. It is a right, with which he is indulged on principles of juſtice, originally eſtabliſhed in courts of equity, and ſince adopted in courts of law. But in order to avail himſelf of it, he muſt ſtop the goods before they get into the *actual* poſſeſſion of the vendee. But in this caſe there is the ſtrongeſt evidence of the conſignee's taking actual poſſeſſion of the goods, by his aſſignee putting his mark on them. It was ſaid by the plaintiffs counſel that the carrier

carrier would have been liable in an action by the vendor; but he would not have been liable in the character of carrier, for the goods had got to the end of their deſtined journey: but he would have been liable only as a warehouſe-keeper, in reſpect of the recompence which he was to receive for warehouſe-room. In order to decide this caſe, it is material to attend to the dates: on the 24th of November, the proviſional aſſignment was made to *Wells*, who on the ſame day demanded the goods in queſtion of the defendant *Hunt, and put his mark on the caſk.* Now it is ſaid that this ſhould have been done by the bankrupt himſelf: but by the aſſignment he was ſtripped of all his property, which was then veſted in the proviſional aſſignee. Therefore, if a corporal touch were neceſſary to defeat the right of the vendors, it took place here. It is true, that the proviſional aſſignee did not alter the ſituation of the goods: but they were then arrived at the end of their deſtined journey, and depoſited in a place where they would have remained till the bankrupt could have carried them to a warehouſe of his own. All this happened on the 24th of November; and it was not until the 28th of that month that the vendor wrote to countermand the delivery of the goods: but that was too late; for the goods were no longer *in tranſitu*; they were then in the poſſeſſion of the party to whom they were conſigned, or of thoſe who repreſented him: viz. the proviſional aſſignee, who then ſtood in his place; who had put his mark on the caſk: now, when the goods were marked, they were delivered to the conſignee, as far as the circumſtances of the caſe would permit: the warehouſeman that inſtant became the agent or ſervant of the bankrupt: the aſſignee could not then take them away, becauſe they were at that time under an attachment: after the mark was put on them, they were no longer *in tranſitu*; and conſequently the plaintiffs right to ſeize them was diveſted.—*Poſtea* to the defendants.

Kinloch *et al.* Aſſignees of Sandiman *et al.* Bankrupts, *v.* Craig, Hil. Ter. 29 Geo. 3. *B.R.* 3 *Ter. Rep.* 119.

A factor has no lien on goods for a general balance, unleſs they come into his *actual* poſſeſſion. And if in conſideration of goods being conſigned to him, he accept bills drawn by the conſignor, and pay part of the freight after they arrive, and become inſolvent before the bills are due, and before the goods get into his *actual* poſſeſſion, *the conſignor may ſtop them in tranſitu.*—This was an action for money had and received, in which a verdict was found for the plaintiffs. Upon a motion for a new trial, the following facts appeared: the plaintiffs claimed, as aſſignees of *Sandiman* and *Graham*; the defendant was the ſequeſtrator of *Steine*; a ſequeſtration in Scotland being analogous to a commiſſion of bankrupt here. The bankruptcies were admitted. The queſtion aroſe on a cargo of ſpirits ſent by

Steine

Steine from Scotland to London, by ſea. It was proved that *Steine* uſed to ſend cargoes to *Sandiman* and *Graham*, and drew bills on them, which they accepted in confidence of the cargoes: That they had 1200*l. per annum* in lieu of commiſſion, and a quarter per cent. commiſſion, and 5*l.* per cent for money advanced: that bills of lading were from time to time ſent, ſometimes indorſed, but more generally not. When the cargo in queſtion arrived, *Sandiman*, and Co. were under acceptances for 29,000*l.* on account of *Steine*; 1200*l.* of which were for this very cargo: before which time they had received the bill of lading of this cargo, unindorſed, and an invoice of the goods; and on the 15th of February had inſured the cargo in their own names and at their own expence. The ſhip arrived at London on the 21ſt of February, the day after *Sandiman* and *Graham* had ſtopped payment; at which time they told the captain, on his recommending to them to unload immediately, that they did not think themſelves at liberty to meddle with the cargo, as they were bankrupts; but on the 8th of March they paid the captain ſix guineas in part of freight. In the middle of March, the captain for the firſt time refuſed to deliver the goods to *Sandiman* and Co.'s aſſignees. It further appeared that *Steine* had written to *Sandiman*, and Co. to unload when the ſhip arrived. The bills which had been accepted by them were not paid. *Steine* ſtopped payment on the 23d of February; and a ſequeſtration was granted on the 3d or 4th of March, under which the ſequeſtrator ſtopped the goods and ſold them. Under theſe circumſtances the queſtion aroſe, Whether this action was maintainable for the value received? PER CUR. We think there ought to be a new trial; and then if either party ſhould be diſſatisfied with our opinion, it will be competent to him to put the facts on the record, that they may be put in a courſe of further inveſtigation. The poſition laid down, that, as between conſignor and factor, the latter has a lien on all conſignments for the general balance, is certainly true: but it muſt be underſtood with this reſtriction, that he has obtained a *poſſeſſion* of the cargo. That the factors in this caſe have no transfer by indorſement is admitted: but it is contended that the conſignor has no right to ſtop the goods *in tranſitu* where the value of them has been paid. The poſition is true as between conſignor and conſignee; but the facts of the caſe do not admit of the application of it; for they have not been paid for; and there is a great difference between *payment* and *liability to pay*. In every inſtance where goods are ſent in the way of ſale, the party to whom they are ſent is liable to pay, but till he has paid, in caſe of his failure, the owner may ſtop them *in tranſitu*. When payment has been made the ſale is complete, and the doctrine of lien is out of the queſtion.

queſtion. But this is not a caſe of *ſale*, for the goods were ſent to *Sandiman* and *Graham as factors*. And there is no caſe which goes the length of ſaying that the factor has a lien till he has obtained the poſſeſſion of the thing which is the object of the lien. When he has got the poſſeſſion, the goods are a *pledge*, and the principal ſhall not take it out of his hands till he pays him his due. But it has been contended that by paying part of the freight, he obtained a conſtructive poſſeſſion; but that cannot be inferred from the act. He paid the money in quality of factor: therefore bare payment of a ſmall part of the freight cannot be conſidered as taking poſſeſſion of the cargo. If it were to be ſo conſidered, the payment of the part of the freight would be a direct fraud; for it was not paid till the day after he had ſtopped payment; and the law would never conſtrue that which was in itſelf a fraud to veſt a poſſeſſion. But if the captain had in fact delivered the goods, he muſt have delivered the goods to him in the quality of factor. He had no right to deliver them to him as *owner*, without an indorſement of the bill of lading. If, indeed, *Sandiman*, and Co. had once got the poſſeſſion, they then might have inſiſted on their lien. The doctrine of liens ought to be governed by equitable principles. Here it is true that one party or the other muſt ſuſtain a hardſhip: but where equity is equal the law muſt prevail. And the conſignor's ſequeſtrator has a better right to ſay, that it is not equitable that *Steine*'s effects ſhould be liable to pay the creditors of *Sandiman* and *Graham* to the full amount of the acceptance, when poſſibly not a fourth part may be paid, and *Steine*'s effects muſt pay the reſt; than *Sandiman* and *Graham*'s creditors have to ſay, that it is hard that his effects ſhould be diminiſhed by paying one-fourth of his acceptances.—Rule abſolute.

Kinloch *et al. v.* Craig, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 783.

On the ſecond trial a ſpecial verdict was found, ſtating the facts of the caſe in ſubſtance as above; and that *Sandiman* and *Graham* having ſtopped payment, told the captain of the veſſel, *that they did not think it proper, in their ſituation, to give directions to him for unloading the ſaid cargo*: and they ſuffered the goods to remain on board the ſhip, though the captain was very anxious to have the cargo unloaded, that he might return to Scotland: that on 8th of March, 1788, the captain, wanting money, received ſix guineas from *Sandiman* and *Graham, on account of the freight* of the cargo, and gave a receipt for the ſame, as follows: "Received, London, 8th of March, 1788, of Meſſrs. *Sandiman* "and *Graham*, 6*l.* 6*s.* on account of freight. *Thomas* "*Jameſon*." After ſequeſtration had been granted againſt *John Steine* in Scotland to the defendant, he claimed the ſaid cargo, in conſequence of which *it was not landed or delivered to* Sandiman *and* Graham, *or their aſſignees*; and it being

being afterwards ſold for 4050*l.* the money was received by the defendant, for the uſe of ſuch perſons as were intitled to the ſame. That the bills which had been accepted by *Sandiman* and *Graham*, on account of *John Steine*, to the amount of 30,000*l.* have been proved as debts under their commiſſion, although *Sandiman* and *Graham*, at the time they became bankrupts, had only the ſum of 2382*l.* 19*s.* 7*d.* in their hands, as factors of *John Steine:* that the ſaid cargo of ſpirits remained in the ſhip in the poſſeſſion of the captain until they were ſold, and *Sandiman* and *Graham never had the poſſeſſion thereof.* THE COURT gave judgment for the defendant, without hearing any argument, ſaying, that the caſe as it ſtood now on the ſpecial verdict, could not be diſtinguiſhed from that which had come on before: whatever difference there was, made it ſtill ſtronger againſt the plaintiffs; for it was now poſitively found that the bankrupts had refuſed to accept the cargo, *and never had poſſeſſion thereof.*

A writ of error was afterwards brought in the Houſe of Lords, where the judgment of *B. R.* was affirmed (1) by the unanimous advice of all the other judges. And Ld. Ch. Bar. *Eyre*, in delivering the opinion of the judges, obſerved, that the parties acted intirely upon the faith of the *agreement* between them; that they (the bankrupts) ſhould accept the bills drawn on them by the *Steines*, and ſhould indemnify themſelves out of the produce of the ſales, in caſe any conſignment ſhould be made them; and if none, or thoſe ſales ſhould fall ſhort, then by remittances; and that the bankrupts ſhould receive a ſalary of 1200*l.* from the *Steines*. And he ſaid that the tranſaction between them, with reſpect to the conſignments, was as between *principal and factor*, and not as between *vendor and vendee*; that therefore *Sandiman* and *Graham* could have no *property* in the cargo: and *the right of ſtopping* in tranſitu *was out of the queſtion*; that never occurring but as between vendor and vendee. And for this he relied on the caſe of *Wright* v. *Campbell*, 4 *Burr.* 2050. That the bankrupts could have no lien in this caſe, as the ſpecial verdict found that the goods never got into their poſſeſſion: that though the bankrupts might have given their acceptances on the faith that theſe conſignments would be made to them; yet ſtill it was an executory agreement, for the non-performance of which, only a right of action accrued; but that no *property* in the goods was thereby veſted in them. And that upon the whole they were of opinion that the proceeds of the cargo of the ſhip Ceres were not money had and received to the uſe of the plaintiffs.

(1) Dom. Proc. May 14, 1790.

If

Slubey *et al. v.* Heyward *et al.* Ea. Ter. 35 Geo. 3. C. B. 3. 2 *Hen. Black.* 504.

If *A.* ſhip goods by the order and on the account of *B.* to be paid for at a future day, and bills of lading are accordingly ſigned by the maſter of the ſhip; and one of the bills is immediately tranſmitted to *B.* who, before the arrival of the ſhip at the place of deſtination, ſells the goods and indorſes the bill of lading to *C*: if after the arrival of the ſhip *part of the goods be delivered to the agent of C.* and then *B.* becomes bankrupt, without having paid *A.* the price of the goods: by this delivery the *tranſitus is at an end* as to the whole of the goods.—On the trial of an action of trover, for a quantity of wheat, the jury found a ſpecial verdict; in ſubſtance, ſtating, "That 7061 buſhels of wheat, the property of the plaintiffs, were, on 23d of January, 1793, ſhipped on board the Pomona, by order and on account of Meſſrs. *Browne*, to be paid for by them at a future day: that the defendant, *Heyward*, being maſter of the ſhip, ſigned five bills of lading; and undertook to deliver the wheat at the port of Cork, to the ſaid Meſſrs. *Browne*, or their aſſigns: one of the bills of lading was afterwards, and before the arrival of the ſhip, tranſmitted to Meſſrs. *Browne*, who on 7th of March, 1793, ſold the ſaid 7061 buſhels of wheat to *Claude Scott*, and thereupon indorſed the ſaid bill of lading; thereby ordering the maſter to deliver the ſaid wheat to *Claude Scott*, or his aſſigns; and at the ſame time drew on *Scott* for the amount of the cargo, by ſeveral bills of exchange, which were duly paid: on March 5, the ſhip arrived at a port in Ireland, and afterwards proceeded to Falmouth, by the orders of Meſſrs. *Browne*, and arrived there on 3d of April: on April 4th, the defendant, *Heyward*, as maſter of the veſſel, reported the ſhip at the cuſtom-houſe, and made oath that the wheat was for the other defendants; and on April 5, he made entry of the ſame in their names, *as agents* for *Claude Scott:* between the 3d and 8th of April 800 *buſhels of the ſaid wheat were taken out of the ſaid ſhip, by the defendants, and received and taken into their poſſeſſion, as ſuch agents of the ſaid* Claude Scott, *and for his account:* Meſſrs. *Browne*, on 5th of April, became bankrupts, and never paid the plaintiffs for the wheat: and the plaintiffs, on 8th of April, *gave notice to the* defendant, *Heyward*, not to deliver the reſidue of the ſaid wheat." The Court (after argument) were of opinion, that under the circumſtances of this particular caſe, the action could not be maintained; for the tranſitus was ended by the delivering of the 800 buſhels of wheat, which muſt be taken to be a delivering of the whole; there appearing no intention, either previous to, or at the time of, the delivery, to ſeparate part of the cargo from the reſt.—Judgment for the defendants.

Hodgſon *et al.* Aſſignees of Ward, *v.* Loy,

A conſignor's right of ſtopping goods in tranſitu, is not taken away by the conſignee's having partly paid for the goods.

goods.—On the trial of an action of trover, to recover the value of 138½ firkins of butter, there was a verdict for the plaintiff, for 322*l.* ſubject to the opinion of the court on the following caſe: "The plaintiffs claimed, as aſſignees of *Ward*, under a commiſſion dated 25th of March, 1797. In the beginning of February, prior to his bankruptcy, the bankrupt, who was a butter merchant, reſident in Cumberland, purchaſed 60 firkins of butter of one *Cowper*, at 41*s.* per firkin, and paid one halfpenny earneſt: it was originally agreed, that *Ward* was to pay 40*l.* of the purchaſe-money, in caſh, upon the Tueſday ſe'nnight following the contract; and on which day the butter was to be delivered: the 40*l.* was not paid on the day ſpecified; but on that day *Ward* purchaſed of *Cowper* 44½ other firkins of butter, making in all 104½; and *Cowper* being indebted to *Ward* in the ſum of 20*l.*, *Ward*, in addition to that ſum, *paid him* 30*l. more on account of the butter*; and having promiſed to ſend him a bill for 100*l.* he afterwards did ſo: but that bill, when it became due, was not paid: on the ſame day that the latter contract was made with *Cowper*, *Ward* purchaſed of one *Wilſon* 34 firkins of butter; and both *Cowper* and *Wilſon* agreed to deliver the butter to one *Golding*, a carrier; who ſaid, he carried it on *Ward*'s account, to be forwarded by him to Stockton, in its way to London; and at the ſame time *Ward* deſired that the butter might be marked with the initials *C. W.* (his brother in London), to whom he uſually ſent his butter, conſigned for ſale, on his own account; and which initials the bankrupt had conſtantly uſed for ſeven years, upon ſuch conſignments: the butter was accordingly delivered on the appointed day, by the vendors, to *Golding*, the carrier, who was deſired, by the bankrupt, to forward the butter, as uſual, to one *Wilkinſon*, the wharfinger uſually employed by the bankrupt, at Stockton, to be by him ſhipped for London: when the butter was delivered to *Golding*, the carrier, he entered it in his book and way-bill, in the name of *Ward*, and carried it on *Ward*'s account; and the vendors told him *Ward* was to pay the carriage; *Golding*, the carrier, carried the firkins as far as *Bowes*, and there delivered them to one *Savage*, another carrier, who received no other inſtructions, but from the way-bill: he proceeded with them to Stockton, and they were delivered by him to *Wilkinſon*, the wharfinger, who, when he received the 138½ firkins in queſtion, wrote a letter to *Ward*, acknowledging the receipt of the butter, and alſo one to *C. W.* to acquaint him of the ſame fact, and of the name of the ſhip by which they were to be forwarded to London. *Before the butter reached London, both the* Wards *ſtopped payment, and became bankrupts; and the defendant, as agent of* Cowper *and* Wilſon, *got poſſeſſion of the butter on its arrival in the river*; and, upon demand made by the plaintiffs, re-

Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 440.

 fuſed

fuſed to deliver it, ſaying, he was indemnified by *Cowper* and *Wilſon*; and admitting that he had ſold it for the price for which the damages were aſſeſſed: *Cowper* had tendered to the plaintiffs the bill for 100*l.* given by *Ward*, and unpaid, and alſo the money actually received; but the plaintiffs refuſed to receive the ſame. PER CUR. (after two arguments)—The right of the vendor to ſtop goods *in tranſitu*, in caſe of the inſolvency of the vendee, is a kind of equitable lien, adopted by the law, for the purpoſes of ſubſtantial juſtice; and it does not ſtand on the ground of reſcinding the contract: and with reſpect to the payment, we are clearly of opinion, on looking into the caſes, that *the circumſtance of the vendee having partly paid for the goods does not defeat the vendor's right to ſtop them* in tranſitu, *the vendee having become a bankrupt*; and that the vendor has a right to retake them, unleſs the whole price has been paid: if ſuch a payment was to be held to take the caſe out of the general rule, it would let in ſuch an exception as would deſtroy the rule itſelf: ſince every payment, however ſmall, even the payment of a farthing, by way of earneſt, would, if ſuch an exception were introduced, prevent the operation of the general rule of ſtopping *in tranſitu*. The conſequence is, that the *poſtea* muſt be delivered to the defendant; he agreeing to repay the money paid by the bankrupt.

IV. *Commiſſion of Bankrupt.*

Smith *et al. v.* Milles, Mic. Ter. 27 Geo. 3 B.R. 1 *Ter. Rep.* 481.

How iſſued.] There were two points made in this caſe: and one was, that the petitioning creditors (being more than three in number) had not proved a debt to ſuch an amount as the ſtatute requires; not having, in the whole, proved a debt to the amount of 200*l.*; though one of them had proved a debt to the amount of 161*l.* The words of the ſtatute of 5 *Geo.* 2. *c.* 30. are, "That no commiſſion of bankrupt "ſhall be awarded and iſſued out againſt any perſon upon "the petition of one or more creditors, unleſs the ſingle "debt of the creditor do amount to 100*l.* or upwards; or "unleſs the debt of two creditors ſo petitioning, as afore-"ſaid, ſhall amount to 150*l.* or upwards; or unleſs the "debt of three or more creditors ſo petitioning, as aforeſaid, "ſhall amount to 200*l.* or upwards." PER CUR. Had the commiſſion ſtood upon the petition of that one only whoſe debt amounted to 161*l.* it would clearly have been good: but as they have choſen to take it out in the name of more, the queſtion is, Whether they have not laid themſelves under the neceſſity of complying with the words of the ſtatute, which in ſuch caſe requires the debt proved to be 200*l.* This may, perhaps, deſerve ſome conſideration: but we give no opinion upon it, as we are clear againſt the plaintiffs on the other point.

A ſecond

A ſecond commiſſion againſt a bankrupt, pending a former one, under which he has not obtained his certificate, is void.—This was a rule to ſhew cauſe why an *exoneretur* ſhould not be entered on the bail-piece, the defendant having become bankrupt ſince the cauſe of action, and obtained his certificate. The defendant, in July, 1775, carried on the trade of a linen-draper, and lived in London: in March, 1776, he became bankrupt, and was refuſed his certificate: before which bankruptcy the cauſe of action aroſe: the defendant then went to Briſtol, where he entered into partnerſhip with one *Wright*, a dealer in cheeſe; and half a year after, became bankrupt again: under this ſecond commiſſion, which was taken out at Briſtol, and which the creditors in London knew nothing of, he obtained his certificate. PER CUR. Where a bankrupt is clearly intitled to his diſcharge, the court, to avoid circuity, have, of late, ordered an *exoneretur* to be entered on the bail-piece, without the form of a regular ſurrender of the bankrupt by his bail. Here it is clear, that the bankrupt himſelf would not have been intitled to his diſcharge, if ſurrendered: and the bail can never be in a better ſituation than the principal: a ſecond commiſſion cannot be taken out againſt an uncertificated bankrupt, and for this reaſon: it would be idle and nugatory, becauſe all his effects belong to his creditors under the firſt; for an uncertificated bankrupt is incapable of trading or contracting for his own benefit; all the property he acquires belongs to his creditors: if he cannot trade for himſelf, he cannot be the object of a ſecond commiſſion: the proceedings, in this caſe, under the laſt commiſſion, are manifeſtly a groſs fraud and contrivance, on the face of them: it was taken out at Briſtol, where it might be conducted without the knowledge of the creditors; and under this he obtains his certificate; the whole is a groſs fraud: even ſuppoſing the creditors under the firſt commiſſion had been informed of this, and had been inclined to prove their debts under it, they could not have done ſo—Therefore diſcharge the rule.

Martin *v.* O'Hara, Ea. Ter. 18 Geo. 3. B.R. *Coup.* 823.

A debt at law, notwithſtanding the ſtatute of limitations incurred, will ſupport a commiſſion.—On the trial of an action of aſſumpſit, laid on 2d of April, 1768, there was a verdict for the plaintiffs, with 90*l.* damages, on this caſe: *G. E.* a trader, was, in Auguſt, 1761, indebted to *Quantock* and others, upon ſimple contract, to the amount of 200*l.* and upwards: on 22d of September, 1761, he was arreſted by one *F.* for 33*l.* and remained in cuſtody till 3d of July, 1762; after which he remained privately in England for a fortnight, but was ſeen by ſeveral of his creditors: he then retired to Germany, but returned and appeared publicly, about the beginning of 1766: on 12th of November, 1767, a commiſſion of bankrupt iſſued on the petition of the plaintiffs, *to which he appeared, and*

Quantock *et al.* *v.* England, Ea. Ter. 10 Geo. 3. B. R. 5 *Burr.* 2628. 2 *Black. Rep.* 702.

was examined by the commiſſioners, and was by them declared a bankrupt: the plaintiffs were afterwards choſen aſſignees: it did not appear that there had been any undertaking by the bankrupt ſince Auguſt, 1761, to pay the debts; nor had any proceſs been ſued out to recover them after 3d of July, 1762; and before the iſſuing of the commiſſion, the defendant had received 90*l.* for the rent of a meſſuage belonging to the bankrupt: THE QUESTION was, Whether the plaintiffs were intitled to recover? which depended on another queſtion: viz. WHETHER the petitioning creditors were not precluded from applying for the commiſſion of bankruptcy by reaſon of the ſix years which had incurred between the original cauſe of their debt and the time of their applying for the commiſſion? PER CUR. The ſtatute of limitations *does not deſtroy the debt*, it only takes away the remedy. The debtor may either take advantage of the ſtatute of limitations, if the debt be older than the time limited for bringing the action, or he may waive this advantage: and, in honeſty, he ought not to defend himſelf by ſuch a plea; and the ſlighteſt word of acknowledgment will take it out of the ſtatute: the bankrupt might have applied to ſuperſede the commiſſion, if he had thought proper: but he has not done ſo: he has, in fact, not objected: he has ſubmitted to the commiſſion, and been examined under it. This, therefore, is ſuch an acknowledgment, as puts it out of the power of a third perſon to make the objection.—*Poſtea* to the plaintiff.

Bickerdike *et al.* v. Bollman, Mic. Ter. 27. Geo. 3. B.R. 1 *Ter. Rep.* 405.

If a creditor to the amount of 100*l.* and upwards, take a bill drawn by his debtor for 20*l.* on a third perſon, who has not then, nor afterwards, any effects of the drawer in his hands; and the bill, when due, is diſhonoured, the creditor's demand on the bill is not diſcharged; although he may have neglected to give notice of its being diſhonoured; and he may ſue out a commiſſion of bankrupt againſt the debtor; and his debt will ſupport it.—On the trial of an action of aſſumpſit, the jury found a verdict for the plaintiffs, ſubject to the opinion of this court on the following caſe: the act of bankruptcy was committed in the middle of Auguſt, 1784; and in the ſame month the bankrupt was indebted to *Greatrix* and Co. the petitioning creditors, in 115*l.* 3*s.* 8*d.*: on the 15th of September, 1784, the bankrupt drew a bill for 20*l.* on the defendant, "who then, and until the time of the bankruptcy, and of the bill becoming due, was a creditor of "the bankrupt," payable to *Greatrix* and Co. two months after date, and paid the ſame to them on account of their ſaid debt; which bill was preſented for payment on the 18th of November following, and diſhonoured: no notice of the non-payment of the bill was ever given by *Greatrix* and Co. to the bankrupt, or left at his houſe: *Greatrix* and Co. received the bill at Mancheſter on the 24th of November, between the hours of eleven and twelve at noon; but the poſt goes from

from London to Mancheſter in three days. The bankrupt then reſided at Mancheſter; but in general ſecreted himſelf, and particularly on market days, after the 20th of November, on which day a commiſſion of bankrupt iſſued againſt him, and he was declared a bankrupt at Mancheſter under that commiſſion in the afternoon of the 24th of November, but at what hour did not appear; and that commiſſion has ſince been ſuperſeded. Afterwards another commiſſion was iſſued on the petition of *Greatrix* and Co. The queſtion for the opinion of the court was, Whether the debt, proved to be due to them under the circumſtances above mentioned, was ſufficient to ſupport that commiſſion? PER CUR. It has never been diſputed, that the want of notice to the drawer, after the diſhonour of a bill, is tantamount to payment by him; but that rule is not without exceptions; for notice is not neceſſary to be given where the drawer has no effects in the hands of the drawee (1): and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawer never had any effects of the drawee in his hands, notice to the drawer is not neceſſary; for he muſt know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been diſhonoured.—But even admitting this to be a general rule, without any exception, it was certainly introduced for the benefit of the drawer. Now every rule may be waived by the perſon for whoſe benefit it is introduced. Under the circumſtances of the preſent caſe, the drawer muſt be conſidered as having waived this benefit, becauſe the commiſſion is founded on that creditor's debt, between whom and the drawer this tranſaction has happened; and his ſubmitting to it is a waiver of the want of notice, and an admiſſion of the debt; which admiſſion the aſſignees have ſubſequently confirmed by bringing this action: therefore, as the bankrupt himſelf has not choſen to take advantage of it, by moving to ſuperſede the commiſſion, it does not now lie in the mouth of a third perſon to do ſo.—*Poſtea* delivered to the plaintiffs.

A debt contracted *before* a man enters into trade, may be the ground of a petition for a commiſſion of bankruptcy.—In this caſe, it appeared, that the debt of one of the petitioning creditors (there being ſix to make up the 200*l.*) was on a promiſſory note, bearing date two years and an half before the bankrupt engaged in trade; and it was contended, that the petitioning creditors' debt muſt be contracted while the bankrupt is actually in trade. SED PER CUR.—The debt, though contracted before, continued a ſubſiſting debt while the bankrupt was in trade.

Butcher *et al.* *v.* Eaſto, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 294.

(1) See *Gale* v. *Walſh*, vide Index.

Anonymous, Tr. Ter. 1 Geo. 3. C. B. 2 *Wilſ.* 135.

The indorſee of a note, after the act of bankruptcy, may be the petitioning creditor. A trader, before he commits an act of bankruptcy, draws a promiſſory note for 200*l.* payable to *B.* or order; then *A.* commits an act of bankruptcy; and afterwards *B.* indorſes the note over to *C.* who is the petitioning creditor. And it was held, *per totam curiam*, that he may well be ſo, for the 200*l.* was a debt due from the bankrupt before he committed the act of bankruptcy to ſomebody, viz. to *B.*

Glaiſter *v.* Hewer, Hil. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 498.

Although the petitioning creditor's debt was not, at the time of the act of bankruptcy, 100*l.* yet if it be increaſed to that ſum by a promiſſory note of the bankrupt's, due at that time, being indorſed to him before the petition, it will be a debt ſufficient to ſupport the commiſſion.—In this caſe, the queſtion in diſpute was, Whether the commiſſion had legally iſſued? the trading and act of bankruptcy were proved; and the only point reſerved aroſe on the legality of the petitioning creditor's debt: as to which it appeared, that the plaintiff at the time of the act of bankruptcy was indebted to the defendant, *Hewer*, in a ſum below 100*l.* and to ſeveral other perſons in ſmaller ſums: amongſt others, to one *W.* to whom the plaintiff had given a promiſſory note for 11*l.* 12*s.* which was outſtanding: this note was indorſed to *Hewer* by *W.* for a valuable conſideration, after the plaintiff had committed an act of bankruptcy, in order to enable *Hewer* to become a petitioning creditor, the two ſums together amounting to above 100*l.* PER CUR. All that the act of parliament requires is, that there ſhould be an exiſting debt of 100*l.* in the petitioning creditor. Now this petitioning creditor had ſuch a debt at the time of petitioning, and that is ſufficient to ſupport the commiſſion. The perſon to whom a note of the bankrupt's is indorſed after an act of bankruptcy, is in the ſame ſituation as the holder of it was in before.

Mann *et al. v.* Shepherd, Mic. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 79.

A creditor of a bankrupt to the amount of 112*l.* previous to the bankruptcy, receiving 50*l.* after notice of an act of bankruptcy, is not thereby precluded from ſuing out a commiſſion of bankrupt.—In trover, the only queſtion was, Whether the petitioning creditor's debt were ſufficient to ſupport the commiſſion? under the following facts:—The bankrupt, previous to his bankruptcy, was indebted to *Mann*, the petitioning creditor, in above 100*l.* But after the act of bankruptcy, which was known to *Mann* at the time, and upon which he afterwards took out the commiſſion, he received of the bankrupt about 50*l.* which reduced his debt under 100*l.* But being afterwards adviſed that he could not retain this money, he ſued out the commiſſion, and proved his original debt, retaining the 50*l.* in his hands, which he carried to the account of the bankrupt's eſtate. PER CUR. It is clear that this payment cannot be retained, and conſequently the original debt remains in force. The creditor himſelf, being aware

that

that the money could not be retained, did not conſider the payment as valid, for he took out the commiſſion on the ground that his whole demand was unpaid; and he cannot now be permitted to ſay that the payment was a good one.

In this caſe the queſtion was, Whether the plaintiffs, who claimed as aſſignees, could call the bankrupt, who had obtained his certificate, as a witneſs to prove the debt of the petitioning creditor? AND *the Court* were unanimouſly of opinion, that he was not a competent witneſs to prove his own petitioning creditor's debt, or any other fact neceſſary to ſupport the commiſſion, in which his certificate and diſcharge from the prior debts depended. Chapman *et al.* v. Gardner, Hil. Ter 34 Geo. 3. C B. 2 *Hen. Black.* 279.

Where a commiſſion of bankrupt is taken out fraudulently or maliciouſly, the Chancellor may, under ſtatute 5 *Geo.* 2. c. 30. order a ſpecific ſum, by way of damages, to be paid by the petitioning creditor to the bankrupt, or aſſign the bond given by the former, and enable the latter to recover the whole penalty of the bond. And the aſſignment of the bond by the Chancellor is concluſive evidence of the fraud or malice in an action brought on ſuch bond.—In an action of debt the plaintiff declared on a bond in 200*l.* which the defendant, as a petitioning creditor, had given to the Lord Chancellor, according to the form of the ſtatute, alleging, that a commiſſion of bankrupt was awarded againſt the plaintiff, &c. but that the defendant did not prove before the commiſſioners that the plaintiff was indebted in 100*l.* and was become bankrupt, &c. by means whereof the ſaid bond became forfeited to the Lord Chancellor, who upon the petition of the plaintiff aſſigned the ſame; by reaſon whereof an action accrued to the plaintiff, as aſſignee of the Lord Chancellor, &c. The defendant pleaded, that *the ſaid commiſſion of bankrupt was not taken out fraudulently or maliciouſly*; to which the plaintiff demurred generally. —PER CUR. (after argument), This action on the bond is maintainable. It is clear that the legiſlature did not intend that the Court, in which the action is brought, ſhould examine into the queſtion of fraud or malice. The act of parliament, in order to prevent commiſſions of bankrupt being taken out improperly, requires the petitioning creditor to give a bond in the penalty of 200*l.*; adding that, if the ſuppoſed debt be not due, or if the party be not proved a bankrupt, and it ſhall appear that the commiſſion was taken out fraudulently or maliciouſly, then the Lord Chancellor may, on the petition of the party grieved, *examine into the ſame*, that is, "into all the premiſes before ſtated," the fraud or malice of ſuing out the commiſſion as well as the exiſtence of the petitioning creditor's debt or the bankruptcy; and may order ſatisfaction to be made for the damages ſuſtained, and aſſign the bond. The Lord Chancellor is therefore to exerciſe his judgment whether the bond ſhall or ſhall not be aſſigned: here he has aſſigned it, and his judgment is concluſive in this Smith v. Broomhead, Tr. Ter. 35 Geo. 3. B. R. 7 *Ter. Rep.* 300.

action. Then it is ſaid, that if this be concluſive there is nothing to be tried in ſuch an action: but the defendant may plead performance, *non eſt factum*, or that the bond was not aſſigned. This is not like a bond of indemnity, to which it has been compared: in ſuch a caſe, before the ſtatute of *William*, the parties were driven into a court of equity to enquire into the damages ſuſtained: but this bond does not come within that act of parliament. As to the objection, that, at all events, the Lord Chancellor ſhould have aſcertained the quantum of damages, and that the action on the bond ſhould only be brought to enforce payment of ſuch damages: it muſt be admitted that, that objection has more the appearance of foundation than the others: but there is a great authority againſt it, that of Lord *Hardwicke* in the caſe *Ex parte Gayter*, 1 *Atk.* 144. where the Chancellor having aſſigned the bond to the party grieved, the petitioning creditor applied to diſcharge that order, or at leaſt to ſuſpend any action on the bond until the damages were inquired into; but Lord *Hardwicke* ſaid "It was in the breaſt of the Court, where the bankruptcy was a doubtful caſe and the commiſſion ſuperſeded, either to direct an inquiry before a maſter of the damages ſuſtained by the bankrupt, or a *quantum damnificatus* upon an iſſue at law; and after the damages are ſettled the Court might, for the better recovery thereof, order ſuch bond to be aſſigned: but that caſe was attended with ſuch flagrant circumſtances, that he would not by a previous inquiry into the damages ſuſtained by the bankrupt prevent his ſeeking an immediate ſatisfaction;" and therefore he diſmiſſed the petition. Now that is a weighty authority; and according to that, the Lord Chancellor may either aſſeſs the damages or enable the plaintiff to recover the whole penalty of the bond. See alſo the caſe of *Brown* v. *Chapman*, in vol. i. p. 31; and *Perkin* v. *Proctor*, in p. 71, ſupra.

Abbot *et al. v.* Plumbe, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 215.

On the trial of an action of trover, to prove the petitioning creditor's debt, a witneſs was called, to prove that the bankrupt had acknowledged to him that he owed the debt, upon which the commiſſion was ſued out: this being upon a bond, and the ſubſcribing witneſs not being called, *The Court* ordered a nonſuit to be entered: For, Per Cur. It is an eſtabliſhed rule, that aſſignees muſt prove the petitioning creditor's debt by the ſame evidence which muſt have been produced in an action againſt the bankrupt; and it is neceſſary to recover on a bond to call the ſubſcribing witneſs, unleſs ſome reaſon can be ſhewn for his abſence.

V. *Power of the Commiſſioners.*

Rex v. Perrot, Hil. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1122.

A bankrupt not anſwering a queſtion reſpecting the diſpoſition of his eſtate and effects to the ſatisfaction of the commiſſioners,

miſſioners, is a good cauſe of commitment by them.—*John Perrot* was committed by the commiſſioners for giving an inſufficient anſwer to the following queſtion: "As you do "admit, that you have ſpent the laſt week previous to this "your examination with Mr. *Maynard*, one of your aſ- "ſignees, to ſettle and adjuſt your accounts, and to draw up "a true ſtate thereof to enable you to cloſe your examina- "tion; and do likewiſe admit, that upon ſuch ſtate thereof, "it appears that after giving you credit for all ſums of money "paid by you, and making you debtor for all goods ſold and "delivered to you from your firſt entering into trade to the "time of your bankruptcy; it appears that there is a defi- "ciency of the ſum of 13,513*l.*; *give a true and particular* "*account what is become of the ſame; and how and in what* "*manner you have applied and diſpoſed thereof?*" To which queſtion the ſaid *John Perrot* wilfully and obſtinately refuſed to give any other than the following general anſwer: "That "on goods ſold this laſt year, I have loſt upwards of 2000*l.* "and by mourning I have loſt upwards of 1000*l.* and that "for nine or ten years I have, I am ſorry to ſay it, been ex- "tremely extravagant, and ſpent large ſums of money."—THE COURT held this a proper queſtion, and the anſwer very inſufficient and unſatisfactory. PER Lord *Mansfield*, Ch. J. The 5th *Geo.* 2. c. 30. gives power to the commiſ- ſioners to commit the bankrupt *until he ſhall ſubmit himſelf, and full anſwer make to their ſatisfaction:* and ſection 17 gives power to the Court or Judge to recommit him to the ſame priſon, there to remain as aforeſaid until he ſhall con- form as aforeſaid.—The examination is not confined to be within the time limited for the bankrupt to come in and ſur- render and ſubmit to be examined. The bankrupt muſt in- deed ſurrender within the limited time; and he muſt ſubmit within the limited time to be examined from time to time; and he muſt upon his examination diſcloſe and diſcover, and deliver up his eſtate and effects: but the act does not require the examination to be full and perfect, and completed within the limited time; nor is it proper that it ſhould be ſo: a man's memory may fail him at one time and be refreſhed at an- other; or his firſt anſwer may be equivocal or imperfect; and he ought to be called upon to explain and complete it. The power of the commiſſioners is general, and not limited to the compaſs of time given to the bankrupt to come in: the laſt examination within the limited time is material, indeed, to the bankrupt himſelf (becauſe he cannot afterwards contradict himſelf); but he may be compelled by the commiſſioners to make further anſwers after that time: the bankrupt may omit to come in, till the very laſt minute of his time; and if he then ſurrenders and ſubmits to be examined, this will ſave his felony: but it may be abſolutely impoſſible for him to

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make a full diſcovery and diſcloſure of his eſtate and effects, or to give full anſwers to proper queſtions within this ſpace of time.—Here the commiſſioners have *within* the limited time required a further anſwer to their queſtion, and committed him for refuſing to give it: this commitment was legal at the time when it was made; and he cannot redeem himſelf from his impriſonment, but on giving a full anſwer to the queſtion: if he ſhould give a full anſwer, and the commiſſioners not be ſatisfied with it, he will then be intitled to his proper remedy. *Foſter*, J. The powers under the ſtat. 1 *Jac.* 1. c. 15. continue ſtill in force, notwithſtanding ſubſequent ſtatutes: and none of them preclude a further examination. *Wilmot*, J. All the bankrupt acts ought to be taken together, ſo as to anſwer the great general end and intention of the legiſlature: the clauſes operate together, and are auxiliary to each other; and they certainly give a power of further examination. The ſubmiſſion alone is not enough, the bankrupt muſt ſubmit to be examined from time to time; and he ought not to be diſcharged till he has fully anſwered. —Defendant remanded.

Rex *v.* Perrot, Tr. Ter. 1 Geo. 3. B. R. 2 *Burr.* 1215.

Afterwards the bankrupt gave a further anſwer, and "particularized a woman upon whom he had ſpent 5000*l.* from Dec. 1758 to Dec. 1759, and alſo particularized the times of ſending and giving it to her; but ſaid that no other perſon was privy to this: and that the woman, whoſe name was *Sarah Powel*, otherwiſe *Taylor*, is dead, as he has heard; that ſhe knew him to be a bankrupt, and never returned the money, or any part of it to him, and that he gave it to her for her maintenance and expences, and not for a fund for her future ſupport, or wherefrom he could draw any advantage: that he knew, in the year 1759, when he gave and remitted thoſe ſums to her, that he was not worth any thing, and that he was remitting to her the money of his creditors; that he was acquainted with her five or ſix years, but he cannot recollect what he gave her or ſpent upon her during the ſecond, third, or fourth years of their acquaintance; nor did he keep any particular account or memorandum thereof either in thoſe years, or in the year 1759, but ſpeaks from memory only: that he did not take any of this money from his banker, but always took it from Mr. *Thompſon* (ſince deceaſed), who uſed to ſell goods for him: that all letters between him and this woman, except one or two, are burnt or deſtroyed." *The Court* held this anſwer to be incomplete and unſatisfactory, and ordered him to be remanded.

Miller's Caſe, Ea. Ter. 13 Geo. 3. C. B. 3 *Wils.* 420 2 *Black. Rep.* 881.

Upon an examination to find out whether two bales of ſilk were, or were not, the property of *Cole*, the bankrupt, ſeveral queſtions were put to *Miller*, a weaver: FIRST, Did you purchaſe, by a broker, the two bales of ſilk? his anſwer was, "I cannot poſitively recollect whether I bought them of

of a broker or not." THE SECOND QUESTION; Can you form any belief, whether you bought them by a broker or not? his anſwer was, "I ſhould rather believe I bought them by a broker." THE THIRD QUESTION; Whether or not do you believe you bought the two bales of ſilk by a broker? his anſwer was, "I cannot give any other anſwer (that is to ſay) than I have now given, viz. I cannot poſitively recollect, &c. but I rather believe, &c." THE FOURTH QUESTION; Whether by the words 'I ſhould rather believe I bought them by a broker,' you mean that the two bales of ſilk were bought by a broker; or, whether you mean to ſay you do believe that the ſaid two bales of ſilk were not bought by a broker? *Miller* refuſed to anſwer this fourth queſtion; and therefore the commiſſioners, for ſuch refuſal, and alſo for that he *in other reſpects* miſbehaved himſelf, committed him to the Fleet, there to remain until ſuch time as he ſhould ſubmit himſelf to the commiſſioners, and full anſwer make to all ſuch queſtions as ſhould be put to him as aforeſaid.—To this warrant ſeveral exceptions were taken on the return to an habeas corpus. PER CUR. By the old ſtatutes of bankruptcy of 34 & 35 *Hen.* 8. and 13 *Eliz.* c. 7. the commiſſioners had no power to commit; but they had power to call before them perſons to be examined on oath for the diſcovery of the bankrupt's eſtate and effects; and if ſuch perſons, upon examination, did not diſcloſe the whole truth of ſuch things as they ſhould be examined of, or deny to ſwear, then ſuch perſons ſhould forfeit double the value of the goods and debts by them concealed.—The ſtatute 1 *Jac.* 1. c. 15. gives the commiſſioners power to commit perſons refuſing to be ſworn, and make anſwer touching the bankrupt's eſtate and effects: this power is adopted by the ſtat. 4 & 5 *Ann*, c. 17. and by 5 *Geo.* 2. c. 30. ſ. 16. which enacts, among other things, that it ſhall be lawful for the commiſſioners to examine every perſon duly ſummoned, or preſent at any meeting of the commiſſioners touching all matters relating to the perſon and effects of the bankrupt, and any act of bankruptcy committed by him; and alſo to reduce into writing the anſwer of ſuch perſon, which examination, the party examined is required to ſubſcribe: and in caſe ſuch perſon ſhall refuſe to anſwer, or ſhall not fully anſwer to the ſatisfaction of the commiſſioners all lawful queſtions put by them, &c. it ſhall be lawful for the commiſſioners to commit him *to ſuch priſon as they ſhall think fit*, there to remain without bail until ſuch perſon ſhall ſubmit himſelf to the commiſſioners, and full anſwer make to the ſatisfaction of the commiſſioners to all ſuch queſtions as ſhall be put to him, and ſubſcribe ſuch examination as aforeſaid: this ſtatute has therefore decided the mode to be purſued in this matter. In *Perrot*'s caſe of commitment, the queſtions put to him were in writing; and he

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was committed until he ſhould anſwer the ſame.—In the preſent caſe, *Miller* had only two ways or means to enable himſelf to anſwer the queſtion put to him, either by recollection or belief: the firſt is knowledge, and muſt imply conſciouſneſs; but in ſome caſes no traces of a fact remain in a man's memory, whereby he can recollect the fact; it is poſſible he may have loſt all knowledge of it; and if he has, he can only anſwer that he doth not know, or cannot recollect the fact: a man may recollect to a certain degree; and though he cannot recollect at one time, he may at another: ſuppoſe I may not or cannot recollect, yet I may and can believe I did a certain fact, becauſe you tell me you ſaw me do it: then I believe I did it, becauſe I give credit to you as a perſon of veracity. How is it in courts of juſtice, where a man ſwears he neither recollects or believes that he did ſuch a fact, or that he did or did not do ſuch a fact, to the beſt of his knowledge, remembrance, and belief? it is certainly a full anſwer. A ſubſcribing witneſs to a bond may ſwear he has totally forgot that he ſubſcribed his name as a witneſs thereto; and that he cannot ſwear poſitively that he ſaw the obligor ſeal and deliver the bond; but ſeeing his own hand-writing ſubſcribed as a witneſs to the execution thereof, he may ſwear he believes he ſaw the obligor execute the bond: and ſuch anſwer would be ſatisfactory to the Court. Suppoſe a banker was, upon examination, aſked whether he paid ſuch a bill by caſh or notes, and he anſwers he cannot tell, but his books may inform him, or his books may be loſt, and his clerks gone away from him. If on looking into his books he ſees, by the hand-writing of his clerks, that the bill appears to be paid by caſh or notes, he then ſwears to his belief accordingly: but if his books be loſt or deſtroyed, and his clerks are dead or gone, and he then ſwears he cannot tell, or doth not know whether the bill was paid by caſh or notes; his anſwer is full, and ought to be taken to be ſatisfactory. So a merchant buying many goods, may have forgot, and cannot recollect or be able to ſwear whether he bought a certain particular parcel and ſort of goods by himſelf or a broker.——But to come to the preſent caſe: the examination was to find out, whether the two bales of ſilk were or were not the property of the bankrupt; and the queſtion put by the commiſſioners was very material and relevant. But we think that the priſoner ought to be diſcharged from his confinement, becauſe his anſwer to that queſtion is as full and ſatisfactory as the nature of things will permit: if the anſwer be true, as we muſt take it to be (elſe it will be indictable perjury), it imports, that he had no certain recollection whether the goods in queſtion were or were not bought by a broker, but he rather believed they were. What could a man, if really under ſuch circumſtances, ſay more?

more? there are degrees of aſſent in the human mind, to any given propoſition, proceeding from doubt and difference, up to poſitive belief; and from thence to abſolute certainty. If a man is ſo hardy as to ſwear he has not any poſitive recollection, and it can be proved from other circumſtances that he has, he is clearly guilty of perjury: but till that be ſhewn, we muſt give the ſame credit to a witneſs in ſwearing to this negative, as in all other caſes: if he really has no recollection, it is impoſſible to make any other anſwer; and we muſt not compel men to impoſſibilities (1).—The concluſion in the warrant of commitment ſeems to be wrong; but as to this point we give no opinion. In *Perrot*'s caſe, the concluſion of the warrant was right.—Priſoner diſcharged.

But a general anſwer to a particular queſtion, by a bankrupt under examination, will not be ſufficient.—Thus, where the following queſtion was propounded to the bankrupt in writing: "As you do admit, that ſince the month of October, 1771, being the time you entered into trade, to the time of your bankruptcy, there is a deficiency of the ſum of 2,751*l.* notwithſtanding your books do not ſhew ſuch a deficiency, give a true and particular account what has become of the ſame, and how and in what manner you have applied and diſpoſed thereof?" to which queſtion he gave the following anſwer, viz. "My expences in ſundry journies to eſtabliſh trade amount to 150*l.*; the amount of diſcounting, noteing, intereſt on bills and notes, and premiums given by me, is 200*l.*; I have loſt 15*l.* by a horſe; I have ſpent 500*l.* in houſekeeping; and I have loſt 1,886*l.* by ſelling goods under prime coſt; and the reaſon why ſuch deficiency does not appear in my books is, that my brother, *John Langhorn*, who was in the capacity of a ſhopman with me, might not be acquainted with the nature of my dealings, and hurt my credit by divulging the ſame. After the bankrupt had ſigned the ſaid anſwer, and the warrant was prepared for his commitment, "he voluntarily acknowledged to have lent to *John Croft*, the Kendall carrier, 100*l.*; to have depoſited with *Roger Bailiff*, grocer, certain hoſe to the value of 15*l.* to indemnify *Bailiff* for being his bail; to have delivered to *Andrew Alliſon*, boot-catcher at the Swan with two Necks, in Lad-lane, a note of *Crawford*, and Co. to be received for his uſe; and to have ſent a quantity of hoſiery goods to the value of 22*l.* to *Robert Eſtwick*, to be kept for his uſe." THE COURT were clearly of opinion, that theſe anſwers were not ſatisfactory.—Priſoner remanded.

Langhorn's caſe, Tr. Ter. 13 Geo. 3. C. B. 2 *Black.* 919.

And if upon the examination of a bankrupt, touching the diſpoſition of his property, he ſwear to an account of the

Ex parte Nowlan, Mic. Ter. 35 Geo. 3. B.R. 6. *Ter. Rep.* 118.

(1) But Lord *Kenyon*, in *Nowlan*'s caſe, 6 *Ter. Rep.* 118. ſaid, that HE ſhould not have thought the anſwers given in *Miller*'s caſe ſatisfactory.

ſame,

ſame, which appears to be incredible, the commiſſioners may commit him to priſon. Thus, where the following queſtions were put to him, and he gave the following anſwers: "*Q.* As you admit to have received 3,505*l.* within a week before you left London, did you receive any further ſum within that time? *A.* I believe I did. *Q.* To what amount? *A.* I cannot preciſely ſay. *Q.* Will you ſwear you did not receive 2000*l.* more? *A.* I cannot; (but he added afterwards) I wiſh to correct that anſwer, becauſe I recollect I did receive about 1000*l.* above the 3,505*l.* within the laſt week. *Q.* As you ſay you were overturned in the mail coach, in April, 1793, and that you then loſt your pocket-book, how much had you in your pocket book at the time the coach was overturned? *A.* 3,500*l.* or 3,600*l.* in bank-notes. *Q.* As you ſay that you had not more notes in your pocket-book than 3,600*l.* and having received 1000*l.* over and above the 3,505*l.* within a week before you left town, how do you account for the difference, which is about 900*l.*? *A.* I cannot give any account; (but he added afterwards) I correct this, by not admitting to have received 1000*l.*; it might be from 400*l.* to 600*l.* more than 3500*l.* *Q.* How do you account for the 400*l.* or 600*l.*? *A.* I cannot at preſent." Theſe anſwers not being ſatisfactory to the commiſſioners, they committed him to Newgate, till he ſhould anſwer to their ſatisfaction. Being again brought up before them, and being aſked what he had done with two ſums of 373*l.* 4*s.* 3*d.* and 222*l.* 6*s.* which it appeared he had received, he anſwered, he had received the money, but he could not then diſcloſe what he had done with it; on which he was again committed to cuſtody for not anſwering ſatisfactorily. On a ſubſequent examination, he gave ſome further anſwer as to theſe ſums (1); and he was then again queſtioned, whether he had received any ſum within a week before he left London, over and above the 3,505*l.*? "*A.* I received to the amount of about 1000*l.* or thereabouts. *Q.* What did you do with this 1000*l.*? *A.* I loſt it with my pocket-book, with the 3,505*l.* as mentioned in my former examination, except about three 20*l.* notes." Theſe anſwers not being deemed ſatisfactory to the commiſſioners, he was remanded to his former cuſtody; and being now brought up by *habeas corpus*, and a motion made to diſcharge him out of cuſtody, upon the ground of the ſufficiency of his anſwers. THE COURT, after argument and full conſideration, ordered him to be remanded. PER CURIAM, There are no technical rules, by which caſes of this kind are determined; but the queſtion in each particular caſe is,

(1) And the ſufficiency of that anſwer was not now called in queſtion.

Whether

Whether the anſwers given by the bankrupt be, or be not, ſufficient to ſatisfy the mind of any reaſonable perſon. It has been contended on behalf of this perſon, that the anſwers he gave muſt now be taken to be ſatisfactory; becauſe, if they be not true, he may be indicted for perjury: but, how can an indictment for perjury againſt him be ſupported, when the ſecret remains locked up within his own breaſt; the creditors are not at preſent furniſhed with any materials to ſupport ſuch an indictment. But it is impoſſible for any reaſonable mind to be ſatisfied with the anſwers the bankrupt has given, if all the examinations be conſidered together. This was the examination of a man who had been in trade, whoſe accounts ought to have been accurate, and who ought to have remembered what property he took with him, conſidering (according to his own admiſſion) that it amounted to a very large ſum. At firſt he ſwore that he took the ſum of 3,505*l.* with him, which he loſt together with a pocket-book by the accident of the mail coach being overturned. The commiſſioners having reaſon to ſuſpect the truth of this account, and that the bankrupt had received a larger ſum juſt before he left London, then aſked him what further ſums he had received within a week before he ſet out for Ireland; at firſt he ſaid that he did not recollect, and ſoon afterwards admitted that he had received 1000*l.* Being interrogated what became of this laſt ſum, he then retracted what he before ſaid; and added, that inſtead of 1000*l.* he had only received from 400*l.* to 600*l.*; and to the queſtion, how he had diſpoſed of the 400*l.* or 600*l.* *he gave no anſwer whatever, on which he was committed, and very properly ſo, to priſon.* Then it appears that he was brought before the commiſſioners at different times, and, on one of thoſe examinations, being again aſked what ſum he had received beſides the 3,505*l.* within a week before he left London, he again admitted that he had received about 1000*l.* which (except three 20*l.* notes) he then, for the firſt time, ſwore he had alſo loſt with his pocket-book, with the 3,505*l.* Now can any perſon ſay that this was a ſatisfactory anſwer? It ſeems that this bears a ſtrong reſemblance to *Perrot*'s caſe, and that the anſwers given in this caſe were as ſatisfactory as the anſwer in that caſe: but that was canvaſſed in different courts in Weſtminſter-Hall, in all of which the anſwer was deemed inſufficient. It was to be hoped, that the ſequel of that cauſe would have been a ſtriking example to all future bankrupts; a large ſum, of which *Perrot* had given ſo unſatisfactory an account, was afterwards diſcovered in the bottom of a chair; and he was executed for concealing his effects. In this caſe we do not take any one anſwer by itſelf: but combining all the examinations together, we think they are not ſufficient to ſatisfy an honeſt mind, and therefore this perſon muſt be remanded.

remanded. It would be a ridiculous ceremony for the commiſſioners to go through in examining a bankrupt, if they were bound to give credit to his account, however improbable or abſurd it might be, merely becauſe he has the effrontery to ſwear to it. In theſe caſes they are to exerciſe their judgment upon the whole. And independently of the contradictory anſwers that this man gave on his different examinations relative to the ſame ſums, his conduct at the time of the ſuppoſed loſs is highly ſuſpicious. The account given by this bankrupt is perfectly incredible; and if ſo, the commiſſioners did right in deeming the anſwers to be unſatisfactory.—Bankrupt remanded.

Dyer *v.* Miſſing, Tr. Ter. 15 Geo. 3. C. B. 2 *Black. Rep.* 1035.

But the commiſſioners have no authority to commit one, ſuſpected to detain effects of the bankrupt, for not attending to be examined, on the firſt ſummons.—Thus, in an action of treſpaſs and falſe impriſonment, againſt three commiſſioners of bankrupts, they pleaded the commiſſion, and that they had juſt cauſe to ſuſpect that the plaintiff had detained ſome of the bankrupt's goods; and on the 15th of September, 1774, ſummoned him to attend on the 30th of September, at Southampton, to be examined, and five guineas were tendered for his expences from London thither, which he accepted, but did not appear at the day; whereupon they iſſued their warrant, on the ſaid 30th of September, to apprehend, and commit the plaintiff to Newgate, till he ſhould ſubmit himſelf to be examined by the major part of the commiſſioners; which warrant was accordingly executed, and they juſtify the impriſonment under the act 1 *Jac.* 1. c. 15. THE COURT held the facts ſtated in this plea to be no juſtification to the defendants, becauſe the ſtatute directs, 1ſt. a ſummons to the party; 2dly, on his default, or neglect, a warrant to bring him before the commiſſioners, in cuſtody, or elſe a ſecond ſummons, at their diſcretion; 3dly, if, when brought in cuſtody, he refuſes to be examined, or, upon a ſecond ſummons refuſes to come, then, and not before, the commiſſioners have power to commit.—Rule abſolute for delivering the *poſtea*, and entering up judgment for the plaintiff.

Miller *v.* Seare *et al.* Ea. Ter. 17 Geo. 3. C. B. 2 *Black. Rep.* 1141.

Treſpaſs and falſe impriſonment lies againſt commiſſioners of bankrupts, for an illegal exerciſe of their diſcretion, in improperly committing a bankrupt who has made a ſatisfactory anſwer.—In treſpaſs and falſe impriſonment againſt three commiſſioners of bankrupt, for impriſoning the defendant, on the 26th of Feb. 1773, and confining him ſixty-ſeven days without any reaſonable or probable cauſe: the defendants pleaded, 1ſt, the general iſſue; 2dly, a juſtification under the authority of the ſtatute of 13 *Eliz.* c. 7; 3dly, the like under 1 *Jac.* 1. c. 15; 4thly, a ſpecial juſtification, ſetting out all the circumſtances of the caſe, as ſtated in p. 74, *ſupra*.

The

The plaintiff replies to the 2d and 3d pleas *de injuriâ ſua propria*, and thereupon, as alſo on the not guilty, iſſue is joined: to the 4th plea he demurs generally. The caſe was elaborately argued, and PER CUR. There are ſeveral exceptions which may be made to this plea, in point of form: as 1ſt, it is not averred that the queſtion put by the commiſſioners was a material one: 2dly, one cauſe of the commitment is manifeſtly illegal; for miſbehaving himſelf: though perhaps that might be rejected as ſuperfluous, and the commitment be referred to that cauſe which, if true, is a legal one: 3dly, the concluſion is certainly bad, "till he anſwer all ſuch queſtions as ſhall be put to him;" but we chuſe rather to determine upon the merits, than upon the form, of a caſe that has been ſo elaborately argued.—This is a caſe without a precedent, and muſt therefore be determined on principles: taken in any view, it involves a hardſhip on either ſide: hard that the commiſſioners ſhould be perpetually haraſſed with actions, in caſe of an innocent miſtake: harder for the public, if they are to be inveſted with an arbitrary power of committing whom, and for what they pleaſe, without being liable to anſwer for it: eſpecially as the ſame law muſt be eſtabliſhed for all commiſſioners of bankrupts; as well thoſe in the country as in London: here little danger is to be apprehended from ſuch a power of commitment, as the commiſſioners are uſually men of knowledge and diſcretion, choſen by the great ſeal, and acting under its immediate inſpection: but, in the country, very low and obſcure men often creep into the commiſſion; and to arm them with ſuch arbitrary powers, would be of the moſt terrible conſequence.—It is certain that no man ought to ſuffer criminally, for an error in judgment: but it is equally juſt, that he ſhould make reparation, *civilly*, for the damage which other perſons have ſuffered by ſuch, his error:—but it is ſaid, that no action will lie againſt perſons acting in a judicial capacity; let us ſee how far this general poſition is warranted by law: 1ſt, it is agreed, that the judges of the king's ſuperior courts of juſtice are not liable to anſwer, perſonally, for their errors in judgment; and this is not ſo much for the ſake of the judges, as of the ſuitors themſelves, *Buſhel*'s caſe, *Vaugh.* 138. 2 *Jones* 15.—2dly, the like, in courts of general juriſdiction, as gaol delivery, &c. 1 *Mod.* 184. 119. 2 *Mod.* 218. 3 *Keb.* 322. 358.—3dly, in courts of ſpecial and limited juriſdiction, having power to hear and determine, a diſtinction muſt be made: while acting within the line of their authority, they are protected, as to errors in judgment; otherwiſe, they are not protected; ſo in Dr. *Bonham*'s caſe, 8 *Co.* 121, falſe impriſonment lay, becauſe they had extended their authority: in Dr. *Groenvelt*'s caſe, 1 Lord *Raym.* 467. it did not lie, becauſe they were

within their juriſdiction: in Dr. *Bouchier*'s caſe, *Strange*, 993, and the caſe of *Terry* and *Huntingdon*, in *Hardres*, it lay, becauſe of the excefs of juriſdiction:—thus much of courts: the caſe is ſtronger, when applied to ſingle magiſtrates, having or not having juriſdiction: in all caſes where protection is given to the judge, giving an erroneous judgment, he muſt be acting as judge: the protection, in regard to the ſuperior courts, is abſolute and univerſal: with reſpect to the inferior, it is only while they act within their juriſdiction:—it is then ſaid, that the defendants, in the preſent caſe, are judges, and acting within their juriſdiction; but we cannot aſſent to this poſition, that commiſſioners of bankrupt are judges: many courts which are held by the king's commiſſion, for ſpecial purpoſes, do not conſiſt of judges; as the courts of Eſcheats, Concealments, Firſt Fruits, and the like: nor can Lord *Holt*'s poſition be generally and univerſally true; that, a power to fine and impriſon, makes a court, or judge of record: there may be officers of record, who are not judges of record, by the common law; as the king's eſcheator, 9 *Hen.* 6. 69.; ſo juſtices of the peace may be judges of record, when made ſo by act of parliament; as in caſe of riots, force, going armed, &c. in which caſes their records are not traverſable—commiſſioners of bankrupts have none of the requiſites of a court of juſtice: they have very little judicial diſcretion; their office is chiefly executory and miniſterial: they cannot commit for puniſhment, but only to compel an anſwer: this proceſs of contempt muſt iſſue at the diſcretion of the commiſſioners, *if the anſwer be not to their ſatisfaction*, for the ſake of diſpatch; elſe they muſt perpetually have recourſe to the great ſeal, and ſuſpend the examination, while they are ſtating the contumacy, and praying the aid of the court: but they are liable to anſwer for the illegal exerciſe of this diſcretion, by iſſuing their proceſs either in conſequence of improper queſtions, or for not acquieſcing in a proper anſwer; or, by commitment for an improper cauſe, or for an improper time; all which concur in the preſent caſe: and the king's courts will examine, whether the commiſſioners have made a due uſe of the authority with which parliament has armed them; and had legal grounds for iſſuing this proceſs of impriſonment: if not, they will deliver the parties committed, which they would not do if committed by a court of record; in which the law repoſes confidence and truſt: and will alſo redreſs him by action, for the injury he has thereby ſuſtained:—as to the form of action, there is no doubt but that adopted in this caſe is right.—Judgment for the plaintiff.

VI. *Aſſign-*

VI. *Aſſignment of the Bankrupt's Eſtate and Effects.*

What Effects ſhall be conſidered as diveſted out of the Bankrupt, before the time of his Bankruptcy.] An aſſignment of goods at ſea, as a collateral ſecurity for a debt, and a ſubſequent indorſement of a bill of lading, are good as againſt the aſſignees of the aſſignor, who committed an act of bankruptcy between the aſſignment of the goods and the indorſement of the bill of lading.—An action of trover was brought by the aſſignees of the bankrupt, to recover the value of fifty tons of goods, of which the defendant had taken poſſeſſion under an aſſignment from *Syeds*, the bankrupt, before his bankruptcy, and an indorſement of the bill of lading afterwards. The circumſtances were theſe: *Syeds* having received advice on the 24th of November, 1786, from his correſpondent at New Providence, that he was about to ſhip the goods in queſtion on board the Elizabeth, which would ſail in ſeven weeks, on *Syeds*'s account; and having procured an inſurance to be made on the 28th of the ſame month, he applied to the defendant the ſame day to advance money on the ſecurity of theſe goods, and the policy of inſurance thereon: *Syeds* was at this time already indebted to the defendant, in the ſum of 190*l.* and upwards, and this latter agreed to advance him 200*l.* more on his note of hand, provided the goods in queſtion, with the policy, were aſſigned over to him as a collateral ſecurity for both thoſe ſums. This was accordingly done by an inſtrument, ſtamped, dated the 29th of November, 1786. At the time of executing this inſtrument, the policy and the letters of advice were depoſited with the defendant; and the bill of lading was indorſed over to him as ſoon as it arrived, but not till after the act of bankruptcy, which was on the 2d of February, 1787, and the commiſſion iſſued on the 10th. On the arrival of the ſhip in April, the goods were delivered by the captain to the defendant, who paid the freight and charges thereof. But no tender was made by the plaintiffs of the amount of theſe charges when the goods were demanded. The judge who tried the cauſe ſaid, it appeared very clearly, that the defendant was reſolved to diſpute the queſtion as to the right of poſſeſſion to theſe goods, and therefore it would have been nugatory to have tendered the freight to him. The principal queſtion was, What right paſſed under the aſſignment to the defendant; and whether he had a right to retain poſſeſſion as againſt the aſſignees, the bill of lading not having been indorſed to him till after the bankruptcy? and his lordſhip was of opinion, under thoſe circumſtances, that the legal property of the goods remained in the bankrupt till

Lempriere *et al.* Aſſignees of Syeds *v.* Paſley, Ea. Ter. 28 Geo. 3 B. R 2 *Ter. Rep.* 485.

the indorſement, and that he could not diveſt himſelf of it after his bankruptcy, in prejudice to the reſt of his creditors; and, therefore, it was too late for the defendant to inſiſt upon the validity of ſuch aſſignment; and the judge having, for theſe reaſons, refuſed to nonſuit the plaintiffs, they thereupon obtained a verdict. A rule was afterwards obtained, to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a new trial granted. After counſel had been fully heard on both ſides, and the court had taken time to conſider,—THE UNANIMOUS OPINION OF THE COURT WAS DELIVERED TO THE FOLLOWING EFFECT, BY ASHHURST, J. Two queſtions have been made; 1ſt, Whether the plaintiff could at any rate recover in this action, without firſt tendering the freight and charges? 2dly, which is the principal queſtion, Whether the defendant, on the circumſtances of the caſe, has not ſuch a property as intitles him to hold againſt the plaintiffs? As to the firſt queſtion, the court have already intimated an opinion, namely, that if the defendant is to be conſidered as a mere wrong-doer, the plaintiffs would have no occaſion to tender him an indemnification for expence incurred by him, in order to obtain a wrongful poſſeſſion. But the ſecond queſtion is a material one; in order to the diſcuſſion of which, I ſhall lay down the following principles, which appear to me to be clear; as between a perſon who has an *equitable lien*, and a third perſon, who purchaſes the thing for a valuable conſideration, and without notice, the prior equitable lien ſhall not over-reach the title of the vendee: for the title of him who has both a fair poſſeſſion, and an equitable title, ſhall be preferred to that of a mere equitable intereſt. But, as between the perſon who has the equitable lien, and the aſſignees; if the lien ſubſiſted before the bankruptcy, they ſhall never recover or retain the thing, without diſcharging the money due. The party who has the equitable lien, ought not to be on a footing with the reſt of the creditors, for whom the aſſignees are truſtees; for the creditors at large truſted to a perſonal credit; but he who has the lien never gave a perſonal credit, but truſted to the thing. The money lent to the bankrupt, would never have become part of the aſſets of the bankrupt, had it not been lent upon the credit of the thing pledged; and when the money is taken out of the bankrupt's effects and repaid, they are only juſt where they would have been, if the money had never been advanced. As between the perſon having the lien, and the aſſignees, they muſt ſtand in the place of the bankrupt; and take his property ſubject to all the equitable liens to which it would have been ſubject in the hands of the bankrupt himſelf. By the act of bankruptcy, they only get the legal right. The bankrupt himſelf had the legal right before the bankruptcy, but he could never

never retain the thing againſt the lien, without paying the money borrowed. So neither can the aſſignees. Nor if the party obtains the poſſeſſion, can they get it from him, without paying the money advanced. For the retaining the thing, agreeable to a lawful ſtipulation between him and the bankrupt, previous to the bankruptcy, can never, even in a court of law, be ſaid to be a wrongful converſion. If the caſe reſted on principles of reaſoning only, I ſhould have very little doubt; but this reaſoning is likewiſe ſupported by authority. I will premiſe, as a ground, that whatever may be ſet off in a court of equity, on the ground of *lien*, may likewiſe be ſet off in an action of trover. This was expreſsly laid down by Lord *Mansfield*, in the caſe of *Green* v. *Farmer*, 4 *Burr.* 2218. Taking that poſition to be law, the caſe of *Brown* v. *Heathcote*. 1 *Atk.* 160, applies very ſtrongly to this caſe. There *Williams* and his partner gave a bond to *Heathcote* for 1200*l.* and the ſame day, by deed, aſſigned to him the goods in two ſhips then at ſea, and alſo delivered to him thirteen bills of lading, and policies of inſurance, the latter of which were indorſed to him, but the bills of lading were not; and a bill being brought by the aſſignees of *Williams*, inſiſting that, as *Williams* had acted as viſible owner of the ſhip and cargo, which were never put into the poſſeſſion of the defendant, the plaintiffs were intitled to them for the benefit of the creditors. But the court was of opinion, that every thing which could ſhew a right to the ſhip and cargo being delivered over to *Heathcote*, the bankrupt could no longer be ſaid to have the order and diſpoſition of them, and therefore the caſe did not fall within the meaning of 21 *Jac.* 1. c. 19. and conſequently, that *Heathcote* had a right to retain the ſhip and cargo till the money was paid. That caſe is very ſimilar to the preſent: for though there was an *aſſignment* of the bill of lading, and here only an agreement to aſſign, yet that makes no difference; as neither conveys more than the equitable title. There is a caſe in *Brown's Rep.* 125, of *Falkener* v. *Caſe*, which, though very ſhortly reported, ſeems to apply to the preſent. But I cite it from a MS. note, which is ſomewhat more full. In Chancery, November 21ſt, 1781, *Falkener*, executor of *Crowder*, againſt *Caſe* and others. *Caſe* owing 6000*l.* to *Crowder*, on bond, with ſome arrears of intereſt, for ſecuring the ſame, in April 1777, gave *Crowder* a bill of ſale of three ſhips, the Banett, which had lately ſailed from Liverpool to Jamaica; the Fancy, then lying in the dock at Liverpool; and the Anna, then building; "and all policies of inſurances, ſum and ſums of money whatever, then inſured, or to be inſured upon the ſaid ſhips, or veſſels, or any of them; to hold the ſaid three ſeveral ſhips or veſſels, and other the premiſſes to the teſtator his executors, &c. as his

and their own proper goods and chattels." And *Caſe* covenanted, that he would "from time to time, at his own proper charges, cauſe the ſame three ſhips to be ſufficiently and properly inſured, and to continue the ſame inſured, whilſt the ſame veſſels ſhould reſpectively be out of the ſaid port of Liverpool, upon any voyage whatſoever; and in caſe of any loſs, ſhould and would pay the money due, and to be recovered, upon any ſuch policy or policies of inſurance to the ſaid *T. Crowder*, his executors, &c. for the purpoſe of paying and ſatisfying to him or them the ſaid 6000*l.* and all intereſt, and other money due, and to become due, to him on the ſaid bond;" with a proviſo for redemption, before the 1ſt of Auguſt then next. The Fancy and Anna lay at Liverpool, for ſome time after the bill of ſale was executed. The Banett returned to Liverpool, and ſailed on another voyage, but *Crowder* never took poſſeſſion of any of them. Soon after the Banett had ſailed, in January, 1778, *Crowder* applied to *Caſe*, to deliver up to him the ſeveral policies which he had covenanted to get effected on the reſpective ſhips. It then appeared, that *Caſe* had inſured in London, upon the ſhip Fancy, 2000*l.* and a large ſum upon her cargo in the ſame policy, with one *Barclay*, an inſurance broker, who retained the policy as a ſecurity for the premiums, and alſo for the balance due from *Caſe* on his general account; and *Caſe* was therefore not able to deliver it over to *Crowder*, but he informed him that ſuch inſurance had been made, and offered to give him an order to recover in caſe of loſs, and deliver to him another policy on the ſame ſhip, for 600*l.* which had been effected in Liverpool. On the 23d of March, 1778, a commiſſion of bankrupt iſſued againſt *Caſe*, and it was not diſputed in the argument, that he had committed acts of bankruptcy in November, 1777, but it was not ſo alleged in either the bill or anſwer. The ſhip Fancy was captured by an American privateer, on the coaſt of Africa, on the 6th of March, 1778; as ſoon as *Crowder* heard of it, which was not till the beginning of July, 1778, he applied to *Barclay* to give up the policy, who refuſed, unleſs he would pay the balance of the account due from *Caſe*, which was 779*l.* 11*s.* and indemnify him. *Crowder* declined to do this, but the aſſignees acceded to theſe terms, and poſſeſſed themſelves of the policy; and thereupon received from the bulk of the underwriters the amount of their ſubſcriptions. *Crowder* filed a bill in Hilary Term, 1779, againſt the bankrupt and the aſſignees, praying that the aſſignees might be decreed to account with him for all the money received from thoſe two policies; and, in caſe any part of ſuch money was unreceived, that the aſſignees might recover and pay the ſame to him, or deliver the policy of inſurance in their hands to the plaintiff, and conſent

ſent to his receiving the money due on both policies, and impower him to make uſe of their names for recovering and receiving it, on the plaintiff's indemnifying them therein; which he thereby agreed and offered to do. After the defendants had put in their anſwer, viz. the 26th of February, 1780, *Crowder* died; and the ſuit was revived and carried on by the executor of *Crowder*. *Kenyon*, for the plaintiff, ſtated the facts, and acknowledged that no delivery accompanied the bill of ſale; and that from not having taken poſſeſſion, the plaintiff muſt give up all claim to the ſhips. The whole queſtion is upon the policy of the ſhip Fancy; and he contended, that though the ſhips did not paſs, the policies of inſurance did paſs. By the bankrupt laws nothing paſſes to the aſſignees, but what the bankrupt was in poſſeſſion of at the time of his bankruptcy, clear of all ſpecial lien thereon. The ſolicitor-general (*Mansfield*) for the defendant, ſaid, that in this caſe, if the bankrupt had remained ſolvent, it would have intitled *Crowder* to come for performance of the agreement. This policy (meaning that made in London) reſted in the hands of the bankrupt. *Ryal* v. *Rowles*, 1 *Vez.* 348. 375. This is merely an equitable aſſignment of the policy, and within the caſe of *Ryal* v. *Rowles*. But beſides, theſe defendants inſiſt on an act of bankruptcy ſo early as November, 1777, and if that were in November, 1777, it is incumbent on the plaintiff to make out that the covenant in 1777, unaccompanied with delivery, was an actual aſſignment. *Thompſon*, for the plaintiff, ſaid, It is perfectly immaterial, whether the act of bankruptcy was in November, 1777, or not, for the plaintiff's title depends on the deed in April, 1777. This is a clear aſſignment in equity of all policies to be made ſubſequent to that deed. The policy on the Fancy was made in July, 1777, and the aſſignees are bound by all the covenants of the bankrupt. *Taylor* v. *Wheeler*, 2 *Vern.* 564. The London policy was not in the cuſtody of the bankrupt, but in the poſſeſſion of *Barclay*, who had a ſpecial lien upon it. *Crowder* was in the place of a ſecond mortgagee of this policy. This is not within the 21 *Jac.* 1. being a *choſe in action*. In caſe of a pawn, the condition is perſonal, and the executor of the pawner cannot redeem it. *Yelv.* 178. Lord Chancellor aſked, Whether in caſe of a pawn, the aſſignees can claim it, if the bankrupt does not redeem it prior to the act of bankruptcy? In caſe of ſhips at ſea, where actual poſſeſſion cannot be given, ſymbolical poſſeſſion is ſufficient. *Kenyon*, in reply, obſerved, that if a perſon, prior to his bankruptcy, entered into a covenant that binds the property, that property is ſubject to the covenant. The ſtatute of *James* does not apply to the argument which the ſolicitor general draws om it. In this caſe, the property was not in the hands of

Caſe, nor could furniſh him with falſe credit. It is ſaid, *Barclay* held the property for the bankrupt; but he held it for *Crowder*. This policy was in fact a pledge or pawn. And if the ſtatute of King *James* had not exiſted, there never was a clearer caſe. The Lord Chancellor admitted, that if the queſtion had been concerning a bond, or any *choſe in action* which had remained in the poſſeſſion of the bankrupt, at the time of the bankruptcy, it would have been within the ſtatute of King *James*. The queſtion therefore is, upon the application of that ſtatute to this caſe. In April, 1777, *Caſe* having aſſigned over the veſſel, aſſigned all policies to *Crowder*, in conſideration of a debt due at the time; and therefore, as to conſideration, the tranſaction is valid. In July following, he made a policy on the Fancy, but the broker being then his creditor, would not part with the policy till he had been paid what was due to him; and *Caſe* agreed, that the policy ſhould lie with the broker, as a ſecurity for paying that demand. There ſeems to me to be no difference in caſes where effects, which have been in poſſeſſion of the pawner, are pledged, or goods that he has a property in are left in the hands of a third perſon; for I conſider them equally as pledges. Taking this as a pawn, I ſhould conſider, firſt, what the caſe would be if the ſtatute of *James* did not affect it; and then what effect that ſtatute has. If there were no ſuch ſtatute in the preſent caſe, it would be clear, that the plaintiff did obtain that intereſt which he is now ſeeking in the ſubject. The policy of inſurance was in *Barclay*'s hands, and *Crowder* in equity acquired a right in that policy: and this court would not turn him round to ſeek his relief againſt *Caſe*. It is clear, abſtracted from the ſtatute, that whatever binds a ſubject of property in the hands of the bankrupt, will bind it in the hands of the aſſignees; their title is merely derivative, and they take the property of the bankrupt ſubject to all equitable liens on it, that bound it in the hands of the bankrupt; and here, if there had been no ſuch ſtatute, the aſſignees would have been bound by this contract of the bankrupt. The queſtion therefore is, ſecondly, Whether this ſtatute affects this caſe? The words are, "if any perſon, at the time he ſhall become bankrupt, ſhall, by the conſent of the true owner, have in his poſſeſſion, any *goods or chattels*, whereof he ſhall be the reputed owner; the commiſſioners ſhall have power to diſpoſe of the ſame for the benefit of the creditors." The queſtion therefore is, Whether the bankrupt's intereſt in this ſubject falls under the words *goods and chattels*, in the act; whether that intereſt reſided in the bankrupt in any right of form or poſſeſſion at the time of the bankruptcy? His right was merely equitable, to redeem. *Barclay* had poſſeſſion againſt the bankrupt, and the bankrupt

rupt had only a right to redeem. The bankrupt, when ſolvent, aſſigned all his intereſt to a ſtranger. It is objected, that he did not then deliver poſſeſſion; but he had not the poſſeſſion to deliver, he had barely the right of redemption; he did therefore, as it ſeems, all that he could do, aſſign all his equitable right to the plaintiff. The ſtatute is to be conſidered as a *jus poſitivum*; and here it is impoſſible to charge the aſſignee of this equity, with having left the poſſeſſion of the thing aſſigned in the hands of the bankrupt. In caſes where ſhips are at ſea, ſymbolical poſſeſſion is allowed; and this is much clearer of the objection of poſſeſſion on the behalf of *Crowder*. But it is argued, that *Crowder* ſhould have given notice to *Barclay* of his equitable intereſt; which would have been publiſhing to the world, that the property did not belong to the bankrupt. The firſt anſwer is, that there was not a *ſcintilla* of property in the bankrupt. And ſecondly, ſuppoſing notice had been given, it would have been a tranſaction merely between *Crowder* and *Barclay*. The conſequence is, that the aſſignees muſt account for all money received on *Barclay*'s policy, as far as it affected the ſhip, but not on the other policy, underwritten at Liverpool, which remained in the bankrupt's hands, and was delivered by him ſubſequent to the act of bankruptcy committed, if the act of bankruptcy preceded the delivery of that policy by the bankrupt to *Crowder*; and the parties to be at liberty to try that fact, if they think proper. That caſe applies ſtrongly to the preſent. It might be a great inconvenience to commerce, if it were to be laid down as law, that a man could never take up money upon the credit of the goods conſigned, till they actually arrived in port. There ſeems to be no inconvenience on the other ſide, nor can it be any inlet to fraud; for no other perſon can be taken in to lend money on the credit of the cargo, after the party has delivered over all the documents, to him who has the firſt lien. Therefore, on the whole, we think the verdict wrong, and that there ought to be a new trial.

A delivery of the grand bill of ſale of a ſhip at ſea, on the mortgage of the ſhip, is equivalent to a delivery of the ſhip itſelf; and if the mortgagee take poſſeſſion on her arrival, he may maintain trover againſt the aſſignees of the mortgagor if they take the ſhip from him, notwithſtanding he has made no demand either on the bankrupt or his aſſignees.—In an action of trover for the ſhip *Mercury*, a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe: By indenture, dated the 16th of March, 1785, *Burn* bargained and ſold the ſhip, then at ſea, and aſſigned the grand bill of ſale thereof to the plaintiff, for ſecuring the ſum of 2000*l.* already advanced by the plaintiff to him, and for ſecuring ſuch further ſums as the plaintiff ſhould advance,

Atkinſon *v.* Maling *et al.* Aſſignees of Burn, Ea Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 462.

advance, ſubject to a proviſo or condition therein contained for redemption on payment by *Burn*, on demand by the plaintiff, of the money then advanced, or which ſhould thereafter be advanced, together with lawful intereſt. The indenture alſo contained a covenant, that *Burn* ſhould, immediately after the execution thereof, cauſe the ſhip to be inſured, and pay the premium, &c.; and it was thereby agreed, that until default in payment ſhould be made, it ſhould be lawful for *Burn* to hold the ſhip, and take the profits for his own uſe and benefit. It alſo appeared, that the grand bill of ſale was delivered to the plaintiff on the execution of the ſaid deed. On the 23d of March, 1785, inſurance was made by *Burn* on the ſhip, at and from Shields to Jamaica, and back again to London. And on the 26th of May, 1785, the following memorandum was made on the back of the policy, and ſigned by all the under-writers: "That whereas the within ſhip "having been ſold to *Charles Atkinſon* (the plaintiff), we, the "inſurers on this policy, do hereby conſent and agree that "he ſhall be entitled to this inſurance, the ſhip having be-"come his property." On the 12th of Auguſt, 1785, *Burn* became a bankrupt. In September, 1785, the ſhip arrived in England, and the plaintiff immediately took poſſeſſion of her. No actual demand of the money ſecured by the aſſignment was proved to be made before the poſſeſſion of the ſhip was taken. The defendants, who were aſſignees of *Burn*, have converted the ſhip to their own uſe. It was contended, on the behalf of the defendants, that this was not a valid conveyance as againſt the creditors at large under the commiſſion, conſidered either with reference to the ſtatute 13 *Eliz.* c. 5. or 21 *Jac.* 1. c. 19. For by the former ſtatute, all conveyances made for the purpoſe of defrauding creditors are made void. And in the latter, 21 *Jac.* 1. c. 19. ſ. 11. The words are, that "if any perſon, at the time he ſhall become bankrupt, ſhall, by the conſent of the true owner, have in his poſſeſſion any goods, &c. whereof he ſhall be the reputed owner, and take upon him the ſale or diſpoſition as owner, the commiſſioners ſhall have power to diſpoſe of, and ſell the ſame." Per Cur. The only doubt that can be made ariſes from the ſtatute 21 *Jac.* 1. But conſidering the whole of this caſe, and the nature of the property, that ſtatute will not be found to apply to it. The object of the ſtatute was, to guard againſt fraudulent ſales, which are intended to give the trader a fictitious credit, and to enable him to commit a fraud on the generality of his creditors. But conſidering the nature of this property, it is not liable to that objection, nor is it within the miſchief intended to be remedied by the act. A mortgage of a ſhip at ſea is very frequently made, is univerſally recognized, and ought to be encouraged for the benefit of trade. But from the nature of

it,

it, no actual delivery of the thing itſelf can be made at the time of the mortgage; and therefore a delivery of the grand bill of ſale has always been held ſufficient to transfer the property. A mortgage of a veſſel at ſea is not like a mortgage of other ſpecies of property; it is warranted by the common courſe of trade; and the act of parliament did not intend to prevent ſuch conveyances. Then, it is ſaid, that a demand ought to have been made; but it appears that the aſſignees had taken the ſhip out of the poſſeſſion of the plaintiff and ſold her, therefore by their own act they had made a demand unneceſſary; and the money was not paid when the action was brought. It is not unlike the caſe in *Co. Lit.* (1), where it is ſaid, that if a man lend ſheep to another to depaſture, and he deſtroy them, the lender may maintain treſpaſs againſt the other without making any demand of the ſheep; becauſe no demand is neceſſary where the thing is deſtroyed. The property of the ſhip, by the bill of ſale, was veſted in the plaintiff, and whenever that is deſtroyed, trover will lie for it without any regard to the proviſo or a demand of the money.—*Poſtea* to the plaintiff.

An abſolute bill of ſale of a ſhip then at ſea is void by 26 *Geo.* 3. c. 60. ſ. 17. unleſs the certificate of the regiſtry be recited therein; although the vendee give at the ſame time an undertaking to reſtore the ſhip on a future day, on payment of a certain ſum, advanced by him on the credit of this ſecurity. And though the vendee had alſo the grand bill of ſale, and had taken poſſeſſion of the ſhip immediately on her arrival, it was held that he could not retain the ſhip, as having a lien on her, againſt the aſſignees of the vendor, who became a bankrupt after this transfer of the ſhip.—On the trial of an action of trover for the ſhip Commerce, the following caſe was reſerved for the opinion of the Court. The bankrupt being indebted to the defendants in 2000*l.* on bills, which they had accepted and paid for him, on the 21ſt of June, 1788, gave them his promiſſory note, payable in three months; and by way of ſecurity, executed to them a bill of ſale of the ſhip Commerce, and at the ſame time depoſited in their hands the grand bill of ſale, and alſo a policy of inſurance on the ſhip from London to Jamaica and back again. *The bill of ſale was* abſolute *on the face of it, and in the uſual form, but it did not contain a recital of the certificate of the regiſtry of the ſhip, as required by ſtat.* 26 Geo. 3. c. 60. ſ. 17. But at the time when the bankrupt executed the bill of ſale, and depoſited that, together with the grand bill of ſale and policy, with the defendants, *they gave him an acknowledgment in writing, promiſing to return the ſame upon payment of the note.*—

Rolleſton *et al.* *v.* Hibbert *et al.* Mic. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 406.

(1) Sect. 71.

On

On the 21ſt of June, 1788, the ſhip was in foreign parts, and did not arrive in England till the 22d of November, 1788. The bankrupt ſtopped payment the 3d of July, 1788; on the 18th of the ſame month, a commiſſion of bankrupt was iſſued againſt him; and on the 8th of Auguſt his effects were aſſigned to the plaintiffs. Immediately on the ſhip's arrival in England the defendants took poſſeſſion of her, and ſtill continue in poſſeſſion. After the 21ſt of June, 1788, and before his bankruptcy, the bankrupt paid to his creditors, in the courſe of his trade, between 3000*l.* and 4000*l.* And it was alſo found by the caſe, that the bill of ſale was not executed by the bankrupt in contemplation of bankruptcy. This caſe was twice argued very elaborately; and THE COURT ordered the *poſtea* to be delivered to the plaintiffs. PER CURIAM, In this caſe, the defendants have undoubtedly acted fairly and *bonâ fide*; and if they loſe the benefit of that ſecurity to which they truſted, it is certainly a hard caſe. But the doctrine of hardſhip is not a favourable ſubject in a court of law in any caſe, ſtill leſs ſo when we are to judge according to the ſpirit and words of an act of parliament. The queſtion is, Whether the bill of ſale, which is ſtated in the caſe, and which appears on the face of it to be *abſolute*, is an effective inſtrument to convey the property in the ſhip? The objection which has been made to it, ariſes from the 17th ſection of the 26th *Geo.* 3. c. 60. which enacts, that "every bill of ſale of a ſhip, or other inſtrument, not having inſerted in it the certificate of the regiſtry of ſuch ſhip, *ſhall be utterly null and void to all intents and purpoſes.*" This clauſe is couched in the moſt poſitive terms which the language affords, and it renders ſuch a bill of ſale an abſolute nullity. This ſtatute was framed by an able ſtateſman (1), who is peculiarly converſant in the commercial intereſts of this country; and from the experience which has been already had of it, it is acknowledged to be founded in wiſdom, and to have produced all thoſe beneficial conſequences to the commerce and ſhipping of this country that were expected from it. Therefore, even if judges could have any leaning in their minds on ſuch occaſions, we ſhould not have any inclination to put ſuch a conſtruction on the words of this act, as would tend to evade the wholeſome proviſions of it. By way of anſwer to the poſitive words of the 17th ſection, it was firſt contended, that it is not neceſſary that the property in a ſhip ſhould paſs by a written inſtrument: on that point we give no opinion, becauſe it is not neceſſary. But certainly if the parties chooſe to convey by a written inſtrument, that ſhews what the in-

(1) Lord *Liverpool.*

tention

tention and the rights of the parties are, and they ſhall not afterwards be permitted to refer to any other agreement.—For if a perſon execute a bill of ſale of goods, without ſtamp, ſuch an inſtrument cannot be received in evidence, and yet the vendee cannot reſort to any parol evidence of the agreement. So here the title of the defendants being reduced to writing, they cannot refer to any other agreement, even though the written inſtrument be void by the act. Then it was urged, that this *ſtatute did not apply to the inſtance of transfer of ſhips at ſea*; but the words of the 17th ſection are *general*, and make no exception of ſuch caſes. And we are not to take upon ourſelves to determine whether the general proviſions of the act are wiſe or not, or whether this caſe ſhould or ſhould not have been excepted out of the ſtatute; thoſe were matters for the conſideration of the legiſlature. And with reſpect to the impoſſibility of complying with the requiſitions of the act, while the ſhip was at ſea, on account of the certificate of the regiſtry being on board, it is to be obſerved, that the parties might have extracted from the regiſtry, at the cuſtom-houſe, all that was neceſſary for this purpoſe. Beſides, the other clauſes of the ſtatute are deciſive; for the caſe of a ſale of a ſhip, either at ſea or in a foreign port, *to a foreigner*, is expreſsly provided for by the 15th ſection: then, if we ſee that in one part of this ſtatute the legiſlatute had in view the ſale of a ſhip at ſea or in a foreign port, and made ſpecial proviſions for ſuch a purchaſe by a foreigner, it cannot be argued, that the ſelling of a ſhip at ſea in other caſes was not in the contemplation of the legiſlature: but it ſhews, that they only intended to make one exception, leaving all other caſes within the general words of the 17th ſection. Alſo, before ſuch an argument ought to be adopted, it ought to appear that, beyond all controverſy, the parties could not comply with the requiſites of the ſtatute, and that this was a *caſus omiſſus*; which is by no means to be collected from the ſtatute. Then it was inſiſted that, although the bill of ſale could not take effect as ſuch, the defendants had a lien on the ſhip, to the amount of their demand: but that is wholly unfounded; for the bill of ſale profeſſes to transfer the abſolute property in the ſhip. And ſuppoſing that the bankrupt had never called for a return of the ſhip, From what time can the title of the vendees be ſaid to accrue? Was it only from the time when the ſum of 2000*l.* became due, and was not paid? On payment of that ſum, indeed, the vendor would have had a right to call for a return of the ſhip; but that could not diveſt the intermediate property of the vendees under the bill of ſale. The law was ſo with reſpect to real property prior to the 14 *Geo.* 2. c. 20; before which time conditional ſurrenders were made by tenants for life, to make good tenants to the *præcipe*, to ſuffer common

common recoveries; which ſurrenders were to be avoided by the payment of large ſums on particular days, when the ſurrenderees were to reconvey: now, if during that interval the whole property did not paſs to the ſurrenderees, ſuch recoveries would have been void; but, undoubtedly, the property did paſs in ſuch caſes. So in the caſe of a mortgage, where a deſcent is caſt before it becomes abſolute, the legal eſtate muſt deſcend according to the terms of the mortgage, notwithſtanding the day of redemption is not paſſed. It was next ſaid, that in this caſe a court of equity would not compel the defendants to deliver up the ſhip, until their demand was ſatisfied. This argument might, perhaps, have had ſome weight as againſt the bankrupt himſelf: but now, by means of the bankruptcy, the rights of third perſons have intervened; and all the creditors of the bankrupt have an equitable lien on his eſtate, and are intitled to an equal diſtribution. And where two equities meet, the legal title muſt prevail, which in the preſent caſe is with the plaintiffs. Beſides, that argument is not applicable here, for it muſt be remembered, that in a court of equity, he who aſks equity muſt firſt do equity. And if ſuch a bill would have been diſmiſſed, it would be becauſe the plaintiff's demand was unconſcientious; but that would not decide the *property of the ſhip*. The argument ought to go farther, and ſhew, that if the defendants in this caſe had prayed in a court of equity to have had a legal conveyance of this ſhip, that court would have decreed it, but no caſe has gone ſuch a length. If, indeed, it had been ſhewn to be the conſtant practice of a court of equity to decree ſuch a conveyance, it would have had great weight; for nothing can be more unfortunate for the ſubject, than that different rules reſpecting property ſhould prevail in the different courts: and in mercantile tranſactions particularly, if the defendants have a clear, indiſputable, equitable title, we, ſitting in this court, ought not to permit the poſſeſſion to be taken from them. But it is ſufficient for us, ſitting in a court of law, to put a legal conſtruction on this ſtatute. And as the inſtrument in this caſe is not valid in point of law, the contract cannot be ſupported here. Therefore, as there is nothing either in the words or the context of this act of parliament to warrant us in giving effect to this bill of ſale, we are of opinion, that the *poſtea* ought to be delivered to the plaintiffs.

Rolleſton *et al. v.* Smith, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 161.

But notwithſtanding the 26 *Geo.* 3. c. 60. ſ. 17. enacts, that a bill of ſale of a ſhip ſhall be abſolutely void, unleſs the certificate of the regiſtry *be truly and accurately* inſerted therein, *a mere clerical miſtake* will not vitiate it. On the trial of an action of trover for the ſhip Scipio, the jury found a verdict for the plaintiffs, ſubject to the opinion of the Court, on a caſe, ſtating ſeveral facts; from which a queſtion aroſe, Whether the bill

of ſale of the ſhip which recited the certificate of the regiſtry *inaccurately*, was not abſolutely void? It appeared that, in order to obtain a regiſtry of a *Britiſh* ſhip, the following ſteps muſt be taken: upon the ſale of a ſhip the purchaſer carries the bill of ſale from the late owner, and the certificate of the regiſtry to the bench officer, and takes the oath of ownerſhip preſcribed by the act of 26 *Geo.* 3. c. 60. A note that the oath has been made, with the certificate of regiſtry, is then taken to the collector outwards, who takes freſh ſecurity from the new owner agreeable to the act, and makes out a new certificate of regiſtry, and cancels the old one. An abſtract of the new certificate of regiſtry is entered in a book kept in the collector's office, another abſtract in another book in his comptroller's office, a third in the regiſter-general's office, and a fourth in the plantation or ſecretary's office. And the certificate of regiſtry is ſigned by the regiſter-general's and ſecretary's clerks, and afterwards by the collector and comptroller, and delivered to the owner. The certificate of regiſtry is firſt made out, and then an abſtract of it is entered in the four books above-mentioned; and no new certificate is granted till the old one is delivered up, if it be in being. Alſo, when a bill of ſale is to be made out of a ſhip, which is abroad at the time, and the certificate is with the ſhip, which it is required to be (and it was in this inſtance), it is the practice to apply to one or other of the four offices above-mentioned for a copy of the certificate of regiſtry, which is granted accordingly. The bill of ſale delivered to the defendant in this caſe, which was in the uſual form, contained a copy of the certificate of regiſtry, whereby it appeared that the ſhip was formerly a French veſſel, taken as prize, and ſtated to have been legally condemned, "*as by* "*ſentence of condemnation, dated the 28th of May*, 1783, *and* "*made free as by certificate of freedom granted at London the* "*28th of January*, 1783, appears, &c." Lord KENYON, Ch. J. delivered the opinion of the Court.—The ſingle queſtion is, Whether the bill of ſale were ſufficiently valid to convey the property in this ſhip to the defendant? and it ariſes on the ſtatute 26 *Geo.* 3. c. 60. ſ. 17. which enacts: "that when and ſo often as the property in any ſhip, belong-"ing to any of his Majeſty's ſubjects, ſhall be transferred to "any other of his Majeſty's ſubjects, the certificate of the "regiſtry of ſuch ſhip ſhall be truly and accurately recited "in words at length, in the bill or other inſtrument of ſale "thereof, and that otherwiſe ſuch bill of ſale ſhall be utterly "null and void, to all intents and purpoſes." Now, it is clear, that the parties to this contract meant to recite the certificate of the regiſtry in the bill of ſale, but it appears that in inſerting it they made a miſtake in one ſingle figure; for the condemnation recited is ſaid to bear date the 28th of May,

May, 1783, *whereas, really and truly, the ſhip was condemned in May*, 1782, and ſo it appears in the certificate of the regiſtry itſelf. But there is one material circumſtance to be attended to, namely, the date of the certificate of freedom, which was in January, 1783: now, by comparing that date with the ſuppoſed date of condemnation, in May, 1783, it is impoſſible that the latter could be correct, inaſmuch as the certificate of freedom would then bear date prior to the condemnation. It is apparent, therefore, on the face of the inſtrument itſelf, that ſome error muſt have crept into this copy of the certificate of the regiſtry, which was inſerted in the bill of ſale. Now it is impoſſible to conceive that the framers of this act of parliament intended to prevent the ſales of ſhips at ſea: but the ſtatute requires that the certificate of the regiſtry ſhall be always on board the ſhip; and that abſtracts of it ſhall be entered at ſeveral offices belonging to the cuſtoms, one of which is the regiſter-general's. And it is ſtated in the caſe, that the parties to this bill of ſale applied to that office for a copy of the certificate entered in the public books there, which they inſerted in the bill of ſale *verbatim et literatim*, as it is there entered. They could not have recourſe to the original certificate, for that was neceſſarily on board the ſhip then at ſea; they went to that which was ſuppoſed to be the moſt authentic depoſitory of the certificate; and I do not ſee what other ſtep they could have taken to comply with the requiſites of the ſtatute. Therefore we are of opinion, that the bill of ſale is valid, notwithſtanding this miſtake. But, even ſuppoſing that the parties had had an opportunity of ſeeing the original certificate, it is too much to ſay that a mere clerical miſtake ſhould render it null and void. Even in criminal caſes ſuch miſtakes are not fatal. In an indictment for forgery (1), where the party undertook to ſtate the tenor of a bill, and wrote "received" for "receiv'd," all the judges very properly decided that it was not a material variance. A variety of other caſes of that kind might be inſtanced. It was the intention of the legiſlature, in paſſing this act of parliament, that *Britiſh* ſhips ſhould be intitled to certain privileges and benefits; and, by way of ſecuring them to the owners of thoſe ſhips only, it was enacted, that there ſhould be a certificate of the regiſtry of the ſhip, which ſhould be inſerted in the bill of ſale on every transfer, to aſcertain preciſely that that ſhip was intitled to all thoſe privileges. Now it is ſufficiently aſcertained in this bill of ſale, that this is the ſame ſhip; the only variation between the copy and the original certificate is, in the figure *three* inſtead of *two*, which appears even on the

(1) *Hart's* caſe, 1776.

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face of the bill of ſale itſelf to be neceſſarily a miſtake. For theſe reaſons, therefore, and with a laudable inclination to ſupport a fair and honeſt tranſaction, *ut res magis valeat quam pereat*, at the ſame time not tranſgreſſing the rules of law, we are of opinion that this bill of ſale was ſufficiently valid to tranſfer the property in this ſhip to the defendant; and conſequently that he is intitled to the *poſtea*.—*Poſtea* to the defendant.

Roe on the demiſe of Hunter *v.* Galliers *et al.* Aſſignees of Green, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 133.

If a leaſe contain a proviſo that the landlord ſhall re-enter on the tenant's committing any act of bankruptcy, whereon a commiſſion ſhall iſſue, and the tenant does become bankrupt, his aſſignees are not intitled to hold the premiſes againſt the landlord.—On the trial of this ejectment, a ſpecial verdict was found, which ſtated, that *Hunter*, being ſeiſed in fee, demiſed the premiſes in queſtion, by two ſeveral leaſes, dated the 24th of December, 1778, to *Green*, who for ſome time before had been, and afterwards continued to be, a dealer in horſes, for twenty-one years from Michaelmas, 1778, at rack-rents for both farms of 150*l.* a year; in each of which leaſes were contained (*inter alia*) certain proviſos "that if *Green*, his executors, or adminiſtrators, ſhould aſſign, without licence; *or if the ſaid* J. Green, *his executors, or adminiſtrators, ſhould commit any act of bankruptcy within the intent and meaning of any ſtatutes made, or to be made, in relation to bankrupts, whereon a commiſſion ſhould iſſue, and he or they ſhould be found or declared to be a bankrupt or bankrupts*; or if he or they ſhould make any compoſition with his or their creditors, for the payment of his or their debts, though a commiſſion of bankrupt did not iſſue, or if he or they ſhould make any aſſignment of his or their effects in truſt for the benefit of his or their creditors; *that then and from thenceforth, in any of theſe caſes, it ſhould and might be lawful to and for the ſaid* J. Hunter, *his heirs, and aſſigns, into the ſaid demiſed premiſes to re-enter*, &c." Counterparts of the ſaid leaſes were executed. And the two farms, after ſuch demiſe, and before the bankruptcy of *Green*, were improved by the bankrupt 30*l. per ann.* It then ſtated the act of bankruptcy; that a commiſſion iſſued thereon on the 3d of February, 1787; that *Green* was duly found, and declared, a bankrupt; and that the defendants afterwards entered into the premiſes, and were poſſeſſed as aſſignees under the commiſſion and the uſual aſſignment. PER CUR. (after argument), The only queſtion is, *Whether a proviſo in a leaſe; that if the leſſee commit an act of bankruptcy, or, in other words, do any of theſe acts upon which a commiſſion of bankrupt may be ſued out, the landlord ſhall have a right to re-enter; be legal or not?* The general principle is clear, that the landlord, having the *jus diſponendi*, may annex whatever conditions he pleaſes to his grant, provided they be not illegal or unreaſonable.

Then is this proviſo contrary to any expreſs law; or ſo unreaſonable as that the law will pronounce it to be void? That it is not againſt any poſitive law is admitted; and no caſe has decided it to be illegal. In the caſe of Lord *Stanhope* v. *Skeggs*, 21 *Geo.* 3. B. R. the Court were divided in opinion upon the queſtion which aroſe there; therefore that is no authority either way: but conſidering what the ground of that difference was, it is ſome authority in ſupport of this proviſo; for the doubt aroſe upon conſidering whether a clauſe of reſtraint could operate upon executors to prevent them from aſſigning land which was expreſsly leaſed to the original tenant and *his executors*, *eo nomine*, when that was the only means by which they could exerciſe their truſt. Lord *Mansfield* there ſaid, the difficulty is, that, as by the terms of the leaſe the executors were to take, the ſubſequent proviſo that they ſhould not aſſign, ſeems to be repugnant to the grant itſelf. Again, that was not a huſbandry leaſe for twenty-one years, like the preſent, but for forty-one years; and there may be great reaſon for a diſtinction between the two terms; for if ſuch a proviſo as this were inſerted in very long leaſes, it would be tying up property for a conſiderable length of time, and would be open to the objection of creating a perpetuity. The defendant's counſel has commented much upon the different parts of this proviſo: but we cannot ſay whether any part of it may or may not be objectionable, with reference to the ſtatutes concerning bankrupts; we are now to decide upon the conſtruction of a proviſo at common law, and not on any ſtatute. There is a great difference between them: Lord Chief Juſtice *Willmot* took the diſtinction in a caſe before him in the Common Pleas, in which his lordſhip ſaid, *where the queſtion depends on a ſtatute, that mows down all before it, and it acts like a powerful tyrant that knows no bounds: but the common law operates with a more lenient hand; it roots out that which is bad, and leaves that which is good.* The queſtion here is, Whether this proviſo, not being againſt any expreſs authority of law, be void, or unlawful, as againſt any reaſon or public policy? Now it does not appear to be againſt either: 1ſt, it is reaſonable that a landlord ſhould exerciſe his judgment with reſpect to the perſon to whom he truſts the management of his eſtate; a covenant, therefore, not to aſſign, is legal; covenants to that effect are frequently inſerted in leaſes; ejectments are every day brought on a breach of ſuch covenants. The landlord may very well provide, that the tenant ſhall not make him liable to any riſk, by a voluntary aſſignment, or by any act which obliges him to relinquiſh the poſſeſſion. If it be reaſonable for him to reſtrain the tenant from aſſigning, it is equally reaſonable for him to guard againſt ſuch an event as the preſent; becauſe the conſequence

ſequence of the bankruptcy is an aſſignment of the property into other hands. Perhaps it may be more neceſſary for the landlord to guard againſt this latter event, as there is greater danger to be apprehended by him in this than in the former caſe. Perſons who are put into poſſeſſion under a commiſſion are ſtill leſs likely to take proper care of the land than a private aſſignee of the firſt tenant. Neither is there any reaſon of public policy to be urged againſt allowing ſuch a proviſo: it conduces to the ſecurity of landlords, which can never be urged as a ground of objection on that head. The caſe of *Goring* v. *Warner*, 2 *Eq. Caſ. Abr.* 100. (1) cited by the defendant's counſel, proves nothing to this purpoſe: it was there taken for granted, that a clauſe to prevent alienation by the tenant was good; but the Court conſidered that the particular alienation in queſtion was not within the terms of the covenant, becauſe the covenant only extended to the act of the party, and that was an alienation in law, for the aſſignment was by virtue of a ſtatute. This caſe has alſo been argued on general principles of inconvenience, becauſe the poſſeſſion of an eſtate on ſuch terms enables tenants to hold out falſe colours to the world; and the defendant's counſel has called to his aſſiſtance the 21ſt *Jac.* 1. but that has never been conſtrued to extend to lands, it only relates to goods and chattels. The argument of the tenant's obtaining credit by holding out falſe colours, does not apply to the caſe of land, but merely to goods; for a man does not get credit merely from the *occupation of land*, but from the *intereſt* which he has in it; in order to know which, it is neceſſary that the creditor ſhould ſee the leaſe, which, when produced, would ſhew that the eſtate would be defeated upon the tenant's becoming a bankrupt. The ſtock upon a farm may, indeed, induce a credit, but that will not govern the preſent caſe: therefore, the argument derived from the credit which the tenant is likely to get by being in poſſeſſion of the land, can have no weight in this caſe. It is next urged, that this is equivalent to *a proviſo that the leaſe ſhall not be ſeized under a commiſſion of bankrupt*; the defendant's counſel having firſt ſuppoſed the leaſe to be granted abſolutely for a certain term, and then that a ſubſe-

(1) In *Goring* v. *Warner*, a leſſee covenanted that neither he nor his executors, or adminiſtrators, would aſſign the term without the leſſor's conſent, with a power of re-entry to the leſſor in ſuch caſe, and that the leaſe ſhould be void; the leſſee died, his executor entered, and afterwards became a bankrupt, and the leaſe was aſſigned over by the aſſignees under his commiſſion for a valuable conſideration to the plaintiff, who brought his bill to be relieved againſt the proviſo, and to ſtay proceedings in an ejectment brought againſt him upon it; Lord Chancellor *Macclesfield* held clearly that the aſſignment, being done by the authority of a ſtatute, would ſuperſede any private agreement between the parties, and that the aſſignment by the aſſignees was no breach of the condition.

quent proviſo is added to that effect. Such a proviſo as that indeed would be bad, becauſe it would be repugnant to the grant itſelf: but here there is an expreſs limitation that the leaſe ſhall be void upon the fact of the leſſee's becoming a bankrupt. It is clear that the landlord, in this caſe, parted with the term on account of his perſonal confidence in his tenant; which is manifeſtly the caſe in all leaſes where clauſes againſt alienation are inſerted. The landlord, perhaps, relies on the tenant's honeſty; or he approves of his ſkill in farming, and he thinks he will take more care of the farm than another; and therefore he has a right to guard againſt the event of the eſtate's falling into the hands of any other perſon, who may not manage it ſo well as the original tenant. Suppoſe a leaſe were made for twenty-one years, on condition that the tenant ſhall ſo long continue to occupy the land perſonally; there could be no objection made to ſuch a condition, for the perſonal confidence is the very motive of granting the leaſe; and that is like the preſent caſe. This cannot be determined to be illegal on any principle which would not equally extend to leaſes which are every day granted in large towns, reſtraining the aſſignment of houſes to perſons exerciſing obnoxious trades: that not only diminiſhes the value of the particular houſe ſo aſſigned, but alſo the adjoining houſes, belonging probably to the ſame landlord. On the whole, The Court were unanimouſly of opinion, that (as this was a ſtipulation not againſt law, nor repugnant to any thing ſtated in the former part of the leaſe, but merely a ſtipulation againſt the act of the leſſee himſelf) the proviſo was valid; and the leaſe having been forfeited by the tenant's becoming a bankrupt, the leſſor of the plaintiff was entitled to recover.—Judgment for the plaintiff.

Dommet *et al.* v. Bedford and Woodham, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 684.

So where *A.* by will gave an annuity to *B.* directing that *B.*'s receipt only ſhould be a diſcharge for it, that *B.* ſhould not alienate it, and that if he did, it ſhould ceaſe and determine: *B.* became a bankrupt, and his commiſſioners aſſigned the annuity, with his other effects, to the aſſignees; it was held, that the annuity ceaſed.—This was a caſe ſent from the court of Chancery, for the opinion of the judges of B.R. and was as follows: *T. Bedford*, clerk, deceaſed, being ſeiſed of ſeveral freehold eſtates, duly made and publiſhed his laſt will, dated in July, 1782, and properly executed and atteſted, &c. and gave "to his niece, *A. Ireland*, one annuity of 30*l.* to be paid her by two equal half-yearly payments, during her natural life; the firſt payment to be made in ſix months after his deceaſe:" under this ſtrict direction, "that this annuity ſhall not be ſubject to the debts or control of her preſent or any future huſband; and that the ſame, from time to time, ſhall be paid to herſelf only; and that a receipt under her own hand, and no other, ſhall be a ſufficient diſcharge

diſcharge for the payment thereof; his intent being, that the ſaid annuity, or any part thereof, ſhall not on any account be alienated for the whole term of her life, or for any part of the ſaid term; and if the ſame ſhall be ſo alienated, the ſaid annuity ſhall immediately thereupon ceaſe and determine." He then gave to his nephew, *R. Tubb*, one annuity of 30*l.* during his natural life, payable in like manner as the former annuity, and with the ſame direction of being paid to himſelf only, and on his own receipt, and under the ſame reſtriction againſt alienating the ſame, or any part thereof. And he then gave to his nephew, *Bedford Woodham*, one annuity of 30*l.* during his life, payable in the like manner as the above annuities, with the ſame direction of being paid into his own hands only, and on his own receipt, and under the ſame reſtriction againſt alienating the ſame, or any part thereof. The deviſor charged his real and freehold eſtates with the payment of thoſe three annuities; and then deviſed his ſaid eſtates to his nephew, the defendant, *John Bedford*, and his heirs, ſubject to the annuities which were thereby and by his late brother, *John Bedford*, charged upon them. The deviſor died in 1789, leaving the ſaid *John Bedford* his heir at law. On the 16th of November, 1790, a joint commiſſion of bankrupt iſſued againſt the ſaid *Bedford Woodham*, together with *A. Davidſon*, his then copartner in trade; and they were duly found and declared bankrupts. The plaintiffs were choſen aſſignees of their eſtate and effects; and by indenture of bargain and ſale, dated the 30th of June, 1791, and which was duly inrolled, &c. made between the major part of the commiſſioners of the one part, and the plaintiffs of the other part, the commiſſioners bargained, ſold, and aſſigned, to the plaintiffs and their heirs and aſſigns (amongſt other things), the ſaid annuity of 30*l.* ſo given by the will of *J. Bedford* to *Bedford Woodham*, for and during the term of the life of *Bedford Woodham*, in truſt, nevertheleſs, and to and for the ſeveral uſes of the plaintiffs and all the other creditors of *Davidſon* and *Bedford Woodham*, who ſhould come in under the commiſſion. The plaintiffs exhibited their bill of complaint in the High Court of Chancery againſt *John Bedford* and *Bedford Woodham*, thereby praying (amongſt other things) that they might be declared intitled to the ſaid annuity or rent-charge of 30*l.* during the life of *Bedford Woodham*. *John Bedford*, by his anſwer, ſubmitted to the judgment of the court, whether the annuity was or was not according to the conditions and reſtrictions mentioned in the will determined by the bankruptcy of *Bedford Woodham*, and the execution of the aſſignment of his effects. And *Bedford Woodham*, by his anſwer, ſubmitted, that as he had not voluntarily alienated the ſaid annuity, he was ſtill intitled to receive the ſame from *John Bedford*. On the 10th of De-

cember, 1795, the cauſe was heard, when it was ordered, that a caſe ſhould be made for the opinion of the judges of this court, and that the queſtion be, Whether, "by ſuch bankruptcy, and bargain and ſale, the annuity of 30*l.* a-year in queſtion in this caſe ceaſed and determined?" And, after the caſe had been fully argued, the following certificate, ſigned by all the judges, was ſent to the Lord Chancellor: "This caſe has been argued before us by counſel: and we have conſidered it, and are of opinion, that by the bankruptcy of *Bedford Woodham*, and the indenture of bargain and ſale of the 30th June, 1791, the annuity of 30*l.* a-year in queſtion in this cauſe ceaſed and determined."

Howard *v.* Jemmet, Hil. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1368. 1 *Black. Rep.* 400.

The ſtatutes of bankrupts do not extend to effects which the bankrupt may have in *auter droit*; therefore, if an executor becomes bankrupt, the commiſſioners cannot ſeize the ſpecific effects of his teſtator; not even in money, which ſpecifically can be diſtinguiſhed and aſcertained to belong to ſuch teſtator, and not to the bankrupt.—The creditors of the teſtator cannot come in under the commiſſion againſt the executor in the uſual ſummary way, becauſe their demand muſt depend upon the account to be taken of the aſſets: but they may come in by a more ſolemn method, by a bill in equity, ſtating the converſion of the aſſets to the bankrupt's uſe: and, in ſuch caſe, the court will order any ſpecific aſſets to be diſtributed among the teſtator's creditors.

Winch *v.* Keeley, Hil. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 619.

So a debt due to a bankrupt, as truſtee for another, does not paſs under the aſſignment of his effects by his commiſſioners.—In *indebitatus aſſumpſit* for work and labour, money paid, laid out, and expended, money lent, and on an account ſtated. THE PLEAS were, 1ſt, *non aſſumpſit*; 2dly, that after the day of making the promiſes, &c. the plaintiff became a bankrupt, &c.; 3dly, a ſet-off. THE REPLICATION admitted the matters contained in the 2d plea to be true; and as to all the promiſes in the declaration mentioned, and all the ſums therein contained, except as to 73*l.* 12*s.* 9*d.* parcel, &c. the plaintiff acknowledged that he would not further proſecute. Then the replication proceeded to ſtate in ſubſtance, that there was due from the defendant to the plaintiff a ſum of 73*l.* 12*s.* 2*d.*; and that the ſaid plaintiff, before he became a bankrupt, was indebted to one *Joſeph Searle*, in 73*l.* 12*s.* 9*d.*: and, being ſo indebted, he, the ſaid plaintiff, afterwards, to wit, on ſuch a day, by a certain deed-poll, did bargain, ſell, aſſign, and transfer to the ſaid *Joſeph Searle*, the ſaid ſum of 73*l.* 12*s.* 9*d.* parcel of the money in the ſaid declaration mentioned. To this replication there was a general *demurrer* and joinder. This raiſed the queſtion, Whether this debt paſſed by the commiſſioners aſſignment? PER CUR. This action is brought in the name of the aſſignor of this bond; and therefore

it does not involve in it the queſtion, Whether *a choſe in action* may be ſo aſſigned as to give a legal title to the aſſignee. The plea only ſays, that the plaintiff is become a bankrupt, and that this debt is transferred to his aſſignees; the anſwer to that is, that this is a debt due in form to the plaintiff, but in ſubſtance to a third perſon; and therefore it is not ſuch a debt as paſſed under a commiſſion; if not, it is ſtill in the plaintiff, and he is intitled to maintain this action. The ſtatute of the 1 *Jac.* 1. c. 15. only ſays, that ſuch debts are to be aſſigned as are for the benefit of the bankrupt. This conſtruction was put upon the ſtatute ſoon after it paſſed, in a caſe in *March* 38; where it was held, that ſuch things as the bankrupt held as truſtee, did not paſs under the commiſſion. Here it muſt be taken, on theſe pleadings, that this debt did not paſs under the commiſſion; therefore it remained in the bankrupt, and he may maintain this action.—Judgment for the plaintiff.

Fox *et al. v.* Hanbury *et al.* Ea. Ter. 16 Geo. 3. B. R *Coxp.* 445.

If one of two partners become bankrupt, the ſolvent partner may, if for a valuable conſideration and without fraud, diſpoſe of the partnerſhip effects; and if he afterwards fail, the aſſignees, under a joint commiſſion againſt both, cannot maintain trover againſt the *bonâ fide* vendee of ſuch partnerſhip effects.—This was an action of trover brought by the plaintiffs, as aſſignees under a joint commiſſion of bankrupt taken out againſt *Barnes* and *Ridgate*, bankrupts, to recover the value of 4000 hogſheads of tobacco: the declaration conſiſted of two counts, one charging the trover and converſion to be *before* either of the bankrupts had committed an act of bankruptcy; the other charging it *ſubſequent* to an act of bankruptcy committed by both the bankrupts. *Barnes* and *Ridgate* were partners; *Ridgate* lived in England, and *Barnes* lived in Maryland. *Ridgate* was under very large acceptances, and much preſſed for money: to ſupport his credit, *Hanbury* agreed to pay, and actually did pay, ſeveral bills for him: but with a view to the better carrying on of the buſineſs, *Ridgate* was to go to Maryland, and *Barnes* was to come to England. *Hanbury* interpoſed his credit upon the confidence of conſignments of tobacco being made to him, which would be a pledge for the monies he advanced. *Ridgate* went to Maryland, and *Barnes* came to England.—Conſignments of tobacco were made by *Barnes* to *Hanbury*, before *Barnes* left Maryland; and there were other conſignments afterwards. Upon the 22d of Jan. 1773, *Barnes*, after returning to England, committed an act of bankruptcy, and afterwards publicly failed: then, and not before, the creditors ſet up *Ridgate*'s going to Maryland as an act of bankruptcy by him; and they took out a joint commiſſion againſt both: and the plaintiffs, in the capacity of aſſignees under the commiſſion, brought the preſent action. The jury,

on the trial, found *Ridgate* a bankrupt upon the 15th of July, 1772, the day on which he left London: no fraud or want of conſideration was fixed on *Hanbury*. But the plaintiffs inſiſted, that all the conſignments after the 15th of July, 1772, were void: the defendants inſiſted, that all the conſignments before the 22d of January, 1773, were good. There were conſignments after the 22d of January, 1773, which the defendants could not ſupport; and therefore, as to them, an account was neceſſarily to be taken of the value of the tobacco, which ſo came to the hands of the defendants, after making juſt allowances: that account was referred to an arbitrator: and the queſtion, Whether the plaintiffs were intitled in this action to recover the whole of the value of the conſignments made by *Barnes*, between the 15th of July, 1772, and the 22d of January, 1773, or a moiety thereof? was ſubmitted to the Court, and according to ſuch opinion ſuch conſignments are to ſtand or fall, and to be brought into or left out of the account by the arbitrator. The caſe was argued twice: after which, Lord Mansfield, Ch. J. delivered the opinion of the Court, in ſubſtance as follows: The ſingle queſtion is, Whether the act of the ſolvent trader, for a valuable conſideration, is good after an act of bankruptcy committed by his partner, without his knowledge, and without the leaſt colour or mixture of fraud? Whether the aſſignees, under a joint commiſſion againſt two partners, taken out after the bankruptcy of both, can, in ſuch a caſe, maintain an action of trover againſt a perſon in poſſeſſion of goods under a ſale or conſignment *bonâ fide*, for a valuable conſideration, and without any mixture of fraud, from one of the partners, who had not then committed an act of bankruptcy himſelf, but after an act of bankruptcy committed by the other partner?—An act of bankruptcy by one partner is to many purpoſes a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes, which avoid all the acts of a bankrupt from the day of his bankruptcy, and from the neceſſity of the thing, all his property being veſted in the aſſignees, who cannot carry on trade. In the caſe of *Hague* v. *Rolleſtone*, Hil. 8 *Geo.* 3. B. R. (1) it was held, that the ſtatutes concerning bankrupts made an *entire, not a partial avoidance* of the bankrupt's acts, as well in reſpect of his partner's moiety, as his own. But no caſe has been cited, where a ſecret act of bankruptcy by one partner has been held to avoid an honeſt conveyance of partnerſhip effects by the other; each has a power ſingly to diſpoſe of the whole of the partnerſhip effects. If partners diſſolve their partnerſhip, they who deal with either, without notice of ſuch diſſolution, have a right againſt both. After a diſſolution, by agreement, by an execution, or by a bank-

(1) See this caſe infra.

ruptcy, the partner out of poſſeſſion of the partnerſhip effects has the ſame lien on any new goods bought in, which he had upon the old: but ſuppoſing, that a ſecret act of bankruptcy by one partner is a complete diſſolution of the partnerſhip; and that from that moment the aſſignees and the ſolvent partner are to be conſidered as tenants in common of the partnerſhip effects: the queſtion will ſtill remain, Whether the plaintiffs have any right to recover in this action? This leads us to conſider, What right in law and juſtice one partner has againſt another, after a diſſolution of the partnerſhip?—It clearly is not to change the poſſeſſion, or to make an actual diviſion of ſpecific effects: one partner may be a creditor of the partnerſhip to ten times the value of all the effects: the other partner, in that caſe, can only have a right to an account of the partnerſhip, and to the balance due to him, if any, on that account. No perſon deriving under the partner can be in a better condition. His executor ſtands exactly in the ſame light. It is the very text of *Littleton*, In ſec. 321, he ſays, "If there be two tenants in common of "a perſonal chattel, and one dies, the executors ſhall hold and "occupy with the ſurvivor, as their teſtator did before he "died." If a creditor takes out execution againſt one partner, as in 1 *Salk.* 392. the vendee would be tenant in common: and in the caſe of *Skipp* v. *Harwood*, reported in 1 *Vezey*, 239. by the name of *Skip* v. *Weſt*, Lord *Hardwicke* ſays, "If a creditor of one partner takes out an execution "againſt the partnerſhip effects, he can only have the undi-"vided ſhare of his debtor; and muſt take it in the ſame "manner the debtor himſelf had it, and ſubject to the rights "of the other partner." The aſſignees, under a commiſſion of bankruptcy againſt one partner, muſt be in the ſame ſtate. They can only be tenants in common of an undivided moiety, ſubject to all the rights of the other partner: the principles explained in the laſt-mentioned caſe, and the ſtrong ſenſe upon which this propoſition is founded, that one partner can have no right againſt the other, but to what is due from him after making him all juſt allowances, induced me, without heſitation, to declare my opinion at the trial; that the conſignments, indorſed by *Barnes* before the 22d of Jan. 1773, the day *Barnes* became a bankrupt, could not be avoided by the plaintiffs, either for the whole or a moiety: this is now fully underſtood; and we are all clearly of opinion, that the action cannot be maintained. Suppoſing the indorſement by *Barnes*, of the bills of lading, not to bind the undivided moiety of the aſſignees, which is the utmoſt the plaintiffs can contend for, then this is an action of trover by one tenant in common againſt another, which cannot be: the text of *Littleton* ſays ſo; *Coke*'s Comment ſays ſo; the Adjudged Caſes ſay ſo; and there is no judgment or declaration to the contrary.

The

The text of *Littleton*, ſec. 323, is as follows: "But if two "be poſſeſſed of chattels, perſonal in common, and one take "the whole to himſelf, out of the poſſeſſion of the other; "the other has no remedy but to take this from him who "hath done the wrong, to occupy in common, &c. when he "can ſee his time, &c." Lord *Coke*, in his comment on this paſſage, 200, ſays, "If one tenant, in common, takes all "the chattels perſonal, the other has no remedy by action; "but he may take them again." So in *Brown* v. *Hedges*, Tr. 7 Ann. B. R. 1 *Salk.* 290. it was held, that "one joint "tenant, tenant in common or parcener, cannot bring trover "againſt another, becauſe the poſſeſſion of one is the poſſeſ-"ſion of both." The reaſon is anſwerable: There is no converſion. Upon theſe authorities we are of opinion, that the action cannot be maintained; and conſequently, that the conſignments prior to the 22d of Jan. 1773, are not to be brought into the arbitrators accounts.

Buckley, Aſſi. of Edm. Buckley a Bankrupt, v. Taylor, Tr. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 600.

If a trader, after committing an act of bankruptcy, take a ſhop, and agree to pay half a year's rent in advance, where, by the cuſtom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an aſſignment under the commiſſion, and before the year expired, may diſtrain the goods on the premiſes for half a year's rent; or if he buy the tenant's goods at the ſale under the commiſſion, he may retain the amount of the year's rent.—The aſſignee of the bankrupt brought this action againſt the defendant to recover 15*l.* for work and labour, goods ſold and delivered, money had and received, &c. The only circumſtances material to the queſtion were theſe: the bankrupt, who had been in the cotton trade, after the act of bankruptcy on which the commiſſion iſſued, &c. entered into an agreement with the defendant for the renting of a ſhop in St. Helen's, at the yearly rent of 30*l.* by which it was ſtipulated, that *Edmund Buckley* ſhould pay half a year's rent in advance. He entered on the 1ſt of May, 1787; and not long after a commiſſion of bankrupt iſſuing againſt him, under which the plaintiff was choſen his aſſignee, his goods were ſold upon the premiſes, on the 18th of October, 1787. At the ſale, the defendant bought goods to the amount of 46*l.* out of which he retained the ſum of 15*l.* for half a year's rent, to recover which, this action was brought. The defendant ſet up the agreement, and ſhewed a cuſtom in this part of the country, that for cottages, ſhops, &c. the half-year's rent ſhould be due on the day the tenant entered. On the trial of this cauſe, the jury found a verdict for the defendant. And a rule having been afterwards obtained, to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial granted, cauſe was accordingly ſhewn. PER CUR. The queſtion is not whether the bankrupt himſelf be liable to an action

action on this agreement, but whether the landlord has the remedy claimed *in rem* on the goods on theſe premiſes. It is admitted by the plaintiff's counſel, that if a year's rent were due in reſpect of the occupation of the tenant, the landlord would have had a right to diſtrain. Now, whether that rent were due or not, depends on the cuſtom of the country; and that is deciſive, for, on the trial, it was proved to be a common cuſtom in many parts of the kingdom, and particularly in Norfolk; and by that cuſtom half a year's rent became due the inſtant the tenant began to occupy. Therefore, the landlord's right of diſtreſs was well founded; and if ſo, he is juſtified in retaining this money.—Rule diſcharged.

Ridout *et al.* Aſſignees *v.* Brough, Tr. Ter. 14 Geo. 3. B.R. *Cowp.* 133.

And the ſtatutes of ſet-off extend to aſſignees under a commiſſion of bankruptcy.—This was aſſumpſit, 1ſt, for money had and received by the defendant *ſince* the bankruptcy, to the uſe of the aſſignees: the ſecond, third, and fourth counts were, for money paid, &c. money lent, &c. and work and labour done by the bankrupt *before* the bankruptcy, and aſſumpſit to the aſſignees. Fifth, an account ſtated with the plaintiffs of money due to them as aſſignees. The defendant PLEADED: firſt, Non-aſſumpſit, on which iſſue was joined. Secondly, A plea of ſet-off of 869*l.* to the whole declaration, for a judgment obtained againſt the bankrupt, for money lent and advanced, money had and received before the bankruptcy. Third, Another plea of ſet off for money lent and advanced, money laid out and expended, and goods ſold and delivered to the plaintiffs, as aſſignees, ſince the bankruptcy, and an account ſtated with them. To the ſecond and third pleas the plaintiffs demurred, and the defendant joined in demurrer. In ſupport of the demurrer, it was contended, FIRST, That both the pleas were bad, becauſe each went to the whole declaration; and if bad as to any one count, they were bad for the whole (1). SECONDLY; The ſtatutes of ſet-off do not extend, in any caſe, to aſſignees of a bankrupt (2). THE COURT (after argument) were clearly of opinion, that the defendant might ſet off a debt due to him from the bankrupt; for the aſſignees are the bankrupt: and they ſeemed to impeach the deciſion in 1 *Wils.* 155. "That the ſtatutes of ſet-off do not extend to aſſignees under a commiſſion of bankruptcy," as againſt the general principles of law, juſtice, and good ſenſe. BUT they were equally clear in the firſt point, that the laſt plea was bad, and the ſecond badly pleaded, being to the whole declaration: but they gave the defendant leave to amend his plea, upon payment of coſts and other terms.

(1) Lord Mancheſter *v.* Vale, 1 *Saund.* 28. Webb *v.* Martin, 1 *Lev.* 48. 2 *Saund.* 50.

(2) Ryall *v.* Larkin, 1 *Wils.* 155.

A broker

Grove *et al.* Aſſignees of Liotard, *v.* Dubois, Hil. Ter. 36 Geo. 3. B. R. 1 *Ter. Rep.* 112.

A broker, with a commiſſion *del credere*, may ſet off, under the *general iſſue*, a loſs upon a policy happening before a bankruptcy, to an action by the aſſignees of the bankrupt, for premiums upon various policies underwritten by him, and for which he has debited the broker.—This was an action for money had and received by the defendant, to and for the uſe of the bankrupt, before he became a bankrupt; and for money had and received to and for the uſe of the plaintiffs, as aſſignees; to which the defendant pleaded the general iſſue, *non aſſumpſit*; whereupon iſſue was joined. The defendant alſo gave a notice of ſet off for money had and received by the aſſignees for his uſe.—On the trial of this cauſe, the jury found a verdict for the plaintiffs, ſubject to the opinion of this Court, on the following caſe: "The "bankrupt, *Liotard*, being an underwriter, ſubſcribed poli-"cies, filled up with the defendant's name, for his foreign "correſpondents, who were unknown to the bankrupt.—"Loſſes happened on the policies, before the bankruptcy of "*Liotard*; the defendant paid the amount of the loſſes to his "foreign correſpondents after ſuch bankruptcy.—The de-"fendant had a commiſſion, *del credere*, from his correſ-"pondents; was made debtor by the bankrupt for premiums; "and always retained the policies in his hands. The queſ-"tion for the opinion of the court was, Whether, under "the notice of ſet-off, or under any of the ſtatutes reſpecting "bankrupts, the defendant be entitled to ſet off this account "with *Liotard?*" PER CUR. Lord *Mansfield*, Ch. J. The whole turns on the nature of a commiſſion *del credere*: Which is an abſolute engagement to the principal from the broker, and makes him liable in the firſt inſtance. There is no occaſion for the principal to communicate with the underwriter, though the law allows the principal, for his benefit, to reſort to him as a collateral ſecurity. But the broker is liable at all events. *Buller*, J. Many actions have been brought againſt brokers with commiſſions *del credere*; and I never heard an enquiry made in ſuch caſes, whether there had been a previous demand upon the underwriter and refuſal: and I can venture to ſay, that ſuch is not the practice. It makes no difference at the time of making the policy, whether the underwriter knew the principal or not: he truſted to the broker; the credit was given to him, and not to the other.—The notice of ſet-off is bad: but this loſs may be proved, and ſet off under the general iſſue of the 28th ſection of the 5 *Geo.* 2. c. 30. The words of that ſection are, "That where it ſhall appear to the commiſſioners, or "the major part of them, that there hath been mutual credit "given by the bankrupt and any other perſon, or mutual "debts between the bankrupt and any other perſon, at any "time before ſuch perſon became bankrupt, the ſaid commiſ-"ſioners,

" ſioners, &c. ſhall ſtate the account between them, and " one debt may be ſet againſt another, and what ſhall " appear to be due on either ſide on the balance of ſuch ac- " count, *and no more, ſhall be claimed*, and paid on either " ſide reſpectively." Therefore we ſee by this ſection of the ſtatute, that the aſſignees could legally *claim* no more than the balance upon the account between the parties. Judgment for the defendant (1).

Dobſon *et al.* Aſſignees of Patrick, *v.* E. Lockhart, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 133.

So where there was an action of *aſſumpſit* for goods ſold and delivered by the bankrupt, againſt the defendant as a ſurviving partner; the defendant PLEADED, 1ſt, the general iſſue; 2dly, a ſet-off on a bond given by the bankrupt to the defendant, and *G. Lockhart*, his late partner; 3dly, (another plea, not ſupported in fact); 4thly, that on the 11th of October, 1788, the bankrupt and the defendant became bound to *S. Nicholſon*, and two other perſons, in 900*l.* conditioned to pay 450*l.* with lawful intereſt on demand; that on the 16th of May, 1789, the bankrupt, one *Foſter*, and the defendant, became bound to *J. Wakefield* and two other perſons in 1000*l.*, conditioned to pay 500*l.* and intereſt, on the 1ſt of June, 1789; that thoſe two bonds were executed by the defendant as a ſurety for the bankrupt, and for his debt only; that before the bankruptcy, viz. on the 21ſt of May, 1789, the bankrupt became bound to *G. Lockhart* and the defendant in 1,400*l.*, conditioned to pay 700*l.* on the 13th of February, 1790; that the laſt bond was given for the purpoſe of indemnifying the defendant againſt the two former, and that the name of *G. Lockhart* was uſed merely as a truſtee for the defendant; that afterwards, and after *Patrick* became a bankrupt, on the 14th of December, 1789, the defendant was obliged to pay *Nicholſon*, and Co. 470*l.* on the firſt bond, and *Wakefield*, and Co. 236*l.* 17*s.* on the ſecond bond; that thoſe two ſums are ſtill due to the defendant, and exceed the money due to the plaintiffs on the promiſes mentioned in the declaration, and that the defendant would ſet them off againſt the demand of the plaintiffs, &c.; 5thly, (after ſtating the two firſt bonds as in the laſt plea, and that the defendant was merely a ſurety, &c.) that before the bankruptcy of *Patrick*, to wit, on the 21ſt of May, 1789, *it was agreed between the defendant and the bankrupt, that, in order to indemnify the defendant againſt theſe two bonds, the latter ſhould become bound to the former in* 1,400l. *conditioned to pay* 700l. *with intereſt, on the* 13*th of February*, 1790; *and as a further indemnity, that the defendant ſhould retain and keep ſuch money, not exceeding the money to be ſecured by the laſt bond, as ſhould at any time be due from*

(1) *Vid. Bize* v. *Dickaſon et al.* Aſſignees of *Barkenſhaw*, in vol. i. p. 271.

G. L.

G. L. *and the defendant to the bankrupt, in reſpect of any dealings between them in trade, until the two firſt bonds ſhould be ſatisfied; and that the defendant ſhould, out of the money which ſhould be due from* G. L. *and himſelf to the bankrupt, retain and ſet off ſo much money, not exceeding the laſt bond, as he ſhould at any time pay on the two firſt bonds*; that the bankrupt accordingly executed ſuch bond for 1,400*l.* &c.; that after the bankruptcy, in December, 1789, the defendant was obliged to pay to *Nicholſon*, and Co., and to *Wakefield*, and Co. &c. (as in the laſt plea); that the money due from the defendant to the bankrupt on the promiſes in the declaration, was ſo due and owing to him for and on account of certain dealings between him and *G. L.* and the defendant in trade; and that the ſums paid by the defendant on the two firſt bonds exceeded the money due to the bankrupt, &c.; and that the defendant would ſet off, &c. REPLICATION to ſecond plea, that at the time of bringing the action, there was nothing due to the defendant on the bond, &c.: to the 4th and 5th pleas, that the bankrupt was not indebted to the defendant in manner and form, &c. On the trial, the facts, contained in the laſt plea, being proved, it was agreed that the plaintiff ſhould be nonſuited, with liberty to move to enter up a verdict for him, if the Court ſhould be of opinion that he was intitled to recover under theſe circumſtances. A rule was accordingly obtained in the laſt term, calling on the defendant to ſhew cauſe why the verdict ſhould not be entered for the plaintiff; and cauſe having been ſhewn againſt it, The Court ordered the judgment of nonſuit to be entered up. PER CUR. There is one ſhort ground, on which we cannot be miſtaken, in ſaying that the caſe is in favour of the defendant. This is an action for goods ſold and delivered by the bankrupt to the defendant; and the queſtion is, Whether the plaintiffs, who are the aſſignees of the bankrupt, have a right, under all the circumſtances of the caſe, to exact payment for the goods? The defendant had various tranſactions with the bankrupt; among others, he became ſecurity for him by bond, in two ſeveral ſums of money; and at the time of becoming ſuch ſecurity, the latter engaged that the defendant ſhould not be called upon to pay for the goods until he was indemnified againſt thoſe bonds: that agreement having been proved, there is no objection to it in point of law: it is a good defence to this action under the general iſſue, and the defendant need not plead it ſpecially, for the caſe falls within the ſtatute 5 *Geo.* 2. c. 30. ſ. 28. which enacts, that "where there have been either mutual credits or mutual debts, between the bankrupt and any other perſon, before the bankruptcy, the commiſſioners ſhall ſtate the account between them, and one debt may be ſet off againſt another; and what ſhall appear to be due

due on either ſide, on the balance of ſuch account, and no more, ſhall be claimed." It is true that, generally ſpeaking, a creditor of the bankrupt cannot prove any debt under the commiſſion that does not become due before the bankruptcy: but that is not like the preſent caſe: the queſtion here ariſes not on the ſet-off, but on the plaintiff's demand; and it muſt be conſidered in the ſame light as an action brought by the aſſignees to recover goods ſold by the bankrupt, he having given a day of payment: *if goods be ſold and twelve months' credit be given by the ſeller, he cannot maintain an action until that time be expired.* Now, in this caſe, the goods were ſold on the expreſs condition, that the defendant ſhould not pay for them till the bonds were diſcharged by the bankrupt; thoſe bonds were not diſcharged by him, but the defendant was obliged to ſatisfy them, and therefore the plaintiffs cannot maintain their action; for, according to the terms of the original contract, they have no cauſe of action. It has been argued, however, that the defendant could not, by virtue of this agreement, have a lien on a floating balance: whatever may be the general rule reſpecting ſuch a lien where there is no agreement, there is no reaſon why the parties may not, by expreſs agreement, make a lien on a floating balance; and here they have done ſo.

Atkinſon *et al. v.* Elliot *et al.* Mic. Ter. 38 Geo. 3 B. R. 7 *Ter. Rep.* 378.

Alſo a creditor may, on the event of his debtor becoming a bankrupt, retain money come to his hands, where mutual credit has been given; though his debt is not payable till a future day, and ſuch retainer is contrary to the agreement between the parties.—On the trial of this action the following caſe was reſerved for the opinion of the Court: The defendants, on the 2d of May, 1796, ſold to the bankrupt a parcel of goods, for 430*l.* at ſix months' credit, and on the 3d of the ſame month, they drew a bill on him, at ſix months' date, for the amount, which he accepted: on the 2d of September, 1796, the bankrupt alſo purchaſed, at ſix months' credit, of the defendants, another parcel of goods, for 230*l.* for which he gave the defendants his acceptance to their draught, dated the 6th of September, 1796, at ſix months' date: the firſt-mentioned bill became due on November 6, 1796, which the bankrupt was not able to pay; but, on the 9th of the ſame month, he gave the defendants a bill upon *Walpole*, and Co. for 100*l.* due the 11th of December, and on the following day (November 10) indorſed and gave the defendants another bill of exchange, accepted by *Bullock*, and Son, dated the 27th of October, 1796, at ſix weeks after date, for 500*l.* and the defendants gave him the following memorandum; *I promiſe to pay to Mr.* N. H. 170*l. when his bill on Meſſrs.* Bullock *and Son, is paid, which bill I received November* 10, 1796, *(ſigned)* E. Elliot, *and Co. Bill dated October* 27, *at ſix weeks, for* 500*l.*: it was not in contemplation

plation of either party to do more than take up the firſt-mentioned acceptance of the bankrupt, with the bill of *Bullock*, and Son; and, therefore, *after payment of what was due on that acceptance*, ſo given as aforeſaid, for the firſt-mentioned parcel of goods, *the reſidue was to be returned to the bankrupt:* the acceptances by *Bullock*, and Son, for the 500*l.* and alſo the bill on *Walpole*, and Co. for 100*l.* were paid on the 11th of December, 1796: on the 13th of December, 1796, a commiſſion of bankrupt iſſued againſt *N. H.* who was duly declared a bankrupt, and the plaintiffs were choſen aſſignees of his eſtate and effects; *they immediately applied to the defendants for payment of the* 170*l. that had been overpaid in the ſaid bill for* 500*l.* on *Bullock* and Son, purſuant to their undertaking above ſtated, *when* they objected to do it, *alleging* that they then held *N. H.*'s acceptance for 230*l.* above mentioned, and they claimed a right to retain the ſaid 170*l.* in part of payment of the ſame, though it did not become due and payable till the 9th of March following, when the ſix months' credit for the goods ſold to *Hodgſon* (which was their uſual credit, and cuſtomary mode of dealing) expired. THE QUESTION was, Whether the defendants were intitled to retain the 170*l.*? PER CUR. The ſtatute 5 *Geo.* 2. c. 30. ſ. 28. enacts, that where there are either *mutual credit* or *mutual debts* between the bankrupt and any other perſon, one debt may be ſet off againſt another, and only the balance claimed." Now, in uſing theſe words, the legiſlature muſt have intended ſomething more than would have been expreſſed by *mutual debts* only: where there is a truſt between both parties there is a mutual credit: juſtice alſo requires that the whole account on both ſides ſhould be ſtated, and that the balance ſhould be the only thing to conſtitute the debt. Here it has been objected, that the defendants cannot ſet off the 170*l.* becauſe it is contrary to their expreſs agreement: but conſider that the bankrupt, by his agreement, was bound to pay his acceptance for 230*l.* at a future day, but that his bankruptcy diſabled him: that was a credit on one ſide; and credit was conſtituted on the other by giving a bill which became due at a ſubſequent time. It is clearly, therefore, a caſe of mutual credit, and it is juſt that one demand ſhould be ſet off againſt another.—*Poſtea* to the defendants.

Tooke *v.* Hollingworth *et al.* Aſſignees of Daniel, Ea Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 215.

If a trader become a bankrupt, being under acceptances to a large amount, in favour of another; and that perſon, in whoſe favour the bills have been accepted (not knowing of the bankruptcy) ſend a parcel of goods, for the ſpecific purpoſe of enabling the bankrupt to diſcharge the acceptances, which parcel is taken by the aſſignees; the perſon who ſo ſent ſuch goods having paid the bankrupt's acceptances, may recover back the goods ſo ſent after the bankruptcy;

ruptcy; on the ground that they were ſent for the particular purpoſe of paying thoſe acceptances, and that, as that purpoſe was not anſwered, the property in the goods, &c. remained in him.—This was a ſpecial verdict, in an action of trover for three bills of exchange, and a certain quantity of guineas. "Two years before the bankruptcy of *Daniel*, *it was agreed between the plaintiff*, a merchant reſiding at Manchester, and *Daniel*, then of London, goldſmith, *that the latter ſhould purchaſe of the former all the light gold coin of this realm, which the plaintiff ſhould ſend from Manchester to* Daniel, *in London*, at a certain ſtated price to be paid by *Daniel*, to wit, at the rate of 20*s.* 11*d.* for each guinea; *and that the plaintiff ſhould, from time to time, draw bills of exchange upon* Daniel, *for the money due to the plaintiff upon ſuch ſale of the light gold*, which bills ſhould be made payable at the end of two months from the reſpective dates thereof; *and that* Daniel *would alſo, from time to time, accept other bills of exchange, drawn by the plaintiff for his own convenience; but in ſuch caſe, the plaintiff ſhould remit value to* Daniel, *to the amount of ſuch acceptances, to anſwer together with the light gold for the different bills ſo drawn on* Daniel; by reaſon of which agreement, an account ſubſiſted between them, upon which, at the time of the bankruptcy of *Daniel*, hereinafter mentioned, *Daniel* was under acceptances for the plaintiff, in the courſe of their dealings, under the contract, to the amount of 873*l.* 7*s.* 6*d.* which ſum exceeded the value of all the gold and bills remitted by the plaintiff to *Daniel*, including the gold and bills in the declaration mentioned. Independently and excluſively of the ſaid acceptances, upon the balance of the ſaid account, *Daniel*, at the time of his bankruptcy, was indebted to the plaintiff in 531*l.* 7*s.* 7*d.*; and none of the bills ſo accepted by *Daniel*, for the plaintiff, at the time of the ſending of the money and three bills of exchange hereafter-mentioned, were due or payable. *The plaintiff being poſſeſſed of the three bills of exchange in the declaration mentioned* (the ſame being then unpaid, and of the value, &c. therein-mentioned), *and alſo of the two hundred and thirteen light guineas, and nineteen light half-guineas*, as of his own bills of exchange and monies, *in purſuance of the ſaid agreement ſo made with* Daniel. *and in order to enable him to pay the ſaid bills ſo accepted by him for the plaintiff, when they ſhould become due (and being then wholly ignorant of* Daniel's *being a bankrupt, as hereafter is mentioned), late in the evening of the* 19*th of July*, 1791, *ſent by the mail-coach at Manchester, which goes from thence to London, the ſaid bills and monies in the declaration mentioned, in a box directed for* Daniel, *and paid the carriage thereof*; which bills ſet out from Manchester for London early in the morning of the 20th of July, and the monies were then and

there partly cut and partly uncut; and the plaintiff, on the ſame day, by the ſame mail, alſo ſent a letter addreſſed to *Daniel*, in which he adviſed *Daniel*, that he had ſent to him the money and bills mentioned in the declaration, and tranſmitted to him an account of ſome light gold and bills which he had ſent on a former day, and alſo an account of the bills drawn by the plaintiff on *Daniel* (in number ſix) ſince his laſt letter, a few days before. None of the drafts ſo adviſed to be drawn, upon *Daniel*, by this letter, were ever accepted by him. The letter and box containing the three bills of exchange and monies, afterwards, on the 21ſt of July, were delivered to one *Joſeph Heathcote* (the meſſenger under the commiſſion) at *Daniel*'s houſe in London, the meſſenger having been in poſſeſſion, from the 19th of July, of the houſe, and of the goods, and effects, of *Daniel:* and the meſſenger paid the porterage for the ſame. The verdict then ſtated, that *Daniel had committed an act of bankruptcy on the 6th of July*, 1791, *by abſconding*; *that the commiſſion iſſued on the 19th of July, on which day, at three o'clock in the afternoon*, Daniel *was declared a bankrupt*; *that on the 30th of July, the aſſignment was made to the defendants*; *after which the meſſenger delivered the bills and guineas to the defendants*, who, at the time within-mentioned, as ſuch aſſignees, &c. *refuſed to deliver the ſame upon demand to the plaintiff*, and converted, &c. After the commiſſion iſſued, and before any of the bills drawn by the plaintiff and accepted by *Daniel* were paid by *Daniel*, or by the defendants, or preſented to them for payment, and before the converſion above ſtated, the plaintiff paid the amount of them to the ſeveral holders: and *Daniel*'s eſtate was thereby wholly exonerated therefrom. And the plaintiff was wholly ignorant of *Daniel*'s bankruptcy until after the delivery of the bills and money to the defendants. But whether, &c." This caſe was very elaborately argued on three ſeveral days, and as the deciſion is of conſiderable importance, and Mr. Juſtice BULLER differed from the other judges, it will be neceſſary to ſtate the opinions of the judges at ſome length. Lord KENYON, Ch. J. There are various caſes in which the ſeparate juriſdictions of courts of law and equity muſt be kept diſtinct; it being for the intereſt of the public, and the forwarding of juſtice, in a variety of caſes that might be put, that they ſhould not be blended: but in the determination of this caſe there can be no difference between the rule which ought to prevail in courts of law and equity; for *equity will go no further than the law.* It appears by the verdict, that the plaintiff and *Daniel* had particular dealings, not general ones, but confined to one object: thoſe parties having agreed that *Daniel* ſhould accept bills drawn by the plaintiff, who was, from time to time, to remit

remit light guineas and bills, to anſwer thoſe drafts; and whenever the account was to be made up, the debtor and creditor ſide could only conſiſt on one ſide of bills drawn by the plaintiff, and on the other of money and bills (money's worth) to anſwer thoſe drafts. This being the agreement of the parties, they proceeded in the execution of it for a ſeries of time, until at laſt that moment arrived which gave riſe to the preſent action. The verdict then ſets forth, that on the 19th of July, about three o'clock in the afternoon, *Daniel* was declared a bankrupt on an antecedent act of bankruptcy; and that afterwards, at a late hour on the ſame evening, the plaintiff, being ignorant of the bankruptcy, ſent the property, which is the ſubject-matter of this cauſe, in a waggon from Mancheſter to London, he paying for the carriage of the goods to London. It alſo appears, that the plaintiff had drawn bills on the bankrupt, to a conſiderable amount, but the days of payment not being arrived when the bankruptcy happened, they were not proved under the commiſſion, but were afterwards paid by the plaintiff. And *the queſtion is, Whether the plaintiff, who has paid the amount of the bills, can recover, in this form of action, the property ſent in order to ſatisfy them?* This is an action of trover; and various queſtions have been agitated at the bar: one of them is, Whether the goods, which are the ſubject of diſpute, can (taking all the circumſtances of the caſe as they then ſtood) be conſidered to have been ſent under the then ſubſiſting agreement? but my opinion will not proceed upon that point. It never yet has been decided, *Whether or not a perſon who, acting under a previous agreement, ſends goods to another againſt whom a commiſſion of bankrupt has been iſſued at the time, and who is not only an inſolvent perſon, but diſabled by the laws of his country from dealing at all, can recover thoſe goods again, under an idea that the ſituation of that other, with whom he meant to deal, was ſo altered, that it could not be conſidered to be a contract with him?* If the purchaſer were dead at the time when the goods arrived, muſt they go to the executor. And other caſes of the ſame kind might be put, which would conſiderably diſtreſs the argument, in the affirmative of the propoſition, that the aſſignees ſhould take theſe goods, although the vendee were a bankrupt when they were ſent. It may be proper to diſcuſs theſe queſtions when they ariſe; but I will now forbear entering into a diſcuſſion of that which appears to be an arduous taſk, becauſe it is not neceſſary for the determination of the preſent caſe. I accede to that argument, which aſſerted that theſe goods were ſent for a ſpecial purpoſe. The caſe of a factor has been ſo frequently decided, and ſo much taken for granted for a ſeries of years paſt, that it muſt now be con-

ſidered to be at reſt. *If goods be ſent to a factor to be diſpoſed of, who afterwards becomes a bankrupt, and the goods remain diſtinguiſhable from the general maſs of his property, the principal may recover the goods in ſpecie, and is not driven to the neceſſity of proving his debt under the commiſſion of bankrupt; nay, if the goods be ſold and reduced to money, provided that money be in ſeparate bags, and diſtinguiſhable from the factor's other property, the law is the ſame.* Then, taking that as an incontrovertible point, it goes a great way to decide this caſe: for here all the dealings between theſe parties reſpected the accepting of the bills, and the ſending of money, or money's worth, to anſwer thoſe bills when they ſhould become due. There was no general trade between the parties; no ſending of goods to which any of the funds were to be applied: but all the goods were ſent for the ſpecial purpoſe of paying the acceptances. That is the general ſtate of the agreement; and that is expreſsly found by the jury. The verdict then ſtates, that the two hundred and thirteen light guineas, and nineteen light half-guineas, together with the ſeveral bills mentioned in the declaration, were ſent by the plaintiff to *Daniel*, in purſuance of the agreement, in order to enable *Daniel* to diſcharge the other bills accepted by him, when they ſhould become due. Then, are not theſe to be applied to this particular purpoſe? Does not this come within the caſe *Ex parte Dumas*, 2 *Vez.* 582. and 1 *Atk.* 232. (1) where there was an appropriation for a particular purpoſe, by the ſignature of the letter G.? That caſe cannot be diſtinguiſhed from the preſent, by ſaying that the property in queſtion was ſent to *Daniel* for a general purpoſe. They did, indeed, conſtitute the general items of a particular account: but this was as much for a particular purpoſe as that was in the caſe of *Dumas*, becauſe all the items here, on one ſide of the account, were the drawing of bills, by the plaintiff, on *Daniel*; and on the other, the ſending of money to enable the latter to ſatisfy thoſe bills: and if *Daniel* had applied the money, or the money's worth, to any other purpoſe, he would have exceeded the limits of

(1) "There *Dumas* and others (the petitioners), who were merchants at Paris, and who had dealings with the *Jullians*, merchants in London, drew ſeveral bills on *Jullians* amounting to 1,115*l.* undertaking to make remittances in order to pay the bills, and deſiring the *Jullians*, at the ſame time, to open a new account for theſe bills under the letter G (alluding to another houſe of the petitioners at Cadiz), and to keep this account ſeparate and diſtinct from their own. The petitioners accordingly remitted ſeveral bills drawn on merchants in London, of the value of 1,146*l.* The *Jullians* became bankrupts, and two days afterwards they got ſome of theſe remittances, amounting to 566*l.*, diſcounted. *Dumas*, and Co petitioned the Lord Chancellor to have the remittances re-delivered to them, inſiſting that they were ſent to the *Jullians* for a ſpecific purpoſe, and were not liable to be applied to any other; and on this ground Lord Chancellor *Hardwicke* ordered thoſe which remained in ſpecie, not diſcounted, to be delivered up to the petitioners.

his

his contract. This caſe, then, cannot be diſtinguiſhed in principle from that of *Dumas*, and from the caſe of a factor. I am, therefore, bound to ſay, that this property remaining in ſpecie, not blended with the other effects of *Daniel*, and not having anſwered the particular purpoſe for which it was ſent, the caſe is with the plaintiff, who has a right to recover back the goods, he having ſince paid the bills to diſcharge which thoſe goods were ſent. In *Harman* v. *Fiſher*, *Cowper* 125. (1), Lord *Mansfield* alluded to the doctrine in *Atkyn* v. *Barwick*, that the vendees, who were become inſolvent, might refuſe to accept the goods: ſo here, the bankrupt acting as an honeſt man, might have ſaid to the plaintiff, that his circumſtances were ſo altered ſince the goods were ſent, that he ought not to receive them. But, without agitating that point, I am of opinion, for the reaſons before given, that the plaintiff is intitled to recover. ASHHURST, J. It muſt be admitted, that the honeſty and juſtice of the caſe are on the ſide of the plaintiff, inaſmuch as he has paid the holders of the ſeveral bills for which the bankrupt had become reſponſible, and has conſequently exonerated the bankrupt's eſtate from the payment of them. It ſeems equally clear, that the plaintiff would be intitled to redreſs in a court of equity. In ſuch a caſe, I ſhould be extremely ſorry that he ſhould be under the neceſſity of applying to that court for redreſs: but it ſeems to me, that he is not under any ſuch neceſſity, and that this court, without intrenching on any principles of law, may give the relief which he ſeeks in this form of action. *Bankruptcy leaves all things in the ſame ſituation in which they were at the time*; *and conſequently the aſſignees, who ſtand in the place of the bankrupt, cannot be intitled to any property, to which the bankrupt himſelf is not intitled.* Then conſider whether the goods, which are the ſubject of this action, can be taken to be the property of the bankrupt. *It is found by the verdict, that he became a bankrupt before the goods were ſent by the plaintiff; and the bankrupt being under an incapacity of acquiring property, the ſending of theſe goods to him muſt be conſidered as a nugatory act; at that time the bankrupt was a nonentity as to all contracts.* But, however that may be, the ground on which Lord *Kenyon* has conſidered this queſtion, is incontrovertible; and, by deciding on that ground, we may avoid the difficulties attending the firſt point. That ground is, that *where goods are ſent by one man to another, for a particular purpoſe, and they have not been (and cannot be) applied to that purpoſe, the former may recover them back again.* Now it appears on the record, that theſe goods were ſent for the expreſs purpoſe of paying the bankrupt's acceptances; and

(1) See this caſe, *infra*.

that purpoſe not having been anſwered, as it could not be, the plaintiff may retake his goods. On this ground, juſtice, honeſty, and law, coincide. The caſe *Ex parte Dumas* is directly in point; for there the Lord Chancellor could only have ordered the goods to be delivered in ſpecie, on the idea that the property remained with the petitioners.—BULLER, J. (*contra*) I have always thought it *highly injurious to the public, that different rules ſhould prevail in the different courts, on the ſame mercantile caſe.* It ſometimes, indeed, happens, that in queſtions of real property, courts of law find themſelves fettered with rules, from which they cannot depart, becauſe they are fixed and eſtabliſhed rules; though equity may interpoſe, not to contradict, but to correct, the ſtrict and rigid rules of law. But *in mercantile queſtions no diſtinction ought to prevail. The mercantile law of this country is founded on principles of equity; and when once a rule is eſtabliſhed, in that court, as a rule of property, it ought to be adopted in a court of law.* For this reaſon, courts of law, of late years, have ſaid that, even where the action is founded on a tort, they would diſcover ſome mode of defeating the plaintiff, unleſs his action were alſo founded on equity; and that though the property might, on legal grounds, be with the plaintiff, if there were any claim or charge by the defendant, they would not conſider the retaining of the goods as a converſion.—In conſidering this caſe, it ſeems to me that two queſtions will embrace all the circumſtances of it; Firſt, Whether or not there was any appropriation of theſe bills to the diſcharge of the acceptances made by the bankrupt? Secondly, What is the effect of an act of bankruptcy, in the ſtage in which it did happen in this caſe? On the firſt queſtion, no caſe directly in point has been produced, as having occurred either in a court of law or equity; for it ſeems to me, that that, *Ex parte Dumas*, is diſtinguiſhable from the preſent. There the account was opened by *Dumas* with *Jullian*, in the letter G.; therefore, as between thoſe parties, the account G. ſtood as the account of a different perſon, and a different correſpondent with *Jullian*. And Lord *Hardwicke* only ſaid, That as the parties had opened a particular account, as diſtinguiſhed from the general account, and which was to be conſidered as the account of a different correſpondent, the aſſignees of *Jullian* ſhould not blend that account with the general one, though they were both opened between the ſame parties. But that is by no means this caſe, for here was no particular account between theſe parties. If we were to ſay, that there was, it would equally extend to all caſes where a tradeſman dealt in one commodity only; and then the law would be thus; if a man dealt in tobacco to any extent, but in no other article, all his dealings in that article muſt be conſidered as dealings on a particular account

count: but it would be a general account, if his dealings were extended to ſeveral articles. But I cannot accede to ſuch a propoſition. According to my ideas, it muſt be one entire tranſaction, in order to make a particular account; as if *A.* by letter, order certain goods to be ſent to him, and incloſe in that letter bills to a given amount to pay for thoſe goods: that is one entire tranſaction, and it may be called an appropriation of thoſe bills to anſwer for the goods. But there is nothing of that kind here: theſe parties had not a particular tranſaction only in their contemplation, but they came to a general agreement, which was to form the baſis of a general dealing between them to any extent, and to be continued to an indefinite length of time. No doubt can be entertained reſpecting this agreement, for it is found in expreſs terms in the verdict; according to that, *Daniel* was to purchaſe of the plaintiff *all the light guineas*, which the latter ſhould ſend at a certain price; the plaintiff was to draw on *Daniel* for the money due upon ſuch ſales, the bills to be payable at the end of two months; and *Daniel* was alſo, from time to time, to accept other bills to be drawn by the plaintiff for his own convenience. This agreement was entered into in 1789, and the parties continued to act under it for two years and upwards, before the bankruptcy of *Daniel*. It was not ſtipulated that the parties, in their dealings, ſhould be confined to a certain quantity of light gold, or to any preciſe value: but the plaintiff was to ſend *all* the light guineas which he could collect. This, therefore, was a general agreement in the outſet; and, if ſo, I think it puts an end to the firſt part of this caſe. If this were not a general account, in what does the particularity conſiſt? Theſe two perſons continued to deal generally together, as far as they could extend their dealing, which excludes the idea of a particular account. Then the plaintiff muſt come in under *Daniel*'s commiſſion.—The next point to be conſidered is, the effect of the bankruptcy. And I think that ſome points have been made by the defendant's counſel, which have not been anſwered. They contended that when theſe goods came to the hands of the aſſignees, the property was veſted in them; and, if ſo, that nothing has happened ſince to diveſt it. This is an important part of the caſe; and, therefore, it is material to conſider, whether or not this property was veſted in the aſſignees. It has been held, that bankruptcy does not put an end to the contract: that was ſo ſtated by Lord *Kenyon* and myſelf, in *Ellis* v. *Hunt*; and that doctrine was not then new; for in *Haſwell* and others v. *Hunt* and others, aſſignees of *Lacey*, the ſame point was ruled. [Here Mr. J. *Buller* read the following note of this caſe; "In trover, the caſe was this: *Lacey* came to the plaintiffs, and bought a parcel of tobacco, to be paid for in ready money:

this was in the morning. He left orders, at his houſe, for receiving the tobacco, and the ſame day went to France to abſent himſelf from his creditors. After he was gone, the plaintiff's ſervant brought the tobacco to *Lacey*'s houſe, but had no orders to make any demand of the money, but only to deliver the goods. The queſtion was, Whether this was a complete ſale, ſo as to veſt the property in *Lacey*, or whether his bankruptcy, between the ſale and the delivery, was ſuch a fraud as avoided the ſale by non-payment of the money? Lord Ch. J. *Eyre* held, that the ſale was made complete by the act of the plaintiffs, who, by delivery of the goods, without demand of the money, veſted the property in *Lacey* by their own aſſent, as a complete ſale *ab initio*, without ready money; and the plaintiffs were non-ſuited. *G. Hall, E.* 12. *G. J. Burnet's M. S.*"] It ſeems then eſtabliſhed, that bankruptcy does not, at all events, put an end to the contracts of the bankrupt. After the bankruptcy, ſeveral contracts have been held to be binding on the bankrupt, though the creditors could not prove their debts under the commiſſion. It is, therefore, material to ſee, by the ſpecial verdict, what the agreement here was, and when it commenced. The foundation of this dealing was the agreement which was made two years before: the next ſtage, in the cauſe, was the acceptance of the bills, which had been previouſly drawn by the plaintiff on *Daniel*; at the time of the bankruptcy, *Daniel* was under acceptances, to the amount of more than 800*l*. It appears then, that a ſubſtantial part of the contract was carried into execution at the time of the bankruptcy; and the caſes I have mentioned, ſhew, that ſo far from what was afterwards done being void, it muſt be ſupported, in order to put the bankrupt on a fair footing with the plaintiff. Then, what was the ſituation of things at the time of the bankruptcy, for that is the material time to be attended to. The bankrupt was then under acceptances to the amount of 873*l*. and had only goods in his hands of the value of 531*l*. on this agreement. This property was then veſted in the aſſignees; and how could it be altered afterwards? Not by the bankrupt, becauſe all his effects were veſted in the hands of his aſſignees, for other purpoſes. And if the bankrupt could not diveſt this property, on what authority could the plaintiff do ſo? It has been contended, that the plaintiff might retake theſe goods after *Daniel*'s bankruptcy, in order to repay himſelf, more than the other creditors: but it cannot be permitted to him, to carve out for himſelf; the inſtant the bankruptcy happened, he ſtood in the ſame ſituation with the other creditors, over whom he could not gain a preference by his own acts. To hold that he could, would be to open a door to contrivance; particular creditors would carve out for themſelves, and leave very little

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for the reſt. If, therefore, at the time of the bankruptcy, the plaintiff could not have retaken theſe goods, I think that he cannot acquire a right to do ſo by any ſubſequent act of his own. It was well put by the defendant's counſel, that if the plaintiff had become a bankrupt after *Daniel* had accepted the bills, *Daniel*'s property would have been liable. Or, ſuppoſe *Daniel* had never obtained his certificate, he might be arreſted for this very ſum; and yet, it is ſaid that, in conſcience, he ought not to have taken theſe goods when they came. But it ſeems to me, that the conſcience of the caſe, at the time of the bankruptcy, was with the bankrupt; for he was then liable for theſe acceptances, and had not ſufficient in his hands to pay them. With regard to one part of the verdict, where it is found that the goods in queſtion were ſent by the plaintiff to *Daniel*, "in order to enable the latter to pay the bills accepted by him," and on which conſiderable reliance has been made in the courſe of the argument, thoſe words muſt not be taken by themſelves, but the whole agreement muſt be conſtrued together; and then it will appear, that they were not ſent to pay particular bills, but, on the general account which ſubſiſted between the parties, to pay all the bills which ſhould become due. Theſe were merely ſent to put them into caſh, in order that *Daniel* might repay himſelf. On the whole, therefore, it appears to me, that the juſtice of the caſe, conſidered at the time of the bankruptcy, is with the bankrupt, as well as the law of the caſe. Grose, J. This is one of thoſe unfavourable caſes under the bankrupt laws, where an endeavour is made to take the property of one man to pay the debts of another. There can be no doubt, therefore, about the juſtice of the caſe; for the plaintiff has paid the acceptances of the bankrupt, and the goods were only ſent to the bankrupt for the expreſs purpoſe of paying thoſe acceptances. The form of this action is trover; and the queſtion is, Whether the property of theſe goods be in the plaintiff or the defendants? There was a time when the excluſive property was clearly in the plaintiff: then, it may be aſked, has it ever been in the defendants, or, if it have, has it ever reveſted in the plaintiff. The defendants claim a right to retain theſe goods under an agreement; and in the argument, they conſidered this as a caſe of goods ſold and delivered under that agreement: if it really were a ſale of the goods under the former part of the agreement, I ſhould have conſiderable doubts about the caſe. But the words of the agreement are material to be conſidered; for I think that it conſiſts of two parts, and that the tranſaction on which this queſtion ariſes, grows out of one part of it only. The firſt part of the ageement was, that the bankrupt ſhould purchaſe of the plaintiff all the light gold that the latter ſhould ſend, and that the plaintiff ſhould draw bills

bills upon the bankrupt for the money due upon ſuch ſale, payable at the end of two months; the other part of the agreement was, that *Daniel* ſhould, from time to time, accept other bills drawn by the plaintiff for his own convenience, and that the plaintiff ſhould in ſuch caſe remit value to *Daniel* to the amount of ſuch acceptances, to anſwer, together with the light gold, for the different bills ſo drawn on *Daniel*. Then let us ſee whether what paſſed between theſe parties, under the firſt part of the agreement, can be conſidered as a caſe of goods ſold and delivered: if the gold is to be conſidered as goods ſold to the defendant, then bills were to be drawn by the plaintiff on the bankrupt, at two months: but in the verdict, not a word is ſaid about the bills being drawn for the light gold mentioned in the verdict.—The ſtate of the tranſaction, at the time of the bankruptcy, was this; there were acceptances by the bankrupt to the amount of 873*l.* over and above the gold and bills in queſtion. Now, the bankrupt being under ſuch acceptances, what was the probability of the tranſaction? Not that the plaintiff would ſell the gold, but that he would remit goods to diſcharge the acceptances. However, we are not left to determine on conjecture, or probabilities, on a ſpecial verdict; for it is expreſsly found as a fact, that the plaintiff, in order to enable the bankrupt to pay the acceptances when they ſhould become due, ſent the goods in queſtion; and it is alſo found, by the verdict, that thoſe bills were afterwards paid by the plaintiff. Then the purpoſe, for which the property in queſtion was ſent, was anſwered by the plaintiff himſelf; and that lets in the doctrine of Lord *Hardwicke*, in the caſe *Ex parte Dumas*, which I conſider immediately and directly in point. The inſtant the acceptances were taken up by the plaintiff, and the end for which the goods were ſent was anſwered, I conſider the property as reveſted in the plaintiff. But it has been aſked, When and how was this property reveſted in the plaintiff? I conſider it to have been a qualified and conditional property in the defendants; it was not veſted in them as an abſolute and unconditional property by the tranſmiſſion for a particular purpoſe. It was veſted in them only for a ſpecial purpoſe, and the inſtant that purpoſe was anſwered in another way, the property was reveſted in the plaintiff. Then it was aſked, What would have been the caſe had the acceptances been diſcharged by the bankrupt? I anſwer, that in ſuch a caſe the purpoſe for which they were ſent would have been anſwered by the bankrupt, and then the plaintiff would have had no property in the goods; then that property, which was before conditional, would have become abſolute in the bankrupt. This caſe comes directly within that of *Dumas*; for here the goods were ſent for a particular purpoſe; the property veſted in the defendants

defendants for a particular purpoſe; and as ſoon as that purpoſe could not be anſwered by the bankrupt, or was otherwiſe anſwered by the plaintiff, the property reveſted in the plaintiff; and therefore, I think, he may maintain this action of trover, to recover back his property, or the value of it.—*Per Curiam*, Judgment for the plaintiff.

A writ of error having been brought on the above judgment, it was twice argued in the Exchequer Chamber, and now the judgment of the Court was delivered by *Eyre*, Ch. J. as follows:—We are all of opinion, that this judgment ought to be affirmed. The right of the parties to the light gold and bills, which are the ſubject of this action, appears to depend principally upon the true conſtruction of the original agreement between *Tooke* and *Daniel*, made two years and upwards before the bankruptcy; that agreement conſiſted of two parts; one being a contract for a bargain and ſale of light gold by *Tooke* to *Daniel*, at a given price, to be paid for by bills of exchange, payable at two months; a ſimple and unembarraſſed tranſaction: the other being a contract, the effect of which was, that *Daniel* ſhould become *Tooke*'s banker; that he ſhould accept his bills, *Tooke* remitting value to the amount of ſuch acceptances, in bills and in light gold; that is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one ſelling and the other buying this article of light gold, and paying for it according to agreement; and had this been a caſe of that kind, the tranſaction would have had one complexion, and the argument upon it would have taken one courſe. But as they might act in that manner, ſo they might, upon the latter branch of the agreement, act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and ſale would enter no farther into their tranſactions upon that branch of the agreement, than merely as it went to fix the price at which the light gold, which ſhould be remitted from time to time, ſhould be carried to the account of *Tooke* as caſh, and be applied by *Daniel* as *Tooke*'s agent, in payment of the acceptances which he had made on the credit of *Tooke*: there would certainly be this mixture of bargain and ſale in any tranſactions which ſhould take place, even under the latter branch of the agreement, which, in other reſpects, would be the tranſaction of principal and factor, or principal and banker. But though there be this mixture, yet the caſe of the light gold cannot, in reſpect of that circumſtance, be ſeparated from the caſe of the bills: if *Daniel* were to be conſidered as factor or banker only, with reſpect to the bills which ſhould be remitted, he ought to be conſidered as banker or factor only, as to the light gold, with an agreement on his part to apply that light gold in payment of his acceptances, at the rate fixed in the former part of the agreement:

Hollingworth *et al. v.* Tooke, E. Ter. 35 Geo. 3. In the Ex. Ch. in Er. Ter. 35 Geo. 3. 2 *Hen. Black.* 501.

agreement: in a word, the bargain and ſale of the light gold, when conſidered under the ſecond branch of the agreement, as a remittance to pay the acceptances, is but one incident in the buſineſs of the principal character of factor or banker. Now if it can be eſtabliſhed, that *Tooke* and *Daniel* acted in the characters of principal and factor, their reſpective rights of property are very eaſily aſcertained: the general right of property would be in *Tooke*, the ſpecial right of property in *Daniel*, to enable him to execute the commiſſion with which *Tooke* had intruſted him; and he would alſo have a lien as againſt the general property of his principal for the balance of his account. In this way of conſidering the caſe, we may lay all this ſtory of the bankruptcy intirely out of the queſtion; for ſuppoſe *Daniel* had remained ſolvent, *Tooke* might at any time have paid him his balance, including any acceptances he might be under, and have withdrawn his effects out of *Daniel*'s hands, and there could have been no room for a queſtion between them, but merely as to the profit upon the light gold eſtimated at the price in the agreement: now that would depend upon the queſtion, Whether the light gold was ſold under the firſt part of the agreement, or whether it was to be conſidered as a mere article of remittance under the latter part? and according to my view of the caſe, I think that queſtion would be decided againſt *Daniel*. The aſſignees ſtanding in the place of *Daniel*, certainly can be in no better condition than *Daniel* himſelf: *they may be in a worſe condition, if many of the arguments which we heard at the bar, and of which we have an account in print, are well founded.* But theſe arguments take a very wide compaſs indeed; *they involve points* of conſiderable difficulty, upon which we have not formed an opinion, and upon which, perhaps, an opinion ought not to be formed, till the points come judicially and unavoidably before the Court. If that diſcuſſion can be avoided now, I think we do our duty by delivering an opinion upon narrower grounds. The ground I have taken is very diſtinctly marked, and very well inforced in the argument of one of the judges of the Court of King's-Bench (1). He concludes ſomewhat differently from me, but the groundwork is there. In my opinion, it may be ſuſtained, it ſteers clear of all difficulties, and it reaches the ſubſtantial juſtice of the caſe, becauſe it meets the only argument of conſiderable weight that ſtruck my mind, namely, the poſſibility that the bankrupt might have been the creditor, and the injuſtice which would have been done to his eſtate, if theſe effects could, on account of the bankruptcy, have been withdrawn from the maſs of his eſtate. Now as

(1) *Groſe*, J.

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the principle upon which my opinion proceeds is, that the bankrupt would have had a lien upon theſe effects for every thing for which his eſtate was creditor, that difficulty is removed. Upon this ground, I concur in thinking, that the judgment in this caſe ought to be affirmed, and it is the unanimous opinion of the Court that the judgment be affirmed.

Zinck *v.* Walker *et al.* Tr. Ter. 17 Geo. 3. C. B. 2 *Black. Rep.* 1154.

Alſo bills remitted to a factor or banker, while unpaid, are in the nature of goods unſold; and if the factor becomes bankrupt, muſt be returned to the principal, ſubject to ſuch lien as the factor may have thereon.—Thus, in an action upon the caſe, for money had and received to the plaintiffs uſe, a verdict was found for the plaintiffs, damages 257*l.* 15*s.* ſubject to the opinion of the Court, on the following caſe: The plaintiff, previous to November, 1776, employed the bankrupt, *Jenner*, as his agent or banker in London, and drew bills on him under an agreement to make remittances to anſwer the ſame when due: on the 8th of November, 1776, *Jenner* tranſmitted to the plaintiff an account current, including all the accepted bills then running on *Jenner*, up to November 30th, which amounted to 1,022*l.* 5*s.* 11*d.* and the whole balance due to *Jenner*, including thoſe bills, was 1,137*l.* 16*s.* 7*d.* On the 15th of November, the plaintiff ſent by the poſt to *Jenner* a bill for 150*l.* which was received the 18th, and became due the 18th of January. On the 16th of November another bill of 300*l.* was ſent by the plaintiff's order to *Jenner*, who received it the 19th, and the ſame became due on the 18th of January following, both which bills were paid in due time to the defendants. On the ſame 16th of November *Jenner* ſtopt payment, and became a bankrupt, by abſconding in the afternoon of the 18th of November, previous to which the 150*l.* bill came to hand—before the receipt of that bill, the plaintiff owed *Jenner* (on the bill account, and for a commiſſion of 6*s.* 8*d.* per cent. for tranſacting the ſaid bill buſineſs, and for intereſt of ſuch monies as happened to be in advance) a bill of 195*l.* 13*s.* 2*d.* The two bills were depoſited, on the 21ſt of November, by *Jenner*'s clerk, in the hands of *Staples*, and Co. who wrote them ſhort in *Jenner*'s book: no part of the acceptances of 1,022*l.* 5*s.* 11*d.* was diſcharged by *Jenner*, but the bills were afterwards paid by the plaintiff. On the whole account, the plaintiff charged the aſſignees with the ſaid 450*l.* the amount of the two bills, and with 3*l.* 8*s.* 2*d.* being the commiſſion charged for the payment of the 1,022*l.* 5*s.* 11*d.* (which was never paid) in all 453*l.* 8*s.* 2*d.* out of which, deducting the former bill of 195*l.* 13*s.* 2*d.* there remained the ſum of 257*l.* 15*s.* for which the verdict was given, ſubject to the opinion of the Court, whether the plaintiff had a right to recover it. Per Cur. The plaintiff ought to recover; though the bills were depoſited at the banker's, the bills are in the ſame ſituation

ation as if they had lain in *Jenner*'s ſcrutoire: it is clear that *Jenner* muſt be conſidered as a factor, and the bills (while unpaid) in the nature of goods unſold: when ſet ſhort in the banker's book, they are only conſidered as a depoſit, and the property is not altered: they are remitted by *Zinck* to *Jenner* for a particular purpoſe; firſt to diſcharge the balance of 195*l.* 13*s.* 2*d.* and the reſidue ſo far as it will extend to indemnify him againſt the acceptances of 1,022*l.* 5*s.* 11*d.* which he had made of *Zinck*'s bills; thus far *Jenner*, and his aſſignees who repreſent him, had a lien on the 450*l.* worth of bills remitted. But thoſe acceptances never being completed, or the bills paid, this reduces the lien to 195*l.* 13*s.* 2*d.* deducting thereout the commiſſion on the impoſed acceptances; and the balance, after diſcharging this lien, ought to be reſtored to the plaintiff, and it is recoverable in this action on the ſame principle, as money paid by miſtake.—*Poſtea* to the plaintiff.

Walker *et al.* Aſſ. of Bean *v.* Burnell *et al.* Sheriff of Middleſex, Hil. Ter. 20 Geo. 3. 1 *Doug.* 317. 3 *Ter. Rep.* 321.

If a bankrupt, after his certificate, and who trades again for himſelf, is left for ſeveral years in poſſeſſion of his houſe, houſhold-goods, and furniture, in order to aſſiſt in ſettling the affairs of the bankrupt's eſtate, the aſſignees repeatedly ſtating the goods, &c. in their accounts with the creditors as part of the eſtate, ſuch poſſeſſion does not veſt the goods in aſſignees under a ſecond commiſſion.—In this caſe, a commiſſion iſſued againſt *Bean*, in Auguſt, 1772, under which he obtained his certificate: he never removed from his houſe, or were the furniture, houſhold-goods, and plate, ſold or removed, but he remained in poſſeſſion of them; and after his certificate engaged in trade on his own account, and continued to trade till ſome time in the ſummer of 1779, and after the execution in queſtion: but though he traded for himſelf, he was continued in the houſe by his aſſignees, as an agent for them, in getting in and ſettling his affairs; and in all the ſtatements of the bankrupt's eſtate and effects, which they had laid before his creditors, at different times, down to March, 1779, the houſhold-goods in queſtion, which had been inventoried and valued immediately after the commiſſion iſſued, were included. In March, 1779, an action was commenced againſt *Bean* by two creditors, *Davis* and *Prothero*, who afterwards recovered a judgment, and ſued out a *fieri facias*. The execution came in in June, and about the ſame time the aſſignees had the goods again appraiſed, when they were valued at 353*l.*; the preſent action was commenced on the 11th of November, 1779, and two days after a ſecond commiſſion iſſued againſt *Bean*; the time of the act of bankruptcy, on which this ſecond commiſſion was grounded, did not appear: the preſent plaintiff proved a debt under it.—A queſtion was raiſed, Whether *Bean*'s poſſeſſion was not ſuch as intitled the aſſignees, under the ſecond commiſſion, to the goods, by virtue of

of the statute 21 *Jac.* 1.? Lord *Mansfield*, Ch. J. I am satisfied the case cannot be brought within the statute; many cases have arisen upon this act where the party left in possession might sell: but *Bean* had not, with the consent of the true owner, *any disposition* of the goods; he never pretended by any act of his, to dispose of them: if he had sold them, it would have been a breach of trust towards the plaintiffs. If I send my plate to a banker's, to be sure he may dispose of it; but he has not my permission or consent so to do: the owner here never consented that the bankrupt should have the disposition of the goods. *Willes*, J. With regard to the question on the statute, the words are, "If the bankrupts take upon them the sale or disposition as owners." *Bean* could not sell; but he was permitted to use the goods, as visible owner, for seven years. I shall not give a decisive opinion on the point, as I think the words in the statute, *order* and *disposition*, are very vague: it may come often before this Court: this does not seem to me to be like the case of plate sent to a banker's. *Abburst*, J. The statute certainly does not extend to every case of possession; not, for instance, to the case of a ready-furnished lodging. I look upon this in the very same light; *Bean* gave his service in settling and arranging the affairs of the estate in lieu of the rent. *Buller*, J. Questions of this kind have much more of fact than of law in them. The sort of possession, disposition, &c. are facts to be proved; and, for the consideration of the jury: the statute says, "whereof they shall be reputed owners." Here the bankrupt was not the reputed owner. Possession of the goods exposed for sale in a shop may be within the statutes; but possession of the furniture in a house, is no more evidence of a right to that furniture, than of a right to the house (1).

If a woman, *before* marriage, with the consent of her intended husband, conveys all her stock in trade and furniture to trustees, to enable her to carry on her business separately: and if the husband do not intermeddle with them, and there be no fraud, such effects (though fluctuating) are not liable to his debts.—In trover for goods, consisting of certain *stock in trade*, and *some furniture*, brought by the plaintiff, who was trustee for the bankrupt's wife, under her marriage settlement; by which deed, made previous to her marriage, after reciting "the marriage agreement between the parties, and that it had "been agreed that the wife's stock in trade, book debts, &c. "should be assigned to a trustee, in trust for her separate use and "disposal, and to the intent that she might carry on her trade "at her own risk and charges, and for her own separate and "exclusive benefit; she assigned to the plaintiff all her stock "in trade, and *other effects*, at, in, or about, and belonging to,

Jarman *v.* Woolloton *et al.* Assignees of Dovey, a Bankrupt, Ea. Ter. 10 Geo. 3. B.R. 3 *Ter. Rep.* 618.

(1) See the Case of *Collins* v. *Forbes* infra.

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" the apartments then in her occupation, being part of a " houſe, No. 78, in Welbeck-ſtreet, and alſo the book, and " other debts then due and owing, and thereafter to grow due " to her in the courſe of her buſineſs (of a milliner), and all " other *her* monies and effects in her ſaid trade; in truſt for " her ſeparate uſe," &c. There was no ſchedule of the goods annexed to the truſt-deed, or referred to therein, but the furniture in queſtion, and ſome other articles were contained in an inventory kept by the truſtee. For ſome time after the marriage the wife carried on her trade in Welbeck-ſtreet, ſeparately from her huſband, who was a linen-draper in Mary-le-bone-ſtreet; but latterly all her effects were removed to his houſe, and ſhe carried on her trade in a ſeparate apartment there. It appeared that the huſband paid the rent of the houſe, and had been at the expence of fitting up the ſhop, but there was contradictory evidence with reſpect to the manner of the wife's carrying on her buſineſs, whether for her own ſeparate uſe or not. *The jury found that it was not carried on ſeparately, and gave a verdict for the defendants as to the ſtock in trade, but found a verdict for the plaintiff for the furniture.* As to which latter, the defendants counſel moved to ſet aſide the verdict, and grant a new trial; on the ground that the truſt-deed did not protect this property; and if it did, that the aſſignees were entitled to keep poſſeſſion of it by virtue of the 21 *Jac.* 1. c. 19. PER CUR. Lord *Kenyon*, Ch. J. How far it would have been wiſe to have determined originally that the actual poſſeſſion ſhould be conſidered as deciſive evidence of all property, is a queſtion now too late to be diſcuſſed. Becauſe, as far back as the year-books (1), a chattel was limited to *A.* for life, and afterwards to *B.* In modern times, the courts, proceeding upon the ſame principle, have ſaid that perſonal property may be carved out in the ſame manner, and poſſeſſion given to one for life, and then over. Now in this caſe, before the bankrupt's marriage, a formal ſettlement was made of all the wife's property, with the conſent of both parties. It is true, indeed, that there was no enumeration of the articles of which her property conſiſted; and though that circumſtance was mentioned, with many others, by Lord *Mansfield*, in *Cadogan* v. *Kennet*, it does not follow that he would have been of a different opinion, if that circumſtance had not exiſted in that caſe: And I do not ſee what difference it could make; for a ſchedule conveys no information to the reſt of the world; if it were annexed to the ſettlement, its exiſtence would only be known to the parties intereſted in it; and therefore ſuch a tranſaction as this would be equally open to fraud, if there had been a ſchedule of this furniture as it is now. But the jury have,

(1) 37 *Hen.* 6. 30.

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by their verdict negatived fraud. And at the trial, the furniture claimed as the wife's property was fairly identified. Neither do I think that this caſe is affected by the 21 *Jac.* 1.: the words of that ſtatute furniſh an anſwer to the defendant's argument; for they are "that if any perſon ſhall become "bankrupt, and at ſuch time ſhall, by the conſent of the true "owner, have in his *poſſeſſion, order, and diſpoſition*, any "goods whereof he ſhall be the reputed owner, and take "upon him the *ſale, alteration, or diſpoſition*, as owner, &c. "the commiſſioners may ſell," &c. ASHHURST, J. Of the ſame opinion. BULLER, J. I think the verdict bears rather hard upon the wife, reſpecting the ſtock in trade: for the weight of evidence is, I think, againſt the defendants upon that point; and there is no pretence to ſay, that there was fraud in any part of the caſe. This motion has been made on two grounds; firſt, that there was no inventory or any ſpecific account, of the furnitute, annexed to the deed, ſo as to identify the wife's property; and 2dly, that the defendants are intitled to theſe goods under the 21 *Jac.* 1. c. 19. With reſpect to the latter point, it is ſufficient to ſay, that the huſband had not the *order and diſpoſition* of this property *with the conſent of the real owner.* The truſtee was the legal owner; and he gave no conſent for ſuch purpoſe: and the wife's poſſeſſion, in the manner proved at the trial, is no evidence of fraud; for ſhe was the agent for the truſtee. The objection ariſing from the want of a ſchedule annexed has no weight: if a ſchedule were neceſſary, here was an inventory, which will ſufficiently anſwer the purpoſe. But I think it is unneceſſary, conſidering the nature of the property; it was not always to remain in the ſame ſtate; the very object of the ſettlement was, that the wife ſhould ſell the goods and purchaſe others, in order to make a profit of them. GROSE, J. Concurred.—Rule diſcharged (1).

Stracey *et al.* *v.* Halſe *et al.* Tr. Ter. 20 Geo. 3. B.R. 2 *Doug.* 411.

If a perſon, ſubject to the payment of exciſe duties, who is in arrear for the ſingle duties, becomes a bankrupt, and is convicted after the aſſignment of his effects, the double duties are a lien upon the exciſeable commodities, utenſils, and materials, in the hands of his aſſignees; and the commiſſioners or magiſtrates may authoriſe the penalty to be levied upon all ſuch commodities, and all the materials, preparations, utenſils and veſſels for making thereof, *in the cuſtody of the bankrupt, or any perſon or perſons in truſt for him.* PER LORD MANSFIELD, Ch. J. The aſſignees do, by privity, ſtand in the place of the bankrupt; they are his repreſentatives; every equity that would affect him they are liable to; if he has pledged they muſt redeem;

(1) See the caſes of *Cadogan* v. *Kennett*; and *Haſelinton* v. *Gill*, under title BARON AND FEME.

and there cannot be a queſtion but that as to this ſort of lien, the aſſignees and the bankrupt are the ſame: it has been repeatedly ſo determined. *Attorney-General* v. *Sinclair*, and *Rex* v. *Fowler*, 2 *Doug.* 415, 416.

Auſtin v. Whitehead *et al.* Mic. Ter. 36 Geo 3. B. R. 6 *Ter. Rep.* 43.

But if the warrant be iſſued to levy the penalty *on the goods of the bankrupt generally*, it will be bad, and cannot juſtify the ſeizure of goods in the hands of the aſſignees.—In this caſe the exciſe officers had ſeized goods in the hands of aſſignees, by virtue of a warrant directed to them, authoriſing them to levy the penalty *on the goods and chattels* of the bankrupt generally; this being after the party had been declared bankrupt, and after the commiſſioners had executed a proviſional aſſignment of his eſtate: it was held by the court, that the proceedings by the exciſe officers could not be juſtified, inaſmuch as the warrant directed the ſeizure to be made of the goods of the bankrupt, when it was clear, that at the time of the ſeizure, the goods taken were not the goods of the bankrupt, but were diveſted out of him by the bankruptcy: and the proviſional aſſignment made under it. And the Court was alſo clear, that this warrant could not be ſupported on another ground, which was this: it directed the ſeizure of *all the bankrupt's* goods generally; whereas the Exciſe Laws, (ſee 28 *Geo.* 3. c. 37.) in this caſe, only give a lien on, and authoriſe the ſeizure of, thoſe goods that are liable to the duties, and the materials and utenſils for making the ſame.

Mace v. Cadell, Mic. Ter. 15 Geo. 3. B.R. *Cowp.* 232.

Property, of which the Bankrupt is the reputed owner, is veſted in the aſſignees by the Commiſſioners Aſſignment.] The enacting part of the ſtatute 21 *Jac.* 1. c. 19. ſ. 11. is not reſtrained by the preamble; but it extends to the goods of *a third perſon*, left in the hands of a trader, who afterwards becomes bankrupt, if he has been permitted to be in the poſſeſſion thereof, and to ſell the ſame as his own; as well as thoſe which were originally the bankrupt's property; for if the ſtatute meant to comprehend nothing more than is contained in the preamble, it means nothing at all; becauſe, even before the ſtatute, if a man had conveyed his own goods to a third perſon, and had kept the poſſeſſion, ſuch poſſeſſion would have been void, as being fraudulent, according to the doctrine in *Twyne*'s caſe (3 *Rep.* 81): at the ſame time the ſtatute does not extend to all poſſible caſes, where one man has another man's goods in his poſſeſſion: as for inſtance, it does not extend to the caſe of factors or goldſmiths, who have the poſſeſſion of other men's goods merely as truſtees, or under a bare authority, to ſell for the uſe of their principal: *the goods muſt in fact be ſuch as the party ſuffers the trader to ſell as his own.* Thus, in this caſe (which was trover for goods), a motion was made to ſet aſide a verdict which had been obtained by the plaintiff; and it appeared that the plaintiff

plaintiff *Mace*, kept a public-houſe, had a licence, and ſaid, ſhe was married to one *Penrice*: it was proved ſhe went to the exciſe-office, had his name entered in the books, with a note in the margin, *married*. *Penrice* had the licence, and continued in poſſeſſion of the houſe and goods from that time till he abſconded, and went to Pimlico, which was an act of bankruptcy: *Mace*, the plaintiff, firſt claimed the goods in queſtion, under a bill of ſale from *Penrice*, but afterwards as her own original property, and denied that *Penrice* and ſhe were married." Upon a queſtion, Whether this was within the ſtatute, THE COURT held, that it was, and that after a ſolemn declaration by the plaintiff that ſhe was married to *Penrice*, and that theſe were the goods of *Penrice*, in her right, ſhe ſhall never be allowed to ſay, that ſhe was not married to him, and that the goods were her ſole property.—PER CUR. Let the verdict be ſet aſide, and a nonſuit entered.

But, where a bankrupt is in poſſeſſion of the goods of another, *bonâ fide* with the conſent of the owner at the time of the bankruptcy, *for a ſpecific purpoſe*, beyond which he has not the right of diſpoſition or alteration, that is not ſuch a poſſeſſion as intitles the aſſignees to recover the value of them under the 21 *Jac.* 1. c. 19. ſ. 11.—On the trial of an action of trover brought to recover the value of ſome timber, a verdict was found for the plaintiffs, with liberty for the defendants to move to enter a nonſuit, in caſe the Court ſhould be of opinion that the action was not maintainable. The following were the principal facts: "The commiſ- "ſioners of the victualling-office, having occaſion to erect "a ſtage at Weevil, in Hampſhire, for the purpoſe of roll- "ing their barrels on board the ſhipping, publiſhed an ad- "vertiſement for carpenters to deliver in propoſals for doing "the work. *Forbes* and his partners were diſpoſed to un- "dertake the buſineſs, and to deliver in their propoſal, but "in as much as they were general merchants, and not car- "penters, and as there might have been difficulties in mak- "ing the contract in their own name, *Kent*, who was a "carpenter, agreed with *Forbes* and Co. to make the con- "tract in his name; and he was to have one-fourth of the "clear profit, and a guinea *per* week for his ſuperintend- "ance; and *Forbes* and Co. were to ſupply the timber, and "to have the reſidue of the profits. The contract was ac- "cordingly made between the commiſſioners and *Kent*; and "*Forbes* was one of *Kent*'s ſureties, which would not have "been allowed (as *Forbes* himſelf knew) according to the "uſual mode of government contracts, had he been known "to have had any concern in the contract, which *Kent* de- "clared he had not. The timber was bought by *Forbes* and "Co. and ſhipped by them in their own name, to be ſent

Collins *et al.* Aſſignees of Kent *v.* Forbes *et al.* Tr. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 316.

" to the yard at Weevil, where it was delivered as for " *Kent*'s uſe, and received by the king's officers as ſuch; " and they ſwore they ſhould not have received it on ac- " count of any other perſon; but that they ſhould not have " permitted even *Kent* to diſpoſe of it in any other manner " than for the work contracted for, except ſuch parts of it " as were found unfit for the intended purpoſe, becauſe they " conſidered it as delivered for the purpoſe of the contract. " *Kent* had informed the agent-victualler that *Forbes* was " the real contractor, but that was a ſecret between thoſe " perſons. Before the work was finiſhed, *Kent* became a " bankrupt, on which, *Forbes* got poſſeſſion of the timber; " to recover which, the preſent action was brought, on a " ſuppoſition that the bankrupt's creditors were intitled to it " under the 21 *Jac.* 1. c. 19." A rule having been obtained to ſhew cauſe why a nonſuit ſhould not be entered, cauſe was accordingly ſhewn. PER CURIAM. The queſtion turns on the mere law of the caſe under the act of parliament 21 *Jac.* 1. c. 19. Upon looking into the authorities, we are of opinion, that though the bankrupt had the *poſſeſſion* of the property, and the *apparent diſpoſition* of it, yet as there is no fraud in the caſe, either actual or conſtructive, and as the real *property is in the defendants*, the ſtatute does not operate upon it. The caſes of *Copeman* v. *Gallant*, 1 *Pr. Wms.* 314. and *Walker* v. *Burnell, et al.* (1) *H.* 20. *G.* 3. are ſtrong authorities on this point; in the preſent caſe there never was any *ſale* of the timber to *Kent*, nor any *general delivery, ſo as to give him the abſolute diſpoſition of it*; for it appeared in evidence that the ſtore-keepers in the yard would not have permitted even *Kent* to have ſold the timber to any other perſon, unleſs any part of it had been unfit to be uſed in performing the contract, as they conſidered that it was delivered only for the purpoſe of the contract. Therefore there could be no danger that *Kent*'s creditors would be induced to truſt him on the credit of that property, or as ſuppoſing it liable to their debts. The poſſeſſion which he had (as it appeared by the facts in the caſe) is ſomewhat ſimilar to that of a carpenter, who receives timber to convert it into a waggon, or of a taylor, to whom cloth is ſent for the purpoſe of being worked up. And it is a very different caſe from that of a perſon making a ſale of any part of his property, and yet continuing in poſſeſſion and taking upon him the diſpoſition of it with the conſent of the vendee; for, in ſuch caſe, as the *property was originally his*, and there never was any viſible alteration in it, it is a ſnare to induce perſons to give him credit, to which the vendee, by his neglect to obtain the poſſeſſion, lends his aſſiſtance,

(1) See p. 126 ſupra.

as he concurs in giving a falſe appearance to the tranſaction. But in the preſent caſe, this timber came into *Kent*'s poſſeſſion in the natural courſe of the tranſaction, in which there was no fraud either actual or conſtructive; for it appeared by the evidence that the timber was originally ſold to the defendants on their own account, and that the vendor did not know that the bankrupt had any concern in the tranſaction. Therefore, on the whole, we think that Judgment of non-ſuit muſt be entered.

Gordon *et al.* Aſſignees of Cameron *et al.* *v.* The Eaſt India Company, Ea. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 228.

But where it is clear that the bankrupt has not only the poſſeſſion, but the order and diſpoſition of the effects of a third perſon, ſuch a poſſeſſion falls within the ſtatute 21 *Jac.* 1. c. 19. ſ. 11.—On the trial of an action of aſſumpſit for money had and received to the uſe of *Cameron*, before his bankruptcy, and alſo for money had and received to the uſe of the plaintiffs, his aſſignees, ſince his bankruptcy, the jury found a verdict for the plaintiffs for 664*l.* 13*s.* 8*d.* ſubject to the opinion of the Court on the following caſe: On the 22d of Nov. 1793, *Cameron* was at Calcutta, in the Eaſt Indies, as chief officer of the Princeſs Amelia, in the ſervice of the Eaſt India Company, and a trader within the bankrupt laws; and being poſſeſſed of a ſum of 675*l.* he applied to *J. Taylor*, of that place, to receive the ſame, and to give him a bill of exchange for the amount upon his correſpondents in England, which *Taylor* agreed to do upon *Cameron*'s permitting him to ſhip in his (*Cameron*'s) name; and as his privilege, ſix bales of piece goods, the property of *Taylor*; which *Cameron* agreed to do. Thereupon *Taylor* gave *Cameron* a bill of exchange for 675*l.* thus: "*Dacca*, 23d November, 1793. For 675*l.* ſterling, twenty days after the final adjuſtment at the Eaſt India Houſe of the account, private trade of Mr. *J. Cameron*, chief officer of the Company's ſhip the Princeſs Amelia, in which are comprized ſix bales of goods, containing 395 pieces, the ſame being delivered in good condition, pleaſe to pay this my firſt of exchange (ſecond and third of the ſame tenor and date not being paid) to the order of the ſaid *J. Cameron*, the ſum of 675*l.* ſterling, value received, and place the ſame to the account as per advice, &c." Addreſſed to "Sir *Henry Fletcher*, Bart. *Evan Law*, *Edward Golding*, *William Taylor*, Eſqrs. London." In purſuance of the above agreement, *Taylor* ſhipped ſix bales of goods, his property, on board the ſaid ſhip, in the name, and as the privilege of *Cameron*. *Cameron*, by a deed poll under his hand and ſeal, dated the 22d of November, 1793, aſſigned to *Taylor*, the ſix bales, to hold the ſame, and the produce thereof, to *Taylor*, his executors, &c. to the uſe of *Cameron*, until the acceptance of the ſaid bill of exchange, and after the acceptance thereof, then to the uſe of *Taylor*, his executors, &c. In the deed poll there was a covenant on the part

of *Cameron*, under the penalty of 800*l.* to tranſport and convey the goods to London, on board the ſhip the Princeſs Amelia; and there, with all convenient ſpeed, after the arrival of the ſhip, to deliver the ſame into the Company's warehouſes, to be ſold at their ſale, at the riſk, and on the account of, *Taylor*. The aſſignment alſo contained a power of attorney from *Cameron*, authorizing Sir *Henry Fletcher*, &c. for the ſole uſe and benefit of *Taylor*, to receive from the Eaſt India Company, the money ariſing by the ſale of the ſix bales, and to give receipts for the ſame as in ſuch caſes is uſual. The ſix bales of goods arrived in England, in the ſhip Princeſs Amelia, *Cameron*, during ſuch voyage being chief officer thereof, and were delivered into the Eaſt India Company's warehouſe as part of the privilege of *Cameron*, and were ſold as ſuch in September and October, 1794, at the Company's ſales of private trade; they produced the net ſum of 664*l.* 13*s.* 8*d.* which ſum was placed to the credit of *Cameron*, and now remains in the hands of the company. The bill of exchange given by *Taylor*, for the purchaſe of the goods was duly accepted, and was indorſed and paid away, by *J. Cameron* to Mr. *E. Cameron*, before the bankruptcy of the former; but has been refuſed payment by the acceptor, *W. Taylor*, in conſequence of the proceeds of the goods not having been paid to him. *Cameron* became a bankrupt in November, 1794, and on the 27th of that month, a commiſſion of bankrupt was duly iſſued againſt him. The plaintiffs were choſen aſſignees. *William Taylor* applied, on the 5th of January, 1795, at the proper office at the India Houſe, for an account of the ſale of the goods, and claimed to receive the ſame under the ſaid aſſignment and letter of attorney; but the meſſenger under the commiſſion of bankrupt againſt *Cameron*, having in November, 1794, given notice to the Eaſt India Company of ſuch bankruptcy, they refuſed to account and pay for the goods to *W. Taylor*. *W. Taylor* could not have got the produce of the goods from the Eaſt India Company before January, 1795; nor could any alteration have been made in the ſhip's books, or at the India Houſe, before the bankruptcy, as to the name of the perſon on whoſe account the goods were ſhipped, received, warehouſed, and ſold. The India Company never pay the produce of the goods which have been aſſigned, without a power of attorney from the aſſignor, authoriſing the perſon ſo appointed, to receive the ſame; and if the party aſſigning die, or become bankrupt, the Company do not afterwards pay to ſuch aſſignee, without being indemnified. The officers of the Eaſt India Company do, notwithſtanding the prohibitory orders of the Company, frequently aſſign the benefit of their privilege, by aſſignments ſimilar to that made by the bankrupt in the preſent

preſent caſe. Theſe orders were read on the trial, intitled "The indulgence of private trade from the United Com-"pany of Merchants of England trading to the Eaſt Indies, "to the commanders and officers of their freighted ſhips," which, after ſtating the tonnage, and other privileges allowed to the officers of the India ſhips, were to the effect following; "the above tonnage and other allowances are to be for the proper uſe and account of the aforeſaid perſons; and they are not on any conſideration allowed to diſpoſe of their own, or make uſe of the privilege of any other perſon whatſoever, unleſs the court ſhall, at any time, think proper to diſpenſe with the ſame." "The commanders and officers ſhall be at liberty to pay any part of the produce of their outward bound adventure into the Company's caſh in India, for which they ſhall have certificates, granted to them on the court of directors, at the uſual rates of exchange, not exceeding 5000*l.* ſterling, during the courſe of the voyage, to be divided among them in the ſame proportions as are now ſettled in reſpect to their private trade outwards.—PER CURIAM, (after argument,) This caſe appears to come directly within the words and meaning of the ſtatute of *James*, the object of which was, to prevent perſons in trade *obtaining falſe credit by the poſſeſſion and apparent ownerſhip of goods not their own*, and thereby deluding their creditors. Under theſe circumſtances any perſon would have advanced money to *Cameron* on the credit of theſe goods, he being the oſtenſible and reputed owner of them: otherwiſe they could not have been brought to England in this manner, for they were brought here as part of his privilege; he had the order and diſpoſition of them; they were carried to the Eaſt India Company's warehouſe and entered in their books as his property, and ſold as his, no notice having been given to any perſon before the bankruptcy that the goods were not the property of *Cameron:* to take the caſe out of the ſtatute, notice ſhould have been given to the Eaſt India Company. But no ſuch notice was given, and for want of it *Taylor* gave *Cameron* an opportunity of defrauding other perſons by the oſtenſible ownerſhip of the goods. It was ſaid, indeed, that, even if notice had been given, the Eaſt India Company would not have ſuffered any alteration to be made in their books before *Cameron* became a bankrupt: but that is immaterial as far as reſpects this caſe; notice might have been given notwithſtanding, and the effect of it would have been, to prevent any perſons, who inquired at the Eaſt India Houſe into the title of theſe goods, being defrauded, becauſe there they would have been informed that the goods were not the property of *Cameron*, though they were entered as his in their books. Such notice, therefore, might have prevented the very fraud againſt which the act of parliament

intended to guard. In *Collins* v. *Forbes*, the Court proceeded on this ground, that the bankrupt *had only the poſſeſſion of the goods for a ſpecial purpoſe*, and had not the order and diſpoſition of them. But that is not the caſe here; it is not pretended that *Cameron* had not the order and diſpoſition as well as the poſſeſſion of theſe goods: it muſt be admitted, that it is always unfortunate when the goods of one perſon are taken to pay the debt of another: but by this act of parliament, *if a trader has in his poſſeſſion the goods of another perſon, with the conſent of that other, and has the order and diſpoſition of them, and the trader becomes a bankrupt, his commiſſioners may diſpoſe of them for the benefit of his creditors.* This act is a very beneficial act, and was paſſed in order to prevent a trader's obtaining a falſe and deluſive credit, by the poſſeſſion of the goods of another; and if, by having ſuch poſſeſſion, the trader gain a falſe credit, the goods are to be diſtributed, under this act, to thoſe who may be ſuppoſed to have given him credit: though individuals may, in ſome inſtances, ſuffer by this, the benefit which the public derive from it infinitely outweighs ſuch private inconveniences. We are, therefore, of opinion, that under this act of parliament, the commiſſioners are intitled to diſpoſe of the produce of theſe goods for the benefit of *Cameron*'s creditors, and that the *poſtea* muſt be delivered to the plaintiffs.

Hague *et al.* Aſſignees of Scott v. Rolleſton, Hil. Ter. 8 Geo. 3. B. R. 4 *Burr.* 2174.

Property delivered by a Trader to a Creditor, in contemplation of Bankruptcy, and in order to give ſuch Creditor an undue preference, is fraudulent, and the value may be recovered back by the Aſſignees.] On the trial of an action of trover there was a verdict for the plaintiffs: a new trial was afterwards moved for, on the following facts: "*Anne* and *Iſaac Scott* were merchants and co-partners; on the 27th of March, 1767, *Iſaac* went out, with intent to abſcond; and did not return till after a commiſſion of bankruptcy had iſſued againſt him: on the 30th, the defendant received a letter, written by *Iſaac Scott*, dated Dover, 28th March, incloſing a bill of parcels, dated 23d March, of ſeven bags of cochineal, for 1645*l.* 14*s.* 6*d.* as if the defendant had purchaſed the ſame of the ſaid *Anne* and *Iſaac Scott*; and informing him, the defendant, "that he (*Iſaac Scott*) was gone off, and that he had depoſited the ſeven bags of cochineal at *George Street*'s warehouſe, in *Rolleſton*'s name, and for his uſe; though, in fact, he had not purchaſed, or agreed to purchaſe, any ſuch goods of them; but the defendant imagined it was intended to *ſecure him* in part of the debt due from the partnerſhip: on the 30th of March, the defendant went to the warehouſe of *George Street*, in Thames-ſtreet, which was a public warehouſe; where he found the ſeven bags of cochineal, depoſited there in his name, which he

ſold

ſold and diſpoſed of, and applied the money to his own uſe, in part of payment of the debt due from them to him; they had been depoſited there with *Street*, on the 26th of March, for the defendant, *Rolleſton:* on the 25th, *Iſaac Scott* told *Street*, that they were for the defendant, and they were ſo booked at the warehouſe: but though the goods were ſent to the warehouſe before *Iſaac Scott*'s act of bankruptcy (by his abſconding and not returning), yet the defendant did not then know that they were there: and he did not declare his acceptance of them till after that time: the plaintiffs were aſſignees on a joint commiſſion."—On the behalf of the defendant, it was inſiſted, that he was intitled to retain the moiety belonging to the partner, who did not become bankrupt till after *Rolleſton* had declared his acceptance of the chochineal; though there was afterwards a joint commiſſion againſt both; becauſe *Iſaac Scott* had, at the time of the act done, a right to diſpoſe of the goods; and the act of *Iſaac*, when both partners were ſolvent, was the act of both partners, and bound *Anne*'s ſhare as well as *Iſaac*'s. Lord MANSFIELD, C. J. Under a joint commiſſion, the commiſſioners aſſign the effects of *both:* on an application *ex parte Turner*, in March, 1742, it was holden, that the joint commiſſion carries all the effects, both joint and ſeveral. Conſider here, the effect of booking the cochineal, on the 26th of March, in the name of *Rolleſton*, and whether it does not go to the whole? and the ſubſequent aſſent, if it does any thing, muſt go to the whole: the aſſent could not be good for part; and not good for the other part: but the aſſent was to nothing at all: the depoſit was not completed antecedent to the 30th of March: this aſſent could not be good for the whole; becauſe there was nothing to aſſent to: nor did *Rolleſton*, in fact, aſſent to any thing but a falſe bill of ſale *ſent* to him from Dover; and that bill of ſale was after the act of bankruptcy committed by *Iſaac Scott*, therefore he could not then affect the partnerſhip: which was at an end by the bankruptcy. And *Rolleſton*'s aſſent was to this falſe bill of ſale ſent to him to make him a creditor upon a falſe foundation of a dealing upon ſpeculation. YATES, J. *Iſaac*'s contract muſt bind the whole, or not operate at all; it could not be good for one part and not for the other. This act was not complete upon the 26th of March: it was revokable till *Rolleſton*'s aſſent; and he muſt aſſent to the whole contract, if he aſſented at all. All *Iſaac*'s power was gone when he wrote from Dover: his act of bankruptcy diſſolved the partnerſhip. The aſſignees of *Iſaac* could never be ſaid to be partners with *Anne*, the other partner. *The tranſaction is void, and ſeems a fraud: there is no account ſtated; a voluntary depoſit is made to favour Rolleſton*, therefore *Iſaac*'s act was void, and had no effect on the moiety belonging

belonging to *Anne*. ASTON, J. and WILLIS, J. concurred.—Rule diſcharged.

Alderſon *et al.* v. Temple, Tr. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2235. 1 *Black. Rep.* 660.

On the trial of an action of trover, brought to recover the value of a certain promiſſory note, the jury found for the plaintiff, ſubject to the opinion of the Court, upon the following caſe: "The bankrupts, *La Roche* and *Willing*, on the 7th of November, 1766, indorſed a promiſſory note, drawn by *Bryer* and *Everard*, for 600*l.* to *Temple*, to whom they were indebted to a large amount; and ſent it in a letter directed to him, at Trowbridge; which letter was carried to the poſt-houſe that morning; the bankrupt thinking that the poſt-day for Trowbridge. The letter, by the courſe of the poſt (which went out on Saturday night), was received by the defendants ſome time on Monday the 10th, and could not be ſo before. The bankrupts had given *Bryer* and *Everard* two notes for 300*l.* each, which had not been diſcharged. *La Roche* and *Willing* committed acts of bankruptcy on Saturday the 8th, and *the ſaid note was ſo indorſed and ſent to the defendant in contemplation of their inſolvency and ſubſequent failure.*" Two queſtions were ſtated: FIRST, Whether the bankrupts' property in the note was diveſted before the act of bankruptcy was committed by him? SECONDLY, Whether a trader can, in any caſe, give ſuch a preference as this? Lord MANSFIELD, Ch. J. The only queſtion I make is, "Whether, under the circumſtances of this caſe, the indorſing and ſending this note to the defendant, is fraudulent and void as ſuch? And I chooſe to put the caſe upon this ground; becauſe the moſt deſirable object in all judicial determinations (eſpecially in mercantile ones, which ought to be determined upon natural juſtice, and not upon the niceties of the law) is to do ſubſtantial juſtice; and, therefore, I will avoid laying the ſtreſs that might properly be laid upon the aſſent being neceſſary to complete the contract; or the want of a delivery; the ſolid ground of which is, that a contract ſhall be preſumed complete upon any diſtinction where the juſtice of the caſe requires it, though there is no actual delivery; and it is ſettled, that "if a man ſends "bills of exchange, or conſign a cargo, and the perſon to "whom he ſends them has paid the value before, though "he did not know of the ſending of them at that time; the "ſending of them to the carrier will be *ſufficient to prevent* "*the aſſignees* from taking theſe goods back, in caſe of an "intervening bankruptcy:" but if goods or bills of exchange are ſent, and the conſideration has not been received, the court of Chancery always interpoſes; and there are numbers of adjudged caſes of that kind in chancery, where the court have ſaid, "the aſſignees ſhall not have the goods without paying the price." But a poſt-boy is not a truſtee. I ground my opinion upon this, "Whether the indorſement be

be fraudulent?" And as to that, it is certain that the ſtatutes of bankruptcy leave a trader, to the moment of an act of bankruptcy committed, every power an owner can have over his eſtate; the ſtatute 1 *Jac.* 1. c. 15. ſays, "fraudulent conveyances ſhall be an act of bankruptcy;" other acts that are fraudulent are not made acts of bankruptcy: but they are attended with the conſequences of fraud at law; which is, "that fraud, renders every act, void." All acts to defraud creditors, or the public laws of the land, are void; and if the nature of the act be a conveyance, or grant, 'tis not only void, but an act of bankruptcy: it has been determined "that a conveyance, by a trader, of *all* his effects, for the "payment of one or more *bonâ fide* creditors of the moſt "meritorious kind, though the effects do not amount to half "what is due, is void; becauſe it is not an act in the ordi-"nary courſe of buſineſs; it is not ſuch an act as a man "could do, but it muſt be followed by an immediate act of "bankruptcy; and it is defeating the equality that is intro-"duced by the ſtatutes of bankruptcy; and the criminal, "(for the bankrupt is conſidered as a criminal) is taking "upon himſelf to prefer whom he pleaſes." But ſuppoſe he leaves out a colourable part of his effects: if it appears to be only colourable, that does not vary the caſe; it is fraudulent: ſuppoſe a trader makes a conveyance of *all* his eſtate for the payment of all his creditors, *except one*, it is void: ſuppoſe it was to pay all his creditors rateably; if there was no aſſent of his creditors, or compoſition, it would be void: for it would be reſcinding the whole ſyſtem of the bankrupt laws; and, inſtead of applying to the great ſeal, he would chooſe his own truſtees. A general queſtion has been ſtated, "Whether, in any caſe, upon the eve of a "bankrupt, a man may do that which, in conſequence, "prefers a particular creditor?" And that has been argued as a general queſtion: but that will depend upon the act; as *if a bankrupt, in courſe of payment, pays a creditor: this is a fair advantage, in the courſe of trade: or if a creditor threatens legal diligence, and there is no colluſion; or begins to ſue a debtor, and he makes an aſſignment of part of his goods*; it is a fair tranſaction, and what a man might do without having any bankruptcy in view: but it never can be ſaid, that "a man in contemplation of an act of bankruptcy can ſet down and diſpoſe of all his effects to the uſe of different creditors;" for that would be a fraud upon the acts of bankruptcy: but if done in a courſe of trade, and not fraudulent, it may be ſupported: this was not done in a courſe of trade; for there never was any dealing between the parties in ſending indorſed notes: there was no application made by the defendant; and it was done with a view to *poſitive iniquity:* for the bankrupts had received this note from *Bryer* and *Everard*, for notes

notes of the ſame value, and knowing they ſhould become bankrupts the next day, to defeat *Bryer* and *Everard* of ſetting off their notes againſt it, they indorſe this note to another perſon; and there was no way of doing juſtice to *Bryer* and *Everard*, but by ſupporting the claim now made by the aſſignees: ſo that there was expreſs particular fraud at the time the fact was done: next, 'tis an act that is, moſt certainly, not complete, as between the parties. The argument in the caſe of *Scott* is very applicable to the preſent: for in that caſe there was a preference given to a *bona fide* creditor, but he knew nothing of it: ſuppoſe, in the courſe of trade, a bill is ſent to Conſtantinople, and a bankruptcy happens in England before it arrives, yet it may be good; but here it is done becauſe they were reſolved to commit an act of bankruptcy—THE THREE OTHER JUDGES agreed, that an aſſent is neceſſary to complete every contract: that in the preſent caſe, the defendant had his election till the 10th of November; that the act of bankruptcy being committed on the 8th, the contract was incomplete; and that, upon the whole, circumſtances taken together, the tranſaction was fradulent and void.—PER CUR.—*Poſtea to the plaintiffs.*

Harman *et al.* v. Fiſher, Tr. Ter. 14 Geo. 3. B. R: *Cowp.* 117.

So alſo in this caſe, on the trial of an action of trover, brought by the aſſignees of *Fordyce*, to recover two promiſſory notes indorſed over to the defendant, by the bankrupt, previous to his bankruptcy, and in contemplation thereof, the jury found a verdict for the plaintiffs, ſubject to the opinion of the Court, on the following caſe: "The defendant, *Fiſher*, was a creditor of the partnerſhip of *Fordyce* and Co. to the amount of 1,300*l.*; and upon June 6, 1772, paid into their ſhop, as bankers, the further ſum of 7000*l.*, and had it written in his book, according to the uſual courſe; which ſum he had borrowed for the purpoſe of accommodating the houſe during the holidays; and, at the time the money was paid in, he ordered the perſon who paid it, to tell them he ſhould not draw the money out before the Friday following, which they were told accordingly: on the 9th of June, *Fordyce* ſat up all night, ſettling his books and affairs, in contemplation of abſconding; and being poſſeſſed, in his own ſeparate right, of two notes for 5,500*l.* and 11,702*l.* 18*s.* 4*d.* about five o'clock in the morning, he incloſed them in a letter to Mr. *Fiſher*; as follows: "Mr. *Fordyce* conceiving "that the money lodged by Mr. *Fiſher* with his houſe, on "Saturday laſt, was a ſum, about which, perhaps, even "ſome pains had been taken to place it there, he has the "honour *to ſhew him that preference*, which he conceives is "certainly his due." *Fordyce* delivered the letter and notes to *Harriſon*, his clerk, with directions to carry them to Mr. *Fiſher*'s office, and give them to him; about ſix o'clock, the ſame morning, *Fordyce* abſconded, and went to France; at

at half an hour after eleven o'clock, the ſame morning, a commiſſion of bankruptcy iſſued againſt him. *Harriſon*, about ten o'clock the ſame day, called at *Fiſher*'s-office; not finding him at home, he returned again about twelve; but it being holiday-time, the office was ſhut up: on Thurſday the 11th, *Harriſon* delivered the letter, with the notes, to Mr. *James*, one of the partners of *Fordyce*, who ſent for *Fiſher*; when Mr. *James*, in his preſence, opened the letter and delivered it, with the notes, to the defendant, who having read the ſame to the company preſent, took them away with him. *Fordyce* was indebted to the partnerſhip in a larger ſum than the amount of the notes in queſtion. PER CUR. The queſtion is, "Whether the plaintiffs are intitled to recover in this action? which depends on this: Whether the property of the two notes was *duly* and *regularly* transferred before the act of bankruptcy? If *duly* and *regularly*, that excludes fraud. There has been much argument upon a general queſtion, "Whether a trader, in contemplation of an act of bankruptcy, can give a preference to a *bonâ fide* creditor?" The ſtating it as a general queſtion, involves a great impropriety; becauſe no trader can do an act of fraud, contrary to the ſpirit of the bankrupt laws, and to the injury of his creditors: He cannot aſſign his effects to all his other creditors, in excluſion of one whom he thinks diſhoneſt or unjuſt: nor even to be equally divided amongſt all his creditors: becauſe he cannot take his eſtate out of that management which the law puts it into. If any act of this ſort is done by deed, it is not only void, but in itſelf an act of bankruptcy from the date of the deed; if without deed, it is void in reſpect of thoſe whom it prejudices.—But all queſtions of preference turn upon the action being complete before an act of bankruptcy committed, for then the property is transferred: otherwiſe, an act of bankruptcy intervening, veſts the property in the hands and diſpoſal of the law. No caſe ever came before us, where we were warranted to ſay, that no caſe can exiſt of a legal preference; for if a man were to make a payment but the evening before he becomes bankrupt, independent of the act of parliament, and in a courſe of dealing and trade, it would be good: or, ſuppoſe legal diligence uſed by a creditor, and an execution or *ca. ſa.* is in the houſe, and under the terror of that, he makes an aſſignment and delivery of his effects, it would be valid, the object not being to give a preference, but to deliver himſelf. In *Linton* v. *Bartlett*, in the common pleas, (1) it was determined that, though the act be complete, yet if the ſure and ſole motive of the trader was to give a preference, it ſhall be void; and if by deed, is in itſelf

(1) See page 28 ſupra.

an act of bankruptcy—the preſent caſe affords no circumſtances that can give riſe to a queſtion. A trader, at five o'clock in the morning, juſt going to commit an act of bankruptcy, orders his ſervant to take certain bills to a creditor, in diſcharge of a debt, purſuant to no contract; in performance of no obligation; in no courſe of dealing; without the privity of the creditor, or call on his part for the money; and without a poſſibility of the notes bieng delivered before an act of bankruptcy was committed; this is an order how his effects ſhall be apportioned after his bankruptcy: he delivers the letter to his own ſervant, and might have countermanded it. Here it falls in with the caſe of *Temple* v. *Alderſon*, and *Hague* v. *Rolleſton*, the act was not complete; and, therefore, the act of bankruptcy revoked it. Suppoſe the drawers had been inſolvent, was Mr. *Fiſher* bound to take the notes in ſatisfaction of his debt; beſides, the amount of the notes exceeded the debt by ſeveral hundred pounds. The nature of the tranſaction, upon the face of the letter is, in terms, a declaration that he means to give a preference that the law does not allow: and if it had been by deed, it would itſelf have been an act of bankruptcy: but it is much ſtronger where the trader mentions that to be his ſole motive; and where the act cannot be completed till after an act of bankruptcy actually committed: if a preference were only conſequential, the caſe muſt be different; as if a payment were made, or an act done, in purſuance of a prior agreement.

Ruſt *et al.* v. Cooper, Tr. Ter. 17 Geo. 3. B.R. *Coup.* 629.

So alſo a *pretended ſale*, though of part of a trader's goods only, to a particular creditor, or any other contrivance *not in the courſe of trade*, but calculated to give *a fraudulent preference*, is void, though the delivery of the goods to ſuch creditor, and his aſſent to the tranſaction be complete before the act of bankruptcy. In this caſe, on the trial of an action of trover, the jury found a verdict for the plaintiffs, ſubject to the opinion of the Court, on the following caſe:—The bankrupts were clothiers at Saliſbury; the defendant a linen-draper and banker at the ſame place: the bankrupts were in difficulties all the ſummer of 1772, owing to the failure of *Fordyce*, the banker. The defendant, on the 1ſt of Auguſt, 1772, lent the bankrupts 1000*l.* upon their bond: their difficulties increaſing, *R. P.*, one of the bankrupts, on the 20th of September, 1772, met Mr. *S. B.* from London, who was under large acceptances for the bankrupts, at Murrel-Green, in Hampſhire, where they agreed upon a commiſſion of bankruptcy being taken out againſt the bankrupts, and that application ſhould be made to one Mr. *A. R.* to be petitioning creditor. On *R. P*'s return home from Murrel-Green, on Monday, the 21ſt of September, at night, buſineſs went on apparently as uſual; but, on that night, he told his clerk he ſhould be obliged to ſtop payment in a few days: on Friday, the

the 25th of September, in the afternoon, *R. P.* bid his clerk ſhut up his ſhop, and not open it next morning; but, recollecting himſelf, he bid him open it next morning, for he would wait till the poſt came in; which came in about nine o'clock in the morning of the 26th, when *R. P.* ordered the doors to be ſhut, and that he ſhould be denied: he was accordingly denied that day, *before which time* he had committed no act of bankruptcy. *In contemplation of this, and in order to give the defendant a preference*, R. P. *made a bill of parcels to the defendant, bearing date the 22d of September*, 1772, *and delivered it to the defendant on the 24th.* The bills of parcels, with an order to Mr. *Elderton* (in whoſe poſſeſſion the goods were depoſited by the bankrupts to ſell for them) to deliver the goods unſold, and to pay the money ariſing from the ſale of ſuch as might have been ſold, to the order of the defendant; together with orders to three other perſons to deliver goods in their poſſeſſion, to the amount of 684*l.* to the defendant, were ſent, by the bankrupts, expreſs to Meſſrs. *Grace* and *Kennedy*, in London; which arrived on the 24th of September, and on the 25th the goods in queſtion were delivered by *Elderton* to *Grace* and *Kennedy*, to the uſe, and as the property of the defendant, *Cooper:* the three other perſons delivered no part of the goods in their poſſeſſion; the defendant never dealt in ſuch goods as were in the poſſeſſion of *Elderton*; and at the time of the delivery of the bill of parcels the bankrupts were inſolvent.——Per Cur. This is a caſe, where the aſſent of the creditor to the act of the bankrupt, and the delivery of the goods to the order of the creditor, is complete, before the act of bankruptcy committed; and, further, it is the caſe of an act done, not of a deed. In all its circumſtances, therefore, there is, perhaps, no caſe exactly ſimilar to it: but the law does not conſiſt in particular caſes; but in general principles, which run through the caſes, and govern the deciſion of them. The general principle, applicable to the preſent caſe, is this, that *a fraudulent contrivance, with a view to defeat the bankrupt laws, is void, and annuls the act:* this principle is eſtabliſhed by many caſes. Every caſe that has determined a conveyance by a trader of *his whole effects* to pay a creditor to be an act of bankruptcy, proceeds on this foundation; that it is fraudulent, againſt the bankrupt laws, and therefore void. Every caſe which ſays it is an act of bankruptcy, if *one creditor* only is excepted out of ſuch conveyance, goes upon the ſame principle: it was long ago determined, that a conveyance of *all a man's effects* was clearly a fraudulent conveyance; and leaving out ſomething, or a part, by way of colour, will not mend it. But the caſe of *Linton* v. *Bartlett* went further than any former caſe, for there the conveyance of a *third* part of the bankrupt's effects only, and a fair tranſaction with the party, was held

to

to be fraudulent and void, as againſt the reſt of the creditors; and being by deed, was in itſelf an act of bankruptcy: and no doubt, in that caſe, which was a bill of ſale, if it was fraudulent at all, it muſt likewiſe be an act of bankruptcy: that caſe was well and fully conſidered.—*No fraudulent tranſaction, which is not a deed, is in itſelf an act of bankruptcy*; but then ſuch a tranſaction is void. Where a ſale of goods is fraudulent, and done with no other view whatſoever, but to defeat the equality of the bankrupt laws, it is void on account of ſuch intended fraud. Now let us ſee whether the tranſaction, in this caſe, is a mere fraudulent contrivance, with no other view whatſoever, but to defeat the conſequences of a *certain bankruptcy*. Was there any application on the part of the creditor? Was the money become due? Did the creditor demand payment? Did he threaten proceſs if the bankrupt did not pay? Not any of theſe circumſtances appear: on the contrary, the whole was tranſacted behind the back of the creditor; and without any previous communication: without any previous tranſaction or ſtipulation, a bill of parcels is made out, which bears date on the 22d of September, but was not delivered until the 24th, and then only to apprize him that the bankrupts meant to ſecure him. Again, there is no receipt on the bond: it is impoſſible to conſider this as a ſale; it muſt be a ſecurity; a plank to ſave: the goods are to a much larger amount than the principal and intereſt due on the bond: there is nothing that carries the face of a ſale upon it: no receipt; no tranſaction; no acknowledgment in diſcharge of the bond; no account; the whole is a ſecret clandeſtine contrivance, with no other view or intention than to give a preference, and to defeat the conſequences of a certain bankruptcy, though it purports to be a *bonâ fide* ſale: another exceſſive ſtrong circumſtance is, that the defendant never bought or dealt in this kind of goods; and, moreover, they were at the time in the hands of the bankrupt's agent. There is a fundamental diſtinction between an act like this, and one done in the common courſe of buſineſs: the ſtatutes have relation back only to the act of bankruptcy; and it is in the preſent caſe to be conſidered, that here is no act of bankruptcy till the 26th. If in a fair courſe of buſineſs, a man pays a creditor *who comes to be paid*, notwithſtanding the debtor's knowledge of his own affairs, or his intention to break; yet being a fair tranſaction in the courſe of buſineſs, the payment is good; for the preference is there got conſequentially, not by deſign: it is not the object, but the preference is obtained in conſequence of the payment being made at the time.—Suppoſe a creditor preſſes his debtor for payment, and the debtor makes a mortgage of his goods and delivers poſſeſſion: that is, and, at any time, may be a tranſaction in the common courſe of buſineſs, without the creditor's

ditor's knowing there is any act of bankruptcy in contemplation, and therefore good. It is not to be affected by what paſſes in the mind of the bankrupt: but in the preſent caſe, there is not a ſingle thing but what is a ſtep towards fraud, and a proof of an intended preference: and to ſupport it, would be to overturn the whole ſyſtem of the bankrupt laws. The preſent, therefore, is a fraudulent ſale upon all the other creditors, and all the laws concerning bankrupts. If the bankrupt had paid what was due on the bond in bank-notes or money, and had taken up the bond, there might be an argument in that caſe, as to the fairneſs of the payment: but this was done without demand; not in a common courſe of dealing; and the bond was left in the hands of the creditor, without any receipt taken upon it. The preſent determination will not affect the caſe of a fair mortgage of goods delivered, ariſing out of a tranſaction in the common courſe of buſineſs: it will only affect caſes, where there is no object but that of defeating the bankrupt laws, and committing a fraud on all the other creditors.—*Poſtea* to the plaintiffs.

But if a bankrupt give a preference to a creditor, *under the apprehenſion of legal proceſs*, however groundleſs ſuch apprehenſion is, it is binding. On the trial of an action of trover, brought by the aſſignees of a bankrupt, *in order to recover ſome goods which the defendant had taken poſſeſſion of under a warrant of attorney, to confeſs a judgment executed by the bankrupt about ſix months before the act of bankruptcy committed*, but at a time when the bankrupt knew ſhe was in an inſolvent ſtate, there was a verdict for the defendant. On a motion to ſet this verdict aſide, it appeared, *inter alia*, that *the defendant had joined the bankrupt in two bonds, and had taken from her a counter bond of indemnity on joining in ſuch bonds.* That previous to the 3d of June, 1785, *the day on which the act of bankruptcy happened*, the bankrupt ſent for the defendant, and propoſed to him that he ſhould *take out his debt in goods*, to which he acceded, and the warrant of attorney in queſtion was given. It appeared, that *her reaſon for ſending for the defendant originated from a letter, taking notice, though not in a threatening way, of her ſituation with reſpect to the defendant, which letter ſhe had received juſt before from Meſſrs.* Foſſet *and* Bellamy, *whom ſhe knew to have acted, in a former tranſaction, as attornies for the defendant*, though upon this occaſion they were not in fact concerned for him. The two laſt bonds were not diſcharged by the defendant till ſome time after the execution, nor had the obligees ever threatened to reſort to him for payment at that time, the bonds not having then become due. And the defendant, when he took poſſeſſion of the goods, under the warrant of attorney, was not an actual creditor. PER CURIAM. A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act,

Thompſon *et al.* v. Freeman, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 155.

favour any one creditor; but *if under fear of legal proceſs he give a preference, it is evidence that he does not do it voluntarily.* And though the defendant, in this caſe, had taken no ſteps to ſecure himſelf in caſe he was called upon, yet *the bankrupt, acting from miſtake, was under the ſame apprehenſions of legal proceſs, as if the defendant had actually* threatened *her*; ſo that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundleſs that might be. —Rule refuſed.

Coſſet *et al. v.* Gough, M. 30 Geo. 3. B. R. 1 *Ter. Rep.* 156. (*n. c.*)

So in trover, for a bill of exchange drawn by the bankrupt, on one *Soper*, and accepted by him; where it appeared, that *the defendant, a creditor, had called on the bankrupt three days before his bankruptcy, and demanded payment of his debt, and received from him this bill*; THE COURT held (upon a motion for a new trial, which was granted) that the defendant had a right to retain the bill, though he had not actually threatened any legal proceſs. And afterwards, on the ſecond trial, Lord *Kenyon*, Ch. J. ſaid, that in conſidering whether ſuch payment were in order to give an undue preference, and in contemplation of bankruptcy, it was not ſufficient to ſhew (which was the only evidence produced by the plaintiffs in this caſe) that the *bankrupt* muſt have known that inſolvency was inevitable, but the *quo animo* of *both* muſt be conſidered; though if a bankrupt *officiouſly* made ſuch payment to a creditor on the eve of his bankruptcy, that of itſelf would be evidence of fraud: it would not be a payment in the ordinary courſe of trade. On the other hand, it was not neceſſary to the validity of ſuch payment, that the creditor ſhould actually threaten an arreſt; but there might be a middle caſe between the two, like the preſent, where the creditor called on his debtor, and demanded payment, which the latter ſubmitted to.

Smith *et al. v.* Payne, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 152.

So if a creditor, knowing his debtor to be in diſtreſſed circumſtances, and not able to pay his debt, applies to him ſome time before his bankruptcy for a ſecurity, and take part of his ſtock in trade for that purpoſe; this is not an undue preference.—On the trial of an action of trover for books, the jury found a verdict for the defendant: and it was afterwards moved to ſet the ſame aſide, under the following circumſtances: It appeared, that about April, 1793, the bankrupt, who was a bookſeller, being indebted to the defendant in ſeveral ſums of money, amounting to about 385*l.* the latter happened, accidentally, to call upon him, when the bankrupt ſtated his fears of being arreſted for 80*l.* the defendant thereupon told him that he was fearful he (the bankrupt) was in a bad ſtate, as he had repeatedly told him, in like circumſtances. The defendant, however, lent him the 80*l.* and deſired him to go and pay the debt. *Shortly after this tranſaction, the defendant applied to the bankrupt, and repreſented to him that he did not like to have the account unſettled, and ſo large a ſum due to him, and deſired to ſee what books he could*

could have out of the ſhop in order to cover his demand; and he did not aſk for money, as he thought he could not get it. The bankrupt ſhewed him his catalogue, and he ſelected the books in queſtion, at prime coſt, being ſuch as he thought the bankrupt could beſt ſpare, without impeding the carrying on of his buſineſs; of which books, the defendant was immediately put in poſſeſſion. It was admitted, that he took the books to ſave himſelf, and that he would not have taken them, but that he was apprehenſive he could get no money, and therefore he had not aſked for any. The act of bankruptcy was committed on the 4th, and the commiſſion was ſued out on the 6th, July, 1793. And the bankrupt ſwore, that the tranſaction was without fraud, and that he did not meditate any act of bankruptcy at the time. PER CUR. This was not a voluntary offer on the part of the bankrupt, but the ſecurity was given in conſequence of his being preſſed by the defendant for that purpoſe, who was not diſpoſed to truſt him any longer. It is admitted, that if the defendant had threatened the bankrupt in caſe of his refuſal, the tranſaction would have been valid: but there is no occaſion for a creditor, under ſuch circumſtances, to threaten an actual arreſt; and here the defendant did preſs the bankrupt for a ſecurity. And under theſe circumſtances, the bankrupt himſelf having ſworn to the honeſty of the tranſaction, and that he did not meditate a bankruptcy at the time, and the jury, by their verdict, having negatived the idea of colluſion, there is no ground for ſetting aſide the verdict.—Rule diſcharged.

But where a ſale of goods has been completed by actual delivery to the buyer, *who afterwards becomes inſolvent before they are paid for*, he cannot reſcind the contract and return the goods, with the conſent of the ſeller, ſo as to give the ſeller a preference to his other creditors. On the trial of an action of trover, brought by the plaintiff, as aſſignee of a bankrupt, for ſixty tons weight of iron, the following admiſſions (*inter alia*) were made by the parties. "On the 9th of November, 1792, the defendant agreed to ſell to the bankrupt 44 tons, 7 cwt. 3 qrs. 14 lb. of iron, at 15*l.* 15*s* per ton, for the amount of which the bankrupt agreed to accept a bill of exchange at nine months date, to be drawn on him by the defendant; and the defendant, on the ſame day, delivered the iron to the bankrupt. The defendant, in purſuance of the agreement, on the ſame day, drew a bill of exchange on the bankrupt for the amount of the purchaſe-money, payable at nine months after date, which the bankrupt then accepted, payable in London, and re-delivered to the defendant, but it did not become due until after the bankruptcy, and it has been ſince proteſted for non-payment. The bankrupt, on the 18th of March, 1793, went to the houſe of the defendant, and informed him that the bank of *Caldwell* and Co. had

Barnes *v.* Freeland. Mic. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 80.

failed, and that he ſhould not be able to take up the bill which he had accepted; for that, in conſequence of *Caldwell* and Co.'s failure, he (the bankrupt) muſt ſtop payment himſelf. But he informed the defendant, that *the iron had not been removed from the warehouſe, wherein it was at the time of the ſale, to the bankrupt*, and ſaid, he thought it would be an act of juſtice to return to the defendant the iron ſo bought, as he ſhould not be enabled to pay for the ſame, or take up the accepted bill. The defendant accepted of the offer; and at the ſame time the bankrupt delivered a bill of parcels to the defendant, *dated the 16th of that month*. On the 18th of March, 1793, the bankrupt delivered the bill of parcels, and alſo the key of the warehouſe, wherein the iron was depoſited, to the defendant, who kept poſſeſſion thereof, but did not return to the bankrupt the bill of exchange, which was accepted by him as aforeſaid, he, the defendant, having paid away the ſame in the uſual courſe of trade, and the ſame was not then in his, the defendant's, poſſeſſion; but the defendant promiſed to take up and cancel the ſame, which he accordingly did. The defendant has, ſince the bankruptcy, ſold the whole of the iron on his own account, and received the purchaſe-money for his own uſe. The defendant did not make any application to the bankrupt to redeliver or reſell to him the iron: but the ſame was a voluntary offer of the bankrupt, wholly unſought by the defendant. This iron was all the ſtock in trade of the bankrupt in his actual poſſeſſion: but the defendant was not privy to this fact; and the bankrupt was indebted to the defendant in a further ſum of money, excluſive of the tranſaction before ſtated, viz. 200*l.* and upwards. On the 23d of March, the bankrupt committed an act of bankruptcy; a commiſſion of bankrupt iſſued againſt him on the 28th; and the plaintiff claimed as aſſignee of his eſtate, &c. On theſe admiſſions, the jury found a verdict for the plaintiff; but liberty was given to the defendant to move to have that verdict ſet aſide. A rule for which purpoſe having been obtained, THE COURT, after hearing the counſel for the defendant, diſcharged the rule. PER CUR. The rules of law are framed with a view to benefit the bankrupt's creditors in general, and not to give a preference to any in particular. It is ſaid, however, that the vender may, in all caſes, reſcind his contract, with the conſent of the vendee, at any time before the bankruptcy of the latter: but if that were ſo, all the creditors of a bankrupt, whoſe goods remained in his hands in ſpecie, might, when they found that he was in inſolvent circumſtances, go to the bankrupt's property and bring away what each had contributed to the fund, leaving nothing to ſatisfy the reſt of the creditors. The preſent ſeems to be extremely clear, for it is founded in fraud. The parties themſelves endeavoured to give a different complexion to the tranſaction

tranſaction from that which is the true one, and in order to miſlead the creditors of the bankrupt, they made a falſe entry in the bankrupt's books; where it was ſtated, that the redelivery of the goods to the defendant was made two days before the time when the tranſaction really took place; and that fact is of great importance; becauſe that antedate carries the redelivery back to a time previous to the bankruptcy of *Caldwell*, and Co. on which depended the ſolvency of the vendee. The goods here were originally ſold and delivered to the vendee, and they were locked up in his warehouſe: therefore there was a complete transfer of the property, from the defendant to the bankrupt at the time; and the queſtion is, Whether, when the latter became inſolvent, he could redeliver it back to the defendant in ſpecie? The preſent caſe cannot be diſtinguiſhed from *Harman* v. *Fiſhar*, on principle, for this bankrupt knew his inſolvent ſituation at the time when he wiſhed to deliver back the goods in queſtion to the defendant, as well as *Fordyce* did in that caſe. Three caſes, however, have been cited, and preſſed upon us, as deciding the preſent; but they are to be diſtinguiſhed from this. In *Atkin* v. *Barwick*, 1 *Strange*, 165, the vendees finding that their affairs were in a declining condition before the goods arrived at their houſe in Cornwall, refuſed to accept the goods, and thereby refuſed to become parties to the contract of ſale: and though, when the goods did arrive by the waggon, the vendees could not turn them looſe in the ſtreet, yet they did what was tantamount to rejecting them, they ſent them to a friend of the conſignors for their uſe. In *Salte* v. *Field* (1), conſider who was the party to the contract; not the clerk of the vendee, who lived in London, but *Dewhurſt*, who was reſiding in New-York; and he, knowing his inſolvent ſituation, ſent orders a month before the tranſaction in diſpute took place, to his clerk here, not to purchaſe any more goods for him; the clerk, immediately on the receipt of this order, applied to the venders to take the goods back again, who agreed to reſcind the contract: there it was ſaid, by Lord *Kenyon*, Ch. J. That "the property in the goods was apparently diveſted out of the plaintiffs at the time of the ſale, according to the opinion which the parties then had of the tranſaction:" but though the property was then, *apparently*, diveſted out of the venders, it was not ſo in reality, becauſe the delivery to the agent of the vendee was controlled by the prior orders of the bankrupt, his principal. But in this caſe, the goods were delivered to and accepted by the vendee, and the property remained in him until he became inſolvent. What was ſaid by Lord *Hard-*

(1) See the caſe immediately following the preſent.

wicke, in the caſe alluded to, *Snee* v. *Preſcott*, 1 *Atk.* 250, does not apply to ſuch a caſe as the preſent: he only ſaid that *before the contract was complete, and while the goods were* in tranſitu, *the owner might by any means, without committing a felony, regain the poſſeſſion of his goods for which he had not been paid.* That, though ſaid in a court of equity, is now become a general and a good rule of law: but it muſt be confined to thoſe caſes where the goods are *in tranſitu.* Our deciſion, therefore, againſt the defendant, in this caſe, will be conformable to every decided caſe, and to the reaſon of the thing.—Rule diſcharged.

Salte et al. v. Field, Ea. Ter. 33 Geo. 3. B.R. & *Ter. Rep.* 211.

The caſe of *Salte* v. *Field*, alluded to in the laſt caſe, was as follows: In trover, for one hundred and ſeventy-ſix pieces of printed callico, the queſtion was, *Whether the goods were the property of the plaintiffs*, OR, *formed a part of the effects of* Dewhurſt, *a bankrupt, and as ſuch veſted in his aſſignees?* and on the trial, a ſpecial caſe was reſerved, in ſubſtance as follows: *Dewhurſt* had a houſe of trade in Auſtin-Friars, London, where his buſineſs was conducted by *Hill*, his clerk: he had alſo a houſe of trade at New-York, where he himſelf reſided and conducted his buſineſs. The goods in queſtion were ſold by the plaintiffs to *Dewhurſt*, through the intervention of *Hill*, his clerk, on the 3d and 5th of May, 1792, and were delivered on thoſe days at the houſe in Auſtin-Friars, London, and were afterwards ſent by *Dewhurſt*'s clerk to the defendant to be packed, in order to their being ſhipped to *Dewhurſt* at New-York. On the 9th of April, 1792, *Dewhurſt* wrote a letter to *Hill*, his clerk and manager, in London, which was received by the latter in London on the 18th of May, 1792; in that letter, after ſaying that he was ruined, in conſequence of ſeveral failures, he added, "*if you have purchaſed any goods for my account, or if any orders are given out, let the perſons have their goods back, and countermand all orders.*" This letter was ſhewn, by *Hill*, to the plaintiffs, on the 18th of May, 1792, about nine o'clock in the evening, who then informed *Hill*, they were ready to take back the goods, as propoſed by the letter: on the 18th and 19th of May, 1792, ſeveral attachments were made in the Mayor's court and Sheriff's court, London; and ſerved upon the defendant, by creditors of *Dewhurſt*, in order to attach the goods in queſtion, and other goods which had been ſold to *Dewhurſt*, and ſent to the defendant as his packer; and the debts for which ſuch attachments were made exceeded in amount the value of all the goods in the hands of the defendant: on the 21ſt of May, 1792, a meeting of *Dewhurſt*'s creditors was convened by *Hill*, his clerk, when the letter was laid before them: on the 23d of May, 1792, the plaintiffs demanded the goods in queſtion of the defendant, and in conſequence of their not

being

being delivered, commenced the preſent action. *Dewhurſt* returned to England in October, 1792, and *S. Wilſon* and *Barnard* were the aſſignees of his eſtate and effects, under a commiſſion of bankrupt dated the 19th of January, 1793.—PER CUR. The property in theſe goods was *apparently diveſted* out of the plaintiffs at the time of the ſale, according to the opinion which the parties then had of the tranſaction: but afterwards, when all the facts were diſcloſed, and when *Dewhurſt* was deſirous not to purchaſe any other goods, it was in the power of the buyer and ſeller to put an end to the contract, as if it had never exiſted: by the letter written by *Dewhurſt*, and by the ſubſequent act of all the parties, the ſale was reſcinded: a propoſal to that effect was made by one party, and agreed to by the other; and, by that, the contract was put an end to by the conſent of both: and though the goods remained in the hands of the defendants, they did not remain there for the purpoſe for which they were originally intended: but the contract being reſcinded, the property reveſted in the plaintiffs; and therefore the creditors of *Dewhurſt* had no right to attach the goods in the hands of the defendant, becauſe at that time they were no longer the property of *Dewhurſt*: this caſe cannot be diſtinguiſhed from that of *Atkin* v. *Barwick*, 1 *Strange* 165. on principle; for in that caſe there had been a delivery of the goods by the ſeller, with the concurrence of all parties intereſted; but the agreement of the parties to reſcind that contract put an end to the ſale as if it had never taken place: ſo, in this caſe, it was competent to the principal to diſavow the contract made by his agent, if the venders choſe to accede to it: the propoſition made by the purchaſer, and which was dictated by common honeſty, might have been refuſed by the venders if they had choſen; but they agreed to it, and by the mutual agreement of both, the contract of ſale was reſcinded. If *Dewhurſt* had died before the purchaſe, the contract muſt have been put an end to.—*Poſtea to the plaintiffs.*

A queſtion had been put, on the argument, Whether theſe acts, done by the agent before he knew of the revocation of his letter of attorney, were good? And BULLER, J. ſaid, he thought that the principal, in ſuch a caſe, could not avoid the acts of his agent done *bonâ fide*, if they were to his diſadvantage; but he might conſent to avoid thoſe which were for his benefit: and, he obſerved, that in this caſe, the principal was anxious to reſcind this as well as all other contracts made by his agent, and the vender agreed to take the goods back again.

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the aſſignees may diſaffirm the contract, and recover the value of the goods in trover: *but if they bring* aſſumpſit, *they affirm the contract, and then*

Smith *et al.* v. Hodſon, Hil Ter. 33 Geo. 3. B.R. 4 *Ter. Rep.* 211.

then the creditor may ſet off his debt.—This was an action of aſſumpſit, and the plaintiffs declared for goods ſold and delivered to the defendant, by the bankrupts, before, and alſo by the aſſignees ſince, the bankruptcy. Pleas *non aſſumpſit*, and a tender of 131*l.* 7*s.* 6*d.* which the plaintiffs took out of court. There was alſo a ſet-off.—At the trial, a verdict was found for the plaintiffs, ſubject to the opinion of the Court on the following caſe: "In Auguſt, 1787, *Lewis* "and *Potter* ſold goods to the defendant to the amount of "42*l.* and on the 4th of March, 1788, they drew a bill on "him at two months, for 442*l.* payable to their own order, "although at that time he was indebted to them in 42*l.* only, "which bill the defendant accepted. *Lewis* and *Potter* made "the following entry in their books; "4th of March, 1788, "received from *James Hodgſon* an acceptance due 7th May, "442*l.*; to bills and notes; to provide 400*l.*:" on the 26th "of April ſeveral bills were refuſed payment by *Lewis* and "*Potter*, ſome of which were preſented by bankers on be-"half of the indorſees: *on the 28th of April*, 1788, *the de-"fendant went to the houſe of* Lewis *and* Potter, *and bought "goods to the amount of* 531*l.* 7*s.* 6*d.* *which were ſent to him, "with a bill of parcels, the ſame day*; the goods were ſold to "the defendant at ſix months credit: on the 29th of April, "1788, *Lewis* and *Potter* committed acts of bankruptcy: "on the 9th of May, the commiſſion iſſued, and they were "duly declared bankrupts, and the plaintiffs choſen aſſignees "of their eſtate and effects. The bill for 442*l.* drawn by "the bankrupts, and accepted by the defendant, became due "the 7th of May, 1788: the defendant did not pay it on "that day, but in September following paid to *Gibſon* and "*Johnſon*, the holders thereof, 200*l.* on account of the bill; "and in October following, before the ſix months credit "upon the goods was expired, he paid the reſidue with in-"tereſt. The jury thought the bankrupts gave an undue "preference to the defendant in the ſale; and gave a verdict "for the plaintiffs, damages 400*l.* The queſtions for the "opinion of the Court were, 1ſt, Whether the plaintiffs "could ſupport this action for the price of the goods? 2dly, "If they could ſupport this action, whether the defendant "could not ſet off againſt it the money paid by him on the "above-mentioned bill for 442*l.*?"—Per Cur. We are of opinion that the defendant has made ſufficient defence againſt the action in its preſent form, and conſequently that a judg-ment of *non-ſuit* muſt be entered. It is expreſsly ſtated in the caſe, that the goods in queſtion were delivered by the bankrupts to the defendant, with a view to defraud the reſt of their creditors; and, therefore, an action might have been framed to diſaffirm the contract, which was thus tinctured with fraud; for *if the aſſignees had brought an action of trover,*

they

they might have recovered the value of the goods. The ſtatute 5 *Geo.* 2. c. 30. ſ. 28. enacts, that where it ſhall appear to the commiſſioners that there hath been *mutual credit* between the bankrupt and any other perſon, or mutual debts between the bankrupt and any other perſon, before the bankruptcy, the commiſſioners, or the aſſignees, ſhall ſtate the account between them, and one debt may be ſet againſt another; and the balance only of ſuch accounts ſhall be claimed and paid on either ſide; in the moſt extenſive words. And, therefore, we are perfectly ſatisfied with the caſes *ex parte Deeze*, 1 *Atk.* 228. and *French* v. *Fenn* in *Cooke*'s B. L. 577. But *if an action of trover had been brought, inſtead of aſſumpſit*, this caſe would have differed materially from thoſe two; becauſe in both thoſe caſes the goods had got into the hands of the reſpective parties prior to the bankruptcy, and without any view of defrauding the reſt of the creditors; and therefore, according to the juſtice of thoſe caſes, whether trover or aſſumpſit had been brought, the whole account ought to have been ſettled in the way in which it was, becauſe the ſituation of the parties was not altered with a view to the bankruptcy: but here it was; and *if trover had been brought, the defendant would have had no defence*, and thoſe caſes would not have availed him. *But this is an action on the contract for the goods ſold by the bankrupt. And although the aſſignees may either affirm or diſaffirm the contract of the bankrupt, yet if they do affirm it, they muſt act conſiſtently throughout*; they cannot, as has often been obſerved in caſes of this kind, blow hot and cold; and *as the aſſignees in this caſe treated this tranſaction as a contract of ſale, it muſt be purſued through all its conſequences, one of which is, that the party buying may ſet up the ſame defence to an action brought by the aſſignees, which he might have uſed againſt the bankrupt himſelf; and conſequently may ſet off another debt which was owing from the bankrupt to him.* This doctrine is fully recognized in *Hitchin* v. *Campbell* (1), and in *King* v. *Leith* (2). Now here the aſſignees, by bringing this action on the contract, recognized the act of the bankrupt, and muſt be bound by the tranſaction in the ſame manner as the bankrupt himſelf would have been; and if he had brought the action, the whole account muſt have been ſettled, and the defendant would have had a right to ſet off the amount of the bill. Therefore, *on the diſtinction between the actions of trover and aſſumpſit, we are all of opinion that a judgment of non-ſuit muſt be entered.*—Judgment of non-ſuit.

A fraudulent purchaſe of goods from a perſon in inſolvent circumſtances, by a creditor who has knowledge thereof, to ſave himſelf and cheat the other creditors, of whom the

Martin *et al. v.* Pewtreſs and Robarts, Mic. Ter. 10 Geo. 3. B. R. 4 *Burr.* 2477.

(1) See p. 193, infra. (2) See p. 36.

inſolvent

inſolvent has bought ſuch goods upon credit, is void.—On the trial of an action of trover, brought by the aſſignees of a bankrupt, for large quantities of goods, a verdict was given for the plaintiffs, to the amount of 19,562*l.* 17*s.* 8*d.*: afterwards the defendants obtained a rule, to ſhew cauſe why this verdict ſhould not be ſet aſide; and upon ſhewing cauſe, the caſe appeared to be as follows: "The defendants were bankers, and large creditors of the bankrupt, who was a linen-draper: the value of the goods for which this action was brought, got into the hands of the defendants in the following manner: *the bankrupt bought goods upon credit from ſeveral tradeſmen who did not ſuſpect his circumſtances; the defendants employed agents to buy theſe goods from the bankrupt:* particularly one *N. S.* bought to the amount of 7,709*l.* at prime coſt, for which he gave his notes, payable at a future day; *theſe notes were paid in to the defendants, and* N. S. *ſold the goods for the uſe of the defendants, and accounted with them for the profits*, as their agent: the defendants alſo ſent another man, one *M. B. to buy goods of the bankrupt*, to the amount of 2,163*l.* 15*s.* 11*d.* prime coſt, *and furniſhed him with bank-notes to that amount, to pay for them: he paid theſe notes to the bankrupt, who changed them at the bank, for others, which he paid in to the defendants.* *M. B.* ſold the goods for the uſe of the defendants, and paid them the produce: and in like manner as to all the reſt. The price, at prime coſt, was furniſhed in paper, by the defendants, to the agent; received by the bankrupt, and returned to the defendants; or notes given by the agent, which notes, the bankrupt paid in to the defendants, and diſcounted with them; and the goods were all ſold for the benefit of the defendants; and the money accounted for to them, by the nominal and apparent purchaſers. It was left to the jury, to conſider "*Whether it was a fair ſale, as between the bankers and the bankrupt; or a cheat, to defraud innocent perſons, from whom the goods were bought?* and the jury found, that this was *a groſs fraud* upon the creditors of the bankrupt, and a cheat, by covin and colluſion between him and the defendants." Lord MANSFIELD, Ch. J. The two grounds of this motion are, 1ſt, That the jury have done wrong in finding the tranſaction to be a fraud: 2dly, that *ſuppoſing the tranſaction to be fraudulent, yet the plaintiffs ought to have been non-ſuited*; and if that be ſo, a new trial ought to be granted, in order that they may have the benefit of a nonſuit upon a new trial:—as to the fraud, the fraudulent deſign and intention muſt depend upon circumſtances: in the preſent caſe 'tis clear that the whole was a wicked ſcheme, concerted between the defendants and the bankrupt, to keep up his credit; to enable him to get goods which were to be employed to ſatisfy and diſcharge the debt due to the defendants: one of them was brother to the bankrupt; they muſt have known his inſolvency;

vency; for, to their knowledge, the goods were ſold at prime coſt: the bankers did not deal in ſuch goods: had they bought them openly and in their own names, and applied the money to ſink the debt due to them, the neighbourhood would have been immediately alarmed: they knew that the perſons who ſold their goods upon credit to the bankrupt would never be paid: but *it did not amount to a bankruptcy, becauſe there was no fraudulent deed or conveyance:* "In conſequence of this verdict, the notes given by *N. S.* "and the other purchaſers of the goods, and delivered or "paid by the bankrupt to the defendants, are not to be "conſidered or imputed as any payments at all, being to-"tally void; and if any money was paid by the defendants "to the bankrupt, as in conſideration of ſuch goods ſo "fraudulently ſold, ſuch money is received by the bankrupt "without any conſideration, and therefore to the uſe of the "defendants; and conſequently to be ſet off under the com-"miſſion"—*his Lordſhip held the action of trover to be maintainable: a trader cannot alter the property of goods by a criminal fraudulent tranſaction, to the prejudice of his creditors.* YATES, J. The general queſtion is, *Whether an action of trover is, in this caſe, maintainable?* One objection to it is, that the defendants are precluded from a ſet-off: but this would be an objection to all actions of trover: for there can be no ſet-off in any action of trover. An action of trover muſt be founded on property; the queſtion then is, Whether this tranſaction altered the property with reſpect to the aſſignees? if *fraudulent*, it does not alter the property; the aſſignees do not ſtand in the place of the bankrupt *in any reſpect:* particularly where the act of bankruptcy has been fraudulent: it muſt be inquired, therefore, Whether this was a ſale and a transfer of the property? The Jury have conſidered it as not ſo: it is ſaid that "the bankrupt, before he had committed any act of bankruptcy, might have delivered the goods, or paid the money to whom he pleaſed." But here he has not done ſo, but has purſued a method which is fraudulent, and which is calculated to cheat innocent perſons: and the defendants were privy to it, and aſſiſting to keep up the credit of a ſinking man, under falſe appearances: this action of trover is a proper remedy to relieve the creditors. ASTON, J. Though this was not an act of bankruptcy in itſelf, yet being a ſcheme concerted at the eve of a bankruptcy, to cheat innocent perſons, in order to ſcreen particular creditors; it is ſuch a fraud as ſhall render the ſale void. WILLES, J. concurred.—Rule diſcharged.

Effects in the Hands of a third Perſon, after an Act of Bankruptcy.] The aſſignees of a bankrupt may maintain an action of trover againſt the maſter of a ſhip, to recover the

Wilkins *et al. v.* Carmichael, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 101.

the ſame, notwithſtanding the bankrupt may ſtand indebted to him for wages, ſtores, and repairs; for the maſter has no lien upon the ſhip.—In an action of trover brought by the aſſignees of a bankrupt for a ſhip, of which the bankrupt was owner, againſt the captain: at the trial, the defence ſet up was, That the captain had a lien on the ſhip for his wages, and for ſtores, proviſions, and repairs; a verdict was found for the plaintiffs, with 605*l.* damages, ſubject to the opinion of the Court, on a caſe, which ſtated as follows: —The defendant being the captain of the ſhip Africa, beſpoke and directed repairs to be done before ſhe ſet out upon her laſt voyage; and likewiſe directed her to be ſupplied with ſtores and proviſions; for which repairs, ſtores, and proviſions the defendant was liable, as well as the owner: the defendant likewiſe had wages due to him: *the owner of the ſhip became a bankrupt; and after the bankruptcy and the demand of the ſhip therein after-mentioned, the defendant paid the creditors their bills for ſtores and repairs.* The plaintiffs (the aſſignees) demanded of the defendant to deliver the ſhip to them, which he refuſed, without having an allowance in his account for his wages and the money he was liable to pay for the bills before-mentioned. THE QUESTION was, Whether in this action the defendant could be allowed to retain, and have deducted, out of the damages which ought to be given for the value of the ſhip, the ſeveral ſums mentioned in the caſe, or any of them, or whether any of the above articles were ſo far a lien on the ſhip as to juſtify his refuſal to deliver the ſhip to the plaintiffs without being paid? PER CUR. The defendant has ſet up a lien upon two ſorts of claim: viz. wages, and ſtores and repairs: as to wages, there was no particular contract that the ſhip ſhould be a pledge; there is no uſage in trade to that purpoſe; nor any implication from the nature of dealing; on the contrary, the law has always conſidered the captain as contracting, perſonally, with the owner: on this ground, prohibitions have been granted; and the caſe of the captain has, in that reſpect, been diſtinguiſhed from that of all other perſons belonging to the ſhip: this rule of law may have its foundation in policy, and the benefit of navigation: for as ſhips may be making profit, and earning, every day, it might be attended with great inconvenience if, on the change of a captain, for miſbehaviour, or any other reaſon, he ſhould be intitled to keep the ſhip till he is paid: as to ſtores and repairs, it is a ſtrong anſwer to that claim, that when the demand was made by the aſſignees, the captain had not paid: but if there was any lien originally, it was in the carpenter: the captain could not, by paying him, be in a better ſituation than his; and he had parted with the poſſeſſion, ſo that he had given up his lien, if he ever had one: the other creditors

creditors had none. If the defendant is liable to the tradeſmen, it is by his own act. Work done for a ſhip in England is ſuppoſed to be on the perſonal credit of the employer. In foreign parts the captain may hypothecate the ſhip. The defendant might have told the tradeſmen, that he only acted as an agent, and that they muſt look to the owner for payment. If there is no lien, can there be a ſet-off? This was no item of any ſort, in account, between the bankrupt and the defendant: the ſhip remained in ſpecie till after the bankruptcy; and the converſion ariſes from an act done on the ſpecific property of the aſſignees, not of the bankrupt.—*Poſtea* delivered to the plaintiffs (1).

Smith *et al. v.* De Silva *et al.* Tr. Ter. 16 Geo. 3 B. R. *Coup.* 469.

One of three partners in a ſhip and cargo, the coſt and outfit of which was 4,568*l.* paid only 410*l.* in part of his third ſhare, and gave his notes for the remainder; but, before they became due, was declared a bankrupt: held that the partners could not, by voluntarily diſcharging the notes, ſtand in his place, for any ſhare of the profits: but that the aſſignees were entitled to and might recover a full third, both of the profits of the adventure, and the value of the ſhip.

Vernon *et al. v.* Hankey *et al.* Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 113.

A banker is not juſtified in paying *the drafts of a perſon who has placed money in his hands, after he has notice of an act of bankruptcy* committed by him. The plaintiffs brought this action for money had and received to their own uſe, and to the uſe of the bankrupt. Plea, the general iſſue.—On the trial of this cauſe, the jury found a verdict for the plaintiffs for 16,930*l.*: and, upon a motion for a new trial, the facts appeared to be as follow: "*Tyler* had committed a clear act of bankruptcy on the night of the 2d of May, 1785, which was well *known to the defendants*, who were her bankers; and it appeared by their books that, ſo much as the verdict was taken for, had been received by them on account of the bankrupt after that time. In anſwer to this, the defendants gave in evidence, that on the ſecond of May, before the act of bankruptcy, inſtructions had been given to the defendants' attorney to draw up a deed of aſſignment, from her to them, of two ſhips, which were then at ſea, and their freight, and alſo of an exchequer tally: that it was prepared on the 4th, but, owing to the abſence of the bankrupt, was not executed till the 19th: of this they claimed the benefit, and *they alſo claimed to deduct a ſum of* 9,670l. *being the amount of drafts drawn by the bankrupt on them after the bankruptcy, in favour of creditors, and which they had paid:* but the judge, being againſt them on theſe two points, directed the jury to find a verdict for the whole ſum." Per Cur. (after cauſe ſhewn againſt the rule) The two grounds on which the preſent application for a new trial is made, are,

(1) *Vide Rich* v. *Coe*, in vol. 1. p. 284.

1ſt,

1ſt, that the defendants are intitled to an allowance for the money which they paid on the bankrupt's drafts, though ſubſequent to an act of bankruptcy committed by her, and full knowledge of it by the defendants; and, 2dly, that they are intitled to the produce of the depoſits, on which they claim a lien antecedent to the act of bankruptcy. The firſt of theſe points ſuppoſes the verdict to have been given againſt law; the ſecond is raiſed on an allegation of ſurprize at the trial. Now with regard to the firſt of theſe points; it has been argued, that *if the caſe involve in it a queſtion of doubt, of great value, or of general importance*, it is a ſufficient ground for granting a new trial; and that, in the preſent caſe, all theſe circumſtances concur: but, if it be not a matter of doubt, the greater the value, the leſs reaſon is there for granting a new trial; becauſe the plaintiffs would be ſo much longer deprived of the fruits of the verdict, to which they are intitled. Motions for new trials have been very much encouraged of late years; and nothing tends more to the due adminiſtration of juſtice, or even to the ſatisfaction of the parties themſelves, than applications of this kind. The court and the counſel are enabled to conſider the queſtion more fully than they could do in the hurry of buſineſs at *Niſi Prius*. But there is a wide difference between the reaſon which ought to induce the Court to grant ſuch rules, and thoſe which are ſufficient to grant new trials. It is well known, that in this Court, a rule to ſhew cauſe why there ſhould not be a new trial, is granted for little more than aſking, if any plauſible doubt can be ſtated: but if this were to be followed up by making the rule abſolute on the ſame grounds, it would be great injuſtice to the parties, and would tend to multiply litigation to an enormous degree. Value alone is not a ground for granting a new trial, although it frequently weighs in granting a rule to ſhew cauſe. The queſtion, in this ſtage of the buſineſs, is, Whether on any part of this caſe there is a ſerious ground for doubt. But there can be no doubt in this caſe; for it is extremely clear that no payments, made either by or to a bankrupt, are protected by the ſtatutes of 1 *Jac.* 1. c. 15. and 19 *Geo.* 2. c. 32. when the party either paying or receiving has knowledge of an act of bankruptcy committed. Here the act of bankruptcy was known to the defendants. Then, is there any thing in the particular ſituation of the defendants to exempt them from the general law on the ſubject? No argument which has been urged can raiſe the ſmalleſt doubt; for there can be no reaſon why a banker ſhould be in a different ſituation from the reſt of the king's ſubjects in the conſtruction of theſe ſtatutes. It does not, however, neceſſarily follow, that a banker ſhould know the ſituation of thoſe who employ him; and if he has no notice of their inſolvency, he will

will be protected in the payments which he makes to them. It has been ſaid, that the defendants were bound to pay over the bankrupt's money: but the queſtion is, Whether or not this was the bankrupt's money? and whether it was not known to them that it was not? This is not like the caſe put in the courſe of argument, that if the aſſignees admit the receipts by the defendants to be good, conſidering them as agents, they ſhall likewiſe be conſidered as agents with reſpect to the payments made by them. The caſes in which that objection has been allowed are, where money has been levied under an execution, and paid over to the party; but there the whole is one act. If the ſheriff had a right to levy money under an execution, he was bound to pay it over to the party at whoſe ſuit the execution iſſued, and therefore it was deemed inconſiſtent to ſay that the ſheriff levied the money legally, but paid it illegally. But there is no inconſiſtency in this caſe: the law ſays, that what the defendants received from the bankrupt after the bankruptcy, is the property of the aſſignees; and they have a right to demand it as money received to their uſe; but it is impoſſible to ſay, on this evidence, that the aſſignees have given the defendants a power, or even conſent, to pay the money in queſtion to the particular creditors. As to the word "underſtand," which is uſed in the ſtatute of *James*, and which has been commented upon, it is too much to ſay that it can become a queſtion, whether a party did or did not know the law: for every man is equally bound to know the law; therefore the defendants muſt have known that a perſon, who has committed an act of bankruptcy, is not a free agent, and has no longer the diſpoſition of his property. If he underſtand the fact, that is ſufficient; he muſt know the law, and is bound by the conſequences. They knew that they were not bound to anſwer the bankrupt's drafts; they muſt have known that they were doing an illegal act, and were aſſiſting in committing a fraud on the reſt of the bankrupt's creditors; the ſpirit of the bankrupt laws being an equal diſtribution of the effects of the bankrupt. So that theſe defendants, who have taken upon themſelves to pay particular creditors the whole of their demand, out of that fund which ought to have been equally diſtributed to all, are not intitled to any favour. It often happens that criminals are tried for facts, the legal conſequences of which they did not know; this is more particularly the caſe where the offence is created by a new ſtatute. The conſequences of the propoſition contended for by the defendant's counſel would be, that if a creditor give notice to a banker, in direct terms, that the debtor had committed an act of bankruptcy, that a docquet had been ſtruck againſt him; and, according to a part of the argument, that he had even been declared a bankrupt,

bankrupt, yet if no aſſignment were executed, the banker might continue to pay the drafts of the bankrupt. Such a propoſition cannot be ſupported; therefore there cannot be the ſmalleſt doubt on the queſtion of law. The caſe put at the bar, with reſpect to a ſheriff, is not inapplicable: the courts have ſaid that ſheriffs, being miniſters of juſtice, are intitled to the protection of the courts, if they act honeſtly: but it has always been held as clear law, that if a ſheriff, after notice of a bankruptcy, proceed to levy, though no commiſſion be taken out, he muſt do it at the peril of anſwering to the aſſignees. But a banker cannot be in a more favourable light than a ſheriff, becauſe he voluntarily puts himſelf into that ſituation. It was firſt ſaid that the defendants were not debtors of the bankrupt; but that cannot be ſuſtained on any ground; for if a merchant pay 1000*l.* into a banker's hands, he is a debtor for ſo much, and, if he refuſe to pay it on demand, may be arreſted for it: and the merchant has the ſame common remedy to recover it, which every creditor has againſt every debtor. A SECOND QUESTION has been made with regard to the produce of the depoſits, the allowance of which the defendants claim in reſpect of the lien which they had on them previous to the bankruptcy. If that matter had been clearly made out at the trial, there is no doubt but that the defendants would have been intitled to the allowance. But the queſtion is, Whether we ought to interpoſe now? as the defendants were aware at the trial, that it was incumbent on them to eſtabliſh that fact; for they produced the aſſignment of the 29th of May: but failing in that defence at the trial, they now ſet up another ground, namely, that they have an equitable lien; inaſmuch as the depoſits, which were the conſideration of that aſſignment, were in their hands before the bankruptcy. Now it is material to conſider whether, in a caſe ſo circumſtanced as the preſent, where a party, who has a defence which he knows is neceſſary to be eſtabliſhed at the trial, but neglecting to make uſe of that, relies upon another in which he fails, ſhall afterwards be permitted to avail himſelf of the firſt as a ground, in this court, for a new trial: ſuch applications ſhould be cautiouſly admitted, as it would be a great inlet to perjury. Therefore, on both grounds, we are of opinion that a new trial ought not to be granted.—Rule diſcharged.

Vernon *et. al. v.* Hanſon, Ea Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 287.

But when the aſſignees have recovered the money from the bankrupt's banker, they cannot recover the ſame ſum from the creditor, though he received it after notice of the bankruptcy. On the trial of an action of aſſumpſit for money had and received. Plea, the general iſſue. The plaintiff was nonſuited. On a motion for a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted,

granted, the facts appeared to be theſe: "The defendant had "received 1,090*l.*, being the amount of a draft drawn in "his favour for a *bonâ fide* debt, by the bankrupt, on Meſſrs. "*Hankeys*, her bankers, which money was received by the "defendant after notice of the bankruptcy." The plaintiffs had recovered a large ſum againſt the *Hankeys*, for money belonging to the bankrupt received by them; in which action they attempted to ſet off this, as well as ſeveral other ſums, which they had paid on the bankrupt's account: but it appearing that they had paid thoſe ſums with full knowledge of the bankruptcy, the ſet-off was diſallowed (1). *The Court* refuſed to grant a rule to ſhew cauſe: for PER CUR. It is admitted, very properly, that the plaintiffs cannot affirm and diſaffirm the ſame tranſaction: then try this queſtion by that teſt. This was no ſpecific money of the bankrupt paid to the defendant; it was only a payment in the common courſe of buſineſs by her bankers, who had, prior to that, received large ſums of money belonging to the bankrupt. The plaintiffs firſt brought an action againſt the bankers, for all the money received by them on the bankrupt's account, againſt which demand they offered to ſet off this, as well as ſeveral other ſums, which they had paid on account of the bankrupt; to this the aſſignees objected, inſiſting that thoſe payments were made with their own money, and not with that of the bankrupt. But in the preſent action, they ſay it was a payment with the money of the bankrupt; and, the defendant having received it, with knowledge of the bankruptcy, they inſiſt that they have a right to recover it back. It has not been attempted to be diſputed, but that the defendant was a *bonâ fide* creditor of the bankrupt; and a payment by her to him, although with notice of the bankruptcy, would have been good as againſt all perſons but the general creditors. If, therefore, he do no injury to the creditors, he does not hold it againſt conſcience. The bankrupt's eſtate has not been injured at all by this payment; for the aſſignees have already received this ſum from the *Hankeys*; then, they ſay, that they have a right to bring this action againſt the defendant, becauſe, otherwiſe, the *Hankeys* cannot recover it back. But the *Hankeys* paid this ſum knowing of the bankruptcy, and, perhaps, have no right to recover it back. But that is immaterial, as far as it reſpects the aſſignees; they are now interpoſing between two creditors, in a caſe in which the general body of creditors have no concern.—Rule refuſed.

If, after the aſſignment of a bankrupt's eſtate, a creditor knowing it, and reſiding in England, attach the money of

Hunter *et al.* v. Potts, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 182.

(1) Vide preceding caſe.

the bankrupt abroad, the aſſignees may recover it in an action for money received to their uſe. On the trial of an action for money had and received, brought againſt the defendant by the plaintiffs, aſſignees of *Lewis* and *Potter*, bankrupts, a ſpecial verdict was found; which, after ſetting forth the formal parts (namely, the trading, the petitioning creditor's debt, the bankruptcy, the commiſſion, and aſſignment), ſtated, that *the bankrupts, before their bankruptcy, were indebted to the defendant on a contract made in England*; at which time, and alſo at the time of the bankruptcy, and until the aſſigning of the attachment hereafter mentioned, all the parties were reſident in England; that, *after the iſſuing of the commiſſion of bankrupt, and the making of the aſſignment, the defendant*, knowing thereof, *gave orders to his attorney, in Rhode Iſland, North America, to attach the effects of the bankrupts in that iſland*; in conſequence of which, the attorney, in May, 1785, attached, in the regular way, certain monies in the hands of *J.* and *W. Ruſſell*, which were due from them to the bankrupts at the time of the bankruptcy, and in November, 1786, obtained, in the court of common pleas, in Rhode Iſland, a regular judgment againſt the bankrupts for 496*l.* 12*s.* 9*d.* and coſts; which ſum he afterwards received, and remitted to the defendant in England, who claims to hold the ſame to his own uſe. The verdict alſo ſtated, that the proceedings of the court, in Rhode Iſland, were continued by imparlances from May, 1785, to November, 1786, at the requeſt of the *Ruſſells*, in order that the bankrupts might have notice of ſuch proceedings. PER CUR. (after the caſe had been twice argued), In the argument in this caſe, many quotations were made from the writers on the civil law, which it is not neceſſary to conſider in determining this queſtion. Generally ſpeaking, it muſt be admitted, that *perſonal property muſt be governed by the laws of the country where the owner is domiciled.* Neither do we mean to break though the rule, that the courts of one country ought to pay a proper deference to the deciſions of the courts in another having competent juriſdiction, where the facts, on which the deciſion was made, were fairly diſcloſed to ſuch court. But THE GENERAL QUESTION here is, *Whether the aſſignment, which was executed by the commiſſioners of the bankrupt, was ſufficient to veſt the bankrupt's property, in the plantations abroad, in the aſſignee under the commiſſion?* becauſe, if it did ſo veſt, at the time of the aſſignment, it is immaterial to conſider, in this caſe, how far the relation under the bankrupt laws ſhould take effect in Rhode Iſland, ſince the aſſignment was executed anterior to the time when the attachment ſuit was there commenced. Therefore the only queſtion here is, Whether or not the property in that iſland paſſed by the aſſignment in the ſame manner as if the owner (the bankrupt) had aſſigned it by his voluntary

voluntary act. And that it does ſo paſs cannot be doubted, unleſs there were ſome poſitive law of that country to prevent it. Every perſon having property in a foreign country, may diſpoſe of it in this: though, indeed, if there be a law in that country, directing a particular mode of conveyance, that muſt be adopted; but in this caſe, no law of that kind is ſtated, and we cannot conjecture that it was not competent to the bankrupt himſelf, prior to the bankruptcy, to have diſpoſed of his property as he pleaſed. Now the bankrupt ſtatutes have expreſsly enacted, that the commiſſioners may aſſign all the property of the bankrupt in the moſt extenſive words; and therefore, on the general reaſon of the thing, if there be no poſitive deciſion to the contrary, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country, where perſonal property may happen to be, the commiſſioners of a bankrupt may diſpoſe of the perſonal property of a bankrupt reſident here, though ſuch property be in a foreign country. Then let us conſider the deciſions which have been made on this ſubject. The caſe of *M'Intoſh* v. *Ogilvie* (1) agrees with our opinion. There it is to be obſerved, that Lord *Hardwicke*, on his being told that the defendant, in that caſe, had not obtained a *ſentence before the bankruptcy*, ſaid, "Then it is like a foreign attachment, by which this court will not ſuffer a creditor to gain priority, if no ſentence were pronounced before the bankruptcy." In another part, he intimated a ſtrong opinion that the property in Scotland ſhould not be taken by one creditor to the prejudice of the reſt of the creditors here. And at the cloſe of that caſe, the Solicitor-general obſerved, that this preciſe queſtion had been determined. But the caſe of *Beckford* v. *Turner* was relied on, when this caſe was firſt argued, as a determination in favour of the attachment creditor: but certainly no queſtion

(1) *H.* 21 *Geo.* 2. In Chancery.—"The plaintiff was the aſſignee of a bankrupt, the defendant a creditor, who, before the bankruptcy, went into Scotland, and made arreſtments on debts due to the bankrupt from perſons there. Upon an affidavit of the defendant's having got this money into his hands, a *ne exeat* was granted. And a motion was now made, on the behalf of the defendant, to diſcharge it, upon a ſuppoſition that he had a right to the goods, as creditor, by his arreſtments.

"The *Lord Chancellor* aſked, whether he had ſentence before the bankruptcy, and, being anſwered in the negative, he ſaid, "Then it is like a foreign attachment, by which this Court will not ſuffer a creditor to gain priority, if no ſentence were pronounced before the bankruptcy. I cannot grant a prohibition to the court of ſeſſions: but I will certainly make an order on the party here to reſtrain him from getting a priority, and evading the laws of bankruptcy here. If the gentleman were not going abroad, I would do nothing: but as he is, I will not diſcharge the writ without his giving ſecurity to abide the event of the cauſe."

"*N. B.* The Solicitor-general ſaid, there had been caſes where creditors had got a priority, and after coming here, have been obliged to refund in a court of law, in an action for money had and received."

of that kind was ſtated among the reaſons ſigned by the counſel, nor was it brought in judgment in that caſe; the ſingle queſtion there was, Whether or not the proceedings in the iſland of Jamaica were conformable to the mode pointed out by the act of aſſembly there? And if it had been ſtated, in the reaſons ſigned in that caſe, this queſtion could not have ariſen in deciding it. There was, indeed, a *dictum*, rather than a deciſion, in *Wilſon*'s caſe, *Co. Bank*, l. 123, that the aſſignment, by the commiſſioners, had no other effect than a *voluntary* aſſignment. I believe the doubt, in all theſe caſes, has ariſen from not attending to the meaning of the word, "voluntary." It has been contended, that it means "without a valuable conſideration": but it is impoſſible to conſider it in that light; for in the caſe of a bankruptcy, there muſt be a conſideration: it means the bankrupt's own *voluntary* act, as contra-diſtinguiſhed from a *compulſory* act by law. Therefore, on the reaſon of the thing, even without any authorities, we have no difficulty in ſaying, that the title of the plaintiffs muſt prevail. For it muſt be remembered that, during the progreſs of this buſineſs, all theſe parties reſided in England; that the defendant, knowing of the commiſſion and of the aſſignment, in order to gain a priority, tranſmitted an affidavit to Rhode Iſland, to obtain an attachment of the bankrupt's property there, in violation of the rights of the reſt of the creditors, which were then veſted: but ſuch an attempt cannot be ſanctioned in a court of law. But in addition to theſe reaſons, the deciſions which have been made on this ſubject, remove all doubts whatever. It is not neceſſary to go through them, becauſe they were mentioned in the argument, and are collected in the caſes of *Salomons* v. *Roſs*, before Lord *Bathurſt*; *Jollet* and another v. *Depontheiu* and *Barril*, before Lord *Camden*; and *Neale* and another v. *Cottingham* and another, in Ireland, before Lord Chancellor *Lifford* (1). The ſecond, there is reaſon to believe, was conſidered by Lord *Camden*, as a very clear caſe; for he did not think it important enough even to make a note of it in his book. And although the laſt caſe was not decided in this country, yet it was determined by a very reſpectable authority, Lord *Lifford*, aſſiſted by ſeveral of the judges, and that noble lord was converſant with the laws of this country, having ſat on the bench here for ſeveral years before he went to Ireland: and we know, alſo, that *Davis*'s reports of the deciſions in that country are cited as authority here. There are, therefore, theſe three deciſions, addition to the caſe before Lord *Hardwicke*, in ſupport of ur opinion; and there are none to the contrary, except, indeed, what was ſaid in *Wilſon*'s caſe, and that ſeems to have turned on miſtaking the import of the word "volun-

(1) Theſe were caſes in the Court of Chancery, and are cited in 1 *Hen. Black.* 131, 132. (*n. a*)

tary."

tary." We are, therefore, clearly of opinion, that the plaintiffs are intitled to judgment.—Judgment for the plaintiffs.

So if after an act of bankruptcy committed, but before an aſſignment, a creditor of the bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the aſſignment, money due to the bankrupt in the Weſt-Indies, the aſſignees may recover the money in an action for money had and received.—On the trial of an action of aſſumpſit, for money had and received to the uſe of the plaintiffs, a ſpecial verdict was found, in ſubſtance as follows: That *William Skirrow*, on the 2d of January, 1782, exerciſed the trade of a woollen-draper at Lancaſter; that he was then indebted to one *James Pilkington*, in 100*l.* and upwards, and *on that day* became a bankrupt; that, on the 16th of January, a commiſſion iſſued on the petition of *Pilkington*; that, on the 28th of January, he was declared a bankrupt; that, on the 5th of March, an aſſignment was made of all his eſtates and effects, &c. to the plaintiffs; that before, and when he became a bankrupt, he was indebted to the defendant, *Worſwick*, in 230*l.* 17*s.* 7*d.* *and that the ſaid debt was contracted at Lancaſter aforeſaid, and at the time when it was ſo contracted*, and always afterwards, *both* Skirrow *and* Worſwick *reſided at Lancaſter, which was their place of abode*; that on the 4th of January, the defendant, *Worſwick*, *knowing that* Skirrow *had become a bankrupt*, did verify and prove, by affidavit, in writing, before the *Mayor of Lancaſter*, that *Skirrow* was indebted to him, the defendant, in 230*l.* 16*s.* and upwards, for money lent, &c. That on the ſame day, and year laſt aforeſaid, the ſaid *affidavit was certified and tranſmitted*, under the common ſeal of the ſaid borough of Lancaſter, to one *Thomas Moore and one* Luke Tyſon, *then* being *perſons reſident in the iſland of St. Chriſtopher*, which ſaid iſland, then and there, and before, and at the paſſing of a certain act of parliament, made in the fifth year of the reign of our Sovereign Lord *George* the Second, intitled, "An act "for the more eaſy recovering of debts in his Majeſty's "plantations in America," and on the 29th day of September, which was in the year of our Lord 1732, was, and thenceforth hath been, and ſtill is, *one of the Britiſh plantations in America*; that the defendant, *Worſwick*, appointed the ſaid *Thomas Moore* and *Luke Tyſon*, ſo being reſident in the ſaid iſland of St. Chriſtopher, his attornies to ſue for, recover, and receive, *of and from the ſaid William Skirrow*, or of, and from, all, or any of his factors, agents, or conſignees, in the Britiſh Weſt-Indies, all ſuch ſum and ſums of money, debts, goods, chattels, and effects whatſoever, as were in any wiſe *due, owing, and belonging* to him, from the ſaid *William Skirrow*. It was then ſtated, that *Moore* and *Tyſon* having received the affidavit ſo certified and tranſmitted, and being

Sill *et al.* v. Worſwick, Tr. Ter. 31 Geo. 3. C. B. 1 *Hen. Black.* 665.

ſo authoriſed by *Worſwick*, the defendant, did on the 6th of March, 1782, implead *Skirrow* in the king's court of the iſland of St. Chriſtopher, in a plea of treſpaſs on the caſe, &c. for the recovery of the ſaid ſum of 230*l.* 17*s.* 7*d.* in which *Skirrow* was indebted to *Worſwick*, the defendant, that on the ſame day, a writ of attachment, grounded on the ſaid plea, *according to the form of a certain law of the ſaid iſland, in that caſe made and provided*, did, at the requeſt of *Worſwick*, the defendant, duly iſſue out of the ſaid court of our ſaid lord the king, by which ſaid writ of attachment, the provoſt-marſhal of our ſaid lord the king, of the ſaid iſland, or his lawful deputy, was commanded by our ſaid lord the king to attach all and ſingular the goods and effects of the ſaid *Skirrow*, in the ſaid iſland, to anſwer to the ſaid *Worſwick*, in his plea aforeſaid: that on the 7th of March, 1782, the provoſt-marſhal did, *according to the laws and cuſtoms of the ſaid iſland*, attach divers ſums of mony, as the proper monies and effects of the ſaid *William Skirrow* (the bankrupt), in the hands of one *Thomas Worſwick, the younger*, who then and there was a merchant, and reſident in the ſaid iſland of St. Chriſtopher, within the juriſdiction of the ſaid court: which ſaid ſums of money were the proper monies and effects of the ſaid *William Skirrow* (the bankrupt) before and at the time when he became bankrupt as aforeſaid, and were received before the time when he became bankrupt as aforeſaid, in the ſaid iſland, by the ſaid *Thomas Worſwick, the younger*, by the order, and to the uſe of the ſaid *William Skirrow* (the bankrupt), and then and there, to wit, &c. did remain, and were in the hands of the ſaid *Thomas Worſwick, the younger*, unaccounted for. It was afterwards ſtated, that judgment was recovered in the court of St. Chriſtopher's, and execution awarded; and that *Moore* and *Tyſon*, as attornies for the defendant, received, on the 14th of May, 1783, the ſum of 230*l.* 17*s.* 7*d.* from *Thomas Worſwick, the younger*, the *garniſhee*; that this money was remitted to, and received by the defendant, in England, before the commencement of the preſent action; that he was requeſted by the plaintiffs to pay it over to them, which he refuſed, inſiſting upon his right to detain the ſame, &c. and that he had not proved his debt under the commiſſion, nor in any other manner received ſatisfaction for the ſum, except as aforeſaid, &c. &c. &c. After a very elaborate argument, it was agreed, that the caſe ſhould wait the determination of a ſimilar one (1) then depending in the court of King's-Bench, which, it was underſtood, was to be argued before the twelve judges in the exchequer chamber. But no ſuch argument having taken place, the caſe was argued very fully

(1) Hunter *et al.* v. Potts, in p. 168, ſupra.

a ſecond time. After which, Lord *Loughborough*, Ch. J. after ſtating the ſpecial verdict, pronounced the judgment of the Court, in the following manner: The queſtion is, *Whether the aſſignees of the bankrupt have a right to recover this money, as money had and received to their uſe?* The objection made to it is, that the money was recovered by proceſs in the iſland of St. Chriſtopher, in which the bankrupt laws of England have no direct binding force. A variety of caſes have occurred on this queſtion; and there is ſome confuſion in the reports of them, which make a very deliberate conſideration of it neceſſary. Not that I think it appears, from the mere terms of the caſe itſelf, that the deciſion of this particular caſe could be attended with any great difficulty, or that any great queſtion could ariſe out of it. The whole which has been argued, has been as to the operation of the bankrupt laws, in countries not ſubject to the juriſdiction of the courts of this country. In the preſent caſe, it is difficult for me to conceive that this queſtion can ariſe out of the facts ſtated. For the ſimple ſtate of the caſe is no more than this: The defendant, reſident in England, and a creditor of *Skirrow* in England, has received money, which was due to *Skirrow*, in the iſland of St. Chriſtopher, at the time of his bankruptcy, and which, at that time, was ſubject to no lien whatſoever. The money being remitted to *Worſwick* in England, and being clearly money which, at the time of the act of bankruptcy, was the property of the bankrupt, and ſubject to no lien whatever, he is, *primâ facie*, accountable for it to the aſſignees. The defence he makes is, that he recovered this money by legal proceſs in the iſland; but he ſtates alſo, that the proceſs was founded on *an act done by him in England*, and under the aid of the law of England. For the foundation of the recovery was *an affidavit of debt* made before the mayor of Lancaſter.—Without that affidavit, he could have inſtituted no proceeding in St. Chriſtopher's; the money would have remained ſubject to the demand of the aſſignees, whenever they had been apprized that ſuch a debt was due, and had ſent out proper powers. Theſe propoſitions cannot be doubted. Then it is not a queſtion, whether the bankrupt laws have an operation at St. Chriſtopher's, but whether they operated at Lancaſter. It is a queſtion, Whether a creditor, reſident in England, ſubject to the laws of England, ſhall avail himſelf of a proceeding of that law, to enable him to get poſſeſſion of a debt from thoſe who are intitled to that debt, and who have the diſtribution of it for the benefit of all the creditors, and to hold that poſſeſſion againſt thoſe creditors. But the argument has gone into a more general conſideration of the caſes which have ariſen under different circumſtances, in which, the bankrupt's property being diſperſed abroad, or he himſelf having changed his reſidence, advantage has been taken of

his local ſituation, or of the local ſituation of the property which has been attached. This leads me to a ſhort conſideration of the caſes on this ſubject, in which I ſee no difference, if their circumſtances are rightly underſtood, and rightly applied. Firſt, it is a clear propoſition, not only of the law of England, but of every country in the world, where law has the ſemblance of ſcience, that perſonal property has no locality. The meaning of that is, not that perſonal property has no viſible locality, but that it is ſubject to that law which governs the perſon of the owner. With reſpect to the diſpoſition of it, with reſpect to the tranſmiſſion of it, either by ſucceſſion, or the act of the party, it follows the law of the perſon. The owner in any country may diſpoſe of his perſonal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a ſubject, that will regulate the ſucceſſion. For inſtance, if a foreigner, having property in the funds here, dies, that property is claimed according to the right of repreſentation given by the law of his own country. In the caſe of *Pipon* v. *Pipon* (1), a party had poſſeſſed himſelf of a debt, which was due to the inteſtate, a ſubject of Jerſey, and whoſe perſonal property was therefore governed by the law of Jerſey. Lord *Hardwicke* was applied to, by his other relations reſident in England, ſtating, that they ſhould be excluded from a ſhare according to the diſtribution of Jerſey, but that they ſhould be intitled to a ſhare according to the diſtribution of England; and they therefore prayed, by their bill, that the adminiſtratrix might be reſtrained from taking the property to Jerſey. Lord *Hardwicke* very wiſely and juſtly determined, that he would not reſtrain the adminiſtratrix, he would not direct in what manner ſhe was to diſpoſe of the property, or to diſtribute it. Having acquired the right to it, ſhe was to diſtribute it according to the law which guided the ſucceſſion to the perſonal eſtate of the inteſtate. Perſonal property then, being governed by the law which governs the perſon of the owner, the condition of a bankrupt, by the law of this country, is, that the law, upon the act of bankruptcy being committed, veſts his property upon a juſt conſideration, not as a forfeiture, not on a ſuppoſition of a crime committed, not as a penalty, and takes the adminiſtration of it, by veſting it in aſſignees, who apply that property to the juſt purpoſe of the equal payment of his debts. If the bankrupt happens to have property, which lies out of the juriſdiction of the law of England, if the country, in which it lies, proceeds according to the principles of well regulated juſtice, there is no doubt but it will give effect to the title of the aſſignees. The determinations of the courts of this

(1) *Ambl.* 25.

country

country have been uniform to admit the title of foreign aſſignees. In the two caſes of *Solomons* v. *Roſs*, and *Follet* v. *Depenthieu*, where the laws of Holland, having, in like manner, as a commiſſion of bankrupt here, taken the adminiſtration of the property, and veſted it in perſons who are called curators of deſolate eſtates, the court of chancery held, that they had, immediately on their appointment, a title to recover their debts due to the inſolvent in this country, in preference to the diligence of the particular creditor ſeeking to attach thoſe debts. In thoſe caſes, the court of chancery felt very ſtrongly the principle which I have ſtated, and it has had a very univerſal obſervance among all nations. But it may happen, that in the diſtribution of the law in ſome countries, perſonal property may be made the ſubject of ſecurities to a greater or leſs extent, and in various degrees of form. It is in thoſe caſes only that any difficulty has occurred. A queſtion of this nature came before Lord *Hardwicke*, very largely, in the bankruptcy of Captain *Wilſon*. With the little explanation I am enabled to give of that caſe, in which the court of ſeſſion entirely concurred with Lord *Hardwicke*, the diſtinctions will be apparent. There were three different ſets of creditors who claimed, ſubject to the determination of the court, on the ground, that *Wilſon* had conſiderable debts due to him in Scotland. By the law of Scotland, debts are aſſignable, and an aſſignment of a debt notified to the debtor, which is technically called an *intimation*, makes a ſpecific lien *quoad* that debt. An aſſignment of a debt, not intimated to the debtor, gives a right to the aſſignee to demand that debt, but it is a right inferior to that of the creditor, who has obtained his aſſignmnent, and intimated it. By the law of Scotland, alſo, there is a proceſs for the recovery of debts, which is called an arreſtment. Some of *Wilſon*'s creditors had aſſignments of ſpecific debts, intimated to the debtors, and completed by that intimation, prior to the act of bankruptcy. Others had aſſignments of debts not intimated before the bankruptcy. Others had arreſted the debts due to him, ſubſequent to the bankruptcy, and were proceeding, under thoſe arreſtments, to recover payment of thoſe debts. The determination of Lord *Hardwicke* and that of the court of ſeſſion, entirely concurred. The firſt claſs I have mentioned, namely, the creditors who had ſpecific aſſignments of ſpecific debts, intimated to the debtors prior to the bankruptcy, were holden, by Lord *Hardwicke*, to ſtand in the ſame ſituation as creditors claiming by mortgage, antecedent to the bankruptcy. All, therefore, he would do with reſpect to them was, that if they recovered under that decree, they could not come in under the commiſſion, without accounting to the other creditors for what they had taken under their ſpecific ſecurity. With reſpect to the next claſs of creditors, Lord *Hardwicke* was

was of opinion, and the court of ſeſſion were of the ſame opinion, that their title, being a title by aſſignment, was preferable to the title by arreſtment: and they likewiſe held, that the arreſtments, being ſubſequent to the bankruptcy, were of no avail, the property being, by aſſignment, veſted in the aſſignees under the commiſſion. It is in this ſenſe, that an expreſſion has been uſed by Lord *Mansfield*, in one or two caſes, in which his language, rather than his deciſion, has been quoted, with reſpect to the law of Scotland, namely, that the effect of the aſſignment, under a commiſſion of bankrupt, was the ſame as a *voluntary aſſignment*. For ſo the law of Scotland treats it, in contra-diſtinction to the aſſignment perfected by intimation, and to an aſſignment which the party might be compelled to make. But it does not follow, that it is an aſſignment without conſideration. On the contrary, it is for a juſt conſideration; not, indeed, for money actually paid, nor for a conſideration immediately preceding the aſſignment. In that reſpect, therefore, it is a voluntary aſſignment. But taking it to be ſo, it excludes, and is preferable to all others attaching, it is preferable to all the arreſters, it is preferable to all creditors who ſtand under the ſame claſs, and to all who have not taken the ſteps to acquire a ſpecific lien till after the act of bankruptcy committed. In a variety of caſes enumerated, in (1) Lord *Kenyon*'s opinion, the ſame idea has prevailed, which, I think, is founded on the cleareſt and moſt evident principles of juſtice. If the aſſignees, in this caſe, had ſent a perſon over to St. Chriſtopher's to act for them, if they had given notice of the aſſignment, the court of St. Chriſtopher's ought, unqueſtionably, to have preferred the title of the aſſignees to the title of the creditor, uſing the proceſs of attachment; becauſe the law of the country, to which the creditor, making the demand, was ſubject, had, on a juſt conſideration, veſted that property in the preſent plaintiffs. As I take the determination in the court of chancery, in the caſe of *Solomons* v. *Roſs*, and the other caſe, to be founded, not on any policy of technical notions of the law of England, but on general law, preferring the title of the aſſignees to the title of the arreſting creditor, the court in St. Chriſtopher's ought alſo to have preferred the title of the aſſignees. When I have laid this down, it by no means follows, that a commiſſion of bankrupt has an operation in another country, againſt the law of that country. I do not wiſh to have it underſtood, that it follows as a conſequence, from the opinion I am now giving (I rather think, that the contrary would be the conſequence of the reaſoning I am now uſing), that a creditor in that country,

(1) Vide p. 162, ſupra.

not

not ſubject to the bankrupt laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverſe ſuit with the aſſignees, he would clearly not be liable. But if the law of that country preferred him to the aſſignees, though I muſt ſuppoſe that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might diſapprove of the principle on which that law ſo decided. But another caſe may poſſibly occur, of a ſuit brought againſt the bankrupt perſonally, and a caſe of this ſort was ſtated in the argument, *Waring* and others v. *Knight*. I have not been able to get a particular account of that caſe. It is ſhortly ſtated, in *Cooke*'s *Bank. Law*, 372, that a perſon, having committed an act of bankruptcy, had gone over to Gibralter, that a commiſſion of bankrupt was taken out againſt him, and that the defendant brought an action againſt him in Gibralter, and obtained judgment, and, under the judgment, payment of his debt. Whether the perſon was reſident at Gibralter prior to the bankruptcy, whether the debt was contracted at Gibralter, whether he appeared to the commiſſion in England, none of theſe circumſtances are ſtated. But the deciſion would undoubtedly be very materially varied by thoſe circumſtances. Lord *Manſfield* held, that the defendant, having recovered the debt againſt the bankrupt, who was perſonally preſent at Gibraltar, was not anſwerable to the aſſignees for the money. I am told, in one account of that caſe, that it turned on the form of the action. But this is clear, that there being no certificate, the defendant, in that caſe, had a right to ſue the bankrupt. A bankrupt in this country, without a certificate, may be ſued; and though his goods could not be taken in execution, being veſted in the aſſignees, yet his perſon might. There was, therefore, a good commencement of the ſuit againſt the perſon of the bankrupt at Gibralter. How the debt was contracted, and how the ſuit was carried on, the report gives no account. However, it is at moſt but a deciſion at *niſi prius*, and is the only caſe which ſeems at all to ſtand againſt the current of authorities, which hold, that the operation of the bankrupt laws, with reſpect to the perſonal property of the bankrupt, when that property is brought into this country, by any one who has obtained it, is to carry a right to recover it to the aſſignees for the benefit of all the creditors. But, as I ſaid before, it is not neceſſary to go the whole length of that diſcuſſion, becauſe, on the circumſtances of this particular caſe, the queſtion is merely, Whether a creditor of the bankrupt, reſident in England, and knowing of the bankruptcy, ſhall avail himſelf of a *proceſs which he has commenced in England*, ſo as to retain his debt from the aſſignees, and

gain

gain a preference over the other creditors. This is a propoſition too clear to require any diſcuſſion. The conſequence therefore is, that there muſt be judgment for the plaintiffs.

Philips *et al. v.* Hunter *at al.* in Ex. Ch. in Error, 2 *Hen. Black.* 402.

So alſo, if after a commiſſion of bankrupt has in fact iſſued, a creditor attaches, in the names of himſelf and his partners, a debt due to the bankrupt in a foreign country, by legal proceſs; and obtains payment of it, under the judgment of a court of juſtice of that country; the aſſignees have a right to recover the money ſo received, in an action for money had and received to the uſe of the aſſignees.—This was an action for money had and received, brought by the defendants againſt the plaintiffs, in error, in the court of King's-Bench, in which, a ſpecial verdict was found at Guildhall, ſtating, "that, before the bankruptcy of *Blanchard* and *Lewis*, *Philips* and Co. had ſold and delivered a large quantity of goods to them, at twelve months credit: that the debt was contracted in England, and that the defendants in error, as well as the bankrupts before and at the time of the bankruptcy, and at the time the ſaid debt was ſo contracted, were reſident in England, and continued to reſide in England long after the debt was contracted, and until the attachments, herein after-mentioned, were iſſued in the court of common pleas in Philadelphia, in the commonwealth of Pennſylvania, in North America: that the plaintiffs, in error, before and at the time of the bankruptcy, and at the time when the debt was ſo contracted, were traders and co-partners, and carried on trade and commerce at Mancheſter, in the county of Lancaſter; that the *Philips*'s, during all the time laſt aforeſaid, were reſident in England, and continued to reſide in England long after the ſaid debt was ſo contracted, and until the attachments, herein after-mentioned, were iſſued, but the other plaintiff, in error, *William Crammond*, before the year 1784, and before the bankruptcy, went from England to America, for the purpoſe of tranſacting, in that country, the commercial concerns of the houſe of *Philips* and Co. ſo carrying on trade and commerce at Mancheſter as aforeſaid, and remained and continued in America till after the iſſuing of the attachments herein after-mentioned: that *William Crammond*, on the 23d of October, 1783, *knowing that* Blanchard *and* Lewis *had ſtopped payment in the month of Auguſt preceding, and after the ſaid commiſſion of bankrupt had iſſued againſt them*, commenced an action for himſelf and partners againſt the bankrupts in England, in the court of common pleas in Philadelphia, in the commonwealth of Pennſylvania, in North-America, according to the laws and cuſtoms of the ſaid commonwealth, for the recovery of the money due for divers of the ſaid parcels of goods, ſo ſold and delivered to the bankrupts; and thereupon, on the ſaid 23d of October, 1784, being after the proviſional aſſignment of

of the ſaid bankrupts effects, cauſed to be attached, by the proceſs of the ſame court, as the goods and chattels of the ſaid bankrupts, in the hands and poſſeſſion of *Duncan Ingraham* the younger, of Philadelphia aforeſaid, merchant, *Stephen Auſtin* of the ſame place, merchant, and *John Blanchard* and *Thomas Ruſſell* of the ſame place, merchants, certain monies, which, before *Blanchard* and *Lewis* became bankrupts, were due to them from the ſaid *Duncan Ingraham* the younger, *Stephen Auſtin*, *John Blanchard*, and *Thomas Ruſſell*, and which, at the time of the ſaid attachment, remained unpaid, and did afterwards, in the ſaid court of common pleas, ſo holden as aforeſaid, on the 1ſt of June, 1786, according to the laws and cuſtoms of the ſaid commonwealth, recover judgment againſt the ſaid *Blanchard* and *Lewis*, for the ſaid debt and damages demanded in the ſaid action, the ſum of 2,639*l.* 18*s.* 3*d.* current money of the ſaid commonwealth of Pennſylvania, being 1,403*l.* 0*s.* 6*d.* of ſterling money of Great Britain, and alſo coſts of ſuit, taxed at 19*l.* 2*s.* 0*d.* of like current money of the ſaid commonwealth; that the ſaid *William Crammond* did, by virtue of, and under ſuch attachment and judgment as aforeſaid, obtain and receive payment from the ſaid *Duncan Ingraham* the younger, and *Stephen Auſtin*, of the ſum of 1,403*l.* 0*s.* 6*d.* of lawful money of Great Britain, in full for the damages recovered by *Philips*, and Co. under the ſaid judgment, from the ſaid monies in the hands of the ſaid *Duncan Ingraham* the younger, and *Stephen Auſtin*, together with ſuch coſts of ſuit, as being part of the monies and effects of the ſaid *Blanchard* and *Lewis*, within the ſaid commonwealth: it was then ſtated, that *Crammond* had recovered a further ſum of 23*l.* 9*s.* 9*d.* in Philadelphia, by a ſimilar proceſs againſt *Ingraham* and *Auſtin*, for the reſidue of the goods ſold and delivered to *Blanchard* and *Lewis*, and that the two ſums of 1,403*l.* 0*s.* 6*d.* and 23*l.* 9*s.* 9*d.* were before the commencement of the action received by the ſaid *Philips*, and Co. which they claimed to hold to their own uſe, and refuſed to pay over to the aſſignees. But whether, &c. &c." Judgment having been given in the court of King's Bench for the defendants in error, without argument, the caſe being conſidered as decided by that of *Hunter* v. *Potts*, *ſupra*, a writ of error was brought, which was twice argued. After time taken to conſider, the opinions of the judges were delivered in the following manner; Mr. J. *Rooke*, Mr. B. *Thompſon*, Mr. J. *Heath*, Mr. B. *Perryn*, Mr. B. *Hotham*, and the Lord Ch. B. *Macdonald*, held that the judgment of the court of King's Bench ought to be affirmed: but the Lord Ch. J. *Eyre* was of opinion that it ought to be reverſed. The courſe of reaſoning of the judges who thought the judgment right, was to the following effect. The general queſtion ariſing upon the facts which

which appear on this record, is, Whether the creditor of a bankrupt in England, who became ſuch creditor in England, having recovered a debt due to the bankrupt in a foreign country, by proceſs of attachment in that country, is intitled to retain the money, ſo recovered, to his own uſe; or whether he has not received it to the uſe of the aſſignees? It muſt be remembered, in diſcuſſing this queſtion, that it is found by the ſpecial verdict, that *Blanchard* and *Lewis*, the bankrupts, were Engliſh traders; that the defendants were partners in an Engliſh houſe; that the debt from the bankrupts to the defendants was contracted in England; that the bankrupts, as well as the defendants, were reſiden in England; and that *Crammond*, who muſt alſo be taken to be an Engliſh ſubject, went from this kingdom to America for the ſpecial and temporary purpoſe of tranſacting buſineſs for the Engliſh houſe at Mancheſter, in which he continued to be a partner. That houſe was the only one the defendants had, it not being found that they had any houſe in America. All theſe facts appearing on the record, this caſe muſt be argued as ariſing between Engliſh ſubjects upon Engliſh property. When the debt, therefore, was contracted, all the parties were as much ſubject to the bankrupt laws, as to the other laws of England under which they lived. It is a propoſition not to be diſputed, that previous to the bankruptcy the bankrupts themſelves might have transferred, or aſſigned this property, though abroad, as abſolutely as if it had been in their own tangible poſſeſſion in this country; and it ſeems that the aſſignees under the commiſſion were intitled, by operation of law, to do with it, after the bankruptcy, what the bankrupts themſelves might have done before. The great principle of the bankrupt laws is juſtice, founded on equality. No creditor ſhall be permitted to acquire an undue preference, and by ſo doing prevent an equal diſtribution among all the creditors. This being the principle of thoſe laws, it ſeems to follow, that the whole property of the bankrupt muſt be under their controul, without regard to the locality of that property, except in caſes which directly militate againſt the particular laws of the country in which it happens to be ſituated. No creditor, whoſe debt was contracted within the ſphere of the operation of thoſe laws, and who has notice of the inſolvency of the debtor, can recover any part of the common fund, for his own particular advantage; after an aſſignment has taken place, his intereſt is transferred to the aſſignees; and if he do recover, he muſt account to the other creditors for the ſum received. If the bankrupt laws were circumſcribed by the local ſituation of the property, a door would be open to all the partiality and undue preference which they were framed to prevent; it being eaſy to foreſee how frequently property would

would be ſent abroad with that unjuſt view, immediately previous to, and in contemplation of an act of bankruptcy. If the perſonal property of merchants employed in the courſe of their dealings in foreign countries, were to be taken by an individual creditor going from hence for that purpoſe, and not to be diſtributable among the creditors at large, ſuch merchants would be materially affected in their credit at home. It is true, that the laws of the country where the property is ſituated, have the immediate controul over it, in reſpect to its locality, and the immediate protection afforded it; yet the country where the proprietor reſides, in reſpect to another ſpecies of protection afforded to him and his property, has a right to regulate his conduct relating to that property: this protection afforded to the property of a reſident ſubject, which is ſituated in a foreign country, is not imaginary, but real. The executive power of this kingdom protects the trade of its ſubjects in foreign countries; facilitates the recovery of their debts; and, if juſtice be delayed or denied, the king, by the intervention of his ambaſſadors, demands and obtains redreſs. Even in the treaty of peace with America, the recovery of private debts, due from the inhabitants of that country to the ſubjects of this, made the ground of a particular article. The property which this country protects, it has a right to regulate: and, in fact, our bankrupt laws have made ſuch regulation. The ſtatute 13 *Eliz.* c. 7. enables the commiſſioners to take the bankrupt's money, goods, chattels, wares, merchandizes, and debts, *whereſoever they may be found or known.* This expreſſion is very extenſive, and ſeems to look beyond the debts and effects of a trader locally ſituated in this kingdom. In a country, a great part of whoſe commercial capital is employed abroad, it is peculiarly proper that ſuch capital over which the trader has a diſpoſing power, although ſituated out of the kingdom, ſhould be conſidered as referrible to the *domicilium* of the owner. In teſtamentary caſes and in the *ſucceſſio ab inteſtato*, the effects are ſubject to the law which governs the country of the teſtator or inteſtate, as was determined in *Pipon* v. *Pipon* (1), and *Thorn* v. *Watkins* (2). The ſtatute 1 *Jac.* 1. c. 15. ſ. 13. which enables the commiſſioners to aſſign debts due to the bankrupt, directs that the ſame ſhall not be *attached as the debt of the bankrupt*, according to the cuſtom of the city of London, *or otherwiſe.* The aſſignment being made by the authority of parliament, every ſubject of this kingdom is a party to it, inaſmuch as he is a party, and conſenting to an act of parliament; and having joined in the aſſignment, he cannot be permitted to contravene it, by at-

(1) *Ambl.* 25. (2) *Veſ.* 35.

taching

taching the debt in the hands of the debtor: and if by means of an attachment he receives the money, it is received to the uſe of the aſſignees. The words of the ſtatute *Jac.* 1. extend to all foreign attachments, both at home and abroad; in countries ſubject to and independent of the crown of Great Britain. As debts due to bankrupts from the ſubjects of foreign countries paſs under the aſſignment, the attachments muſt be conſidered as co-extenſive with the debts mentioned in the ſtatute. The equal diſtribution, which it is the policy of the bankrupt laws to eſtabliſh, is as much infringed by attachments in foreign countries, as in the Britiſh dominions: the miſchief is the ſame, and the remedy ought to be advanced to meet the miſchief. The words "*according to the cuſtom of London*," mean "*in ſuch manner as is warranted by the cuſtom of London*;" which is put by way of inſtance or illuſtration. Many caſes already decided on the ſubject of bankruptcy, go a great way to prove, that an individual creditor is precluded from retaining what he ſhall recover abroad and bring into this country. In *Mackintoſh* v. *Ogilvie* (1), Lord *Hardwicke*, by the writ of *ne exeat* prevented the creditor from going to ſue in Scotland, after the bankruptcy. By giving this preventive remedy againſt an unconſcientious preference, which one creditor might have obtained over the others, his lordſhip muſt be underſtood to ſay, that the creditor was bound, as far as the circumſtances would enable him to apply them, by the bankrupt laws of this country; and had that creditor effectuated his payments in Scotland, it ſhould ſeem that his lordſhip, in order to be conſiſtent, would have obliged him to have accounted with the aſſignees, if the fund had been brought within his juriſdiction. In *Solomons* v. *Roſs* (2), money attached by an individual creditor, after an aſſignment in Holland, was decreed, by Lord *Hardwicke*, to be paid to the attorney of the aſſignees, for the benefit of the creditors; plainly conſidering each creditor as bound by the aſſignment, and the money recovered here as referrible to Holland, the country of the debtor. The ſame is likewiſe to be inferred from *Follet* v. *Depontheiu* (3), and *Neale* v. *Cottingham* (4). It has been urged, that thoſe caſes turned upon this circumſtance, *viz.* that we admit the claim of the aſſignees in preference to a particular creditor, where bankrupt laws are inſtituted in the domicil of the bankrupt, but as there are no bankrupt laws in America, the reaſon is not applicable in this caſe. Now it does not appear upon this record, whether there are bankrupt laws in America or not. There were none in Holland or France peculiar to inſolvent traders.

(1) Cited in p. 163, ſupra.
(2) *Ante* 164.
(3) *Ibid.* 164.
(4) *Ibid.*

The

The courts, therefore, here, muſt in thoſe caſes have proceeded on a larger principle. But the judgment of Lord *Loughborough* in *Silk* v. *Worſwick* (1), is an authority directly in point, and in favour of the plaintiffs in the preſent action. The caſes oppoſed, of *Le Chevalier* v. *Lynch* (2), *Cleve* v. *Mills* (3), and *Allen* v. *Dundas* (4), prove only, that where a debtor has paid (not where a creditor has received) money under due proceſs of local law, he ſhall not be compelled to pay it over again: and *Wilſon*'s caſe is truly and ſatisfactorily explained by Lord *Loughborough* in his judgment in *Sill* v. *Worſwick*, to have turned on the ſeveral liens which different creditors had by the law of Scotland: but there Lord *Hardwicke* held, that the arreſters of the fund which was not ſo bound, after the bankruptcy, ſhould be poſtponed to the aſſignees. But it is objected, that the judgment in Pennſylvania is final and concluſive, and binds the property. That it muſt be ſo taken to be between the parties, is not diſputed. But as the recovery of the plaintiffs in error, otherwiſe than for the uſe of the defendants, would be in violation of an act of parliament, ſuch recovery ſhall be taken to be for the uſe of the defendants. In an action for money had and received, the receipt ſhall be always deemed to enure to the uſe of him who hath the right, even though it be taken under an adverſe title: as for inſtance, when this ſpecies of action is brought to try the title to an office. Indeed, in the preſent action, the judgment of the court in Pennſylvania is affirmed. Another objection has been made, that the reſidence of *Crammond* in America enabled him to recover this debt, without accounting for it to the defendants in error. In order to raiſe that queſtion, the ſpecial verdict ſhould have found that he was reſident within the ſtate of Pennſylvania. But if that queſtion were raiſed, no reſidence in foreign parts can exempt a Britiſh ſubject from the operation of an act of parliament, much leſs an occaſional reſidence. It is alſo imputed to the aſſignees, and much relied upon, that they did not ſtate their claim in the foreign court, which they ought to have done, inſtead of bringing their action here. But it is not found by the verdict, that they had any notice of the proceedings in that court. No Engliſh ſubject can be affected by the proceedings in a foreign court, without clear and direct notice: for however Engliſh ſubjects are bound by the proceedings in our own courts, from a preſumption of their having notice of them, no ſuch preſumption can be raiſed with reſpect to foreign courts. When it is argued, that in many inſtances the bankrupt laws of this country do not operate in another, it is to be

(1) *Ante* p. 165. (2) *Infra* 178. (3) *Cooke Bank. Law*, 370.
(4) See this caſe under the title *Executors* and *Adminiſtrators*.

obſerved, that though to ſome purpoſes they do not, yet to all civil purpoſes they do, when ſuch purpoſes are neither repugnant to the law of the particular ſtate, nor to the general law of nations. And it is on wiſe principles, that foreign ſtates acknowledge, and act according to the different civil relations, which ſubſiſt between men in their own country. If, then, there be no law of the particular ſtate, nor any law of nations that forbids the operation of the Engliſh bankrupt laws on the perſonal property of an Engliſh ſubject, wherever it is found, there is nothing to reſtrict the large words of the ſtatutes 13 *Eliz.* and 1 *Jac.* 1. but an implied power in a foreign country, to declare that an Engliſh ſubject becoming bankrupt, ſhall, notwithſtanding, continue to be inveſted with all his rights, and in the enjoyment of all his property, in defiance of thoſe laws to which he owes ſubmiſſion. But ſuch a power cannot be aſſumed by any foreign ſtate, nor ought this country to make to any ſo important a ſurrender. For theſe reaſons, it appears that the judgment of the court of King's Bench ought to be affirmed.

Le Chevalier, Aſſignee of Dormer *v.* Lynch *et al.* Ea Ter. 19 Geo. 3. B. R. 1 *Doug.* 169.

But if the perſon, in whoſe hands the money is attached, be ſued by the aſſignees for the ſame, the Court will, on application to them for that purpoſe, put off the trial till the party is able to procure evidence of the debt's having been attached in his hands.—Thus, where a creditor of *Dormer's*, to whom he was indebted before he became a bankrupt, attached in the iſland of St. Chriſtopher's, after the bankruptcy, a ſum of money owing by *Lynch* to *Dormer*; and afterwards *Lynch* coming to England, the plaintiffs brought an action againſt him to recover the debt owing by him to the bankrupt; *Lynch* applied to the Court for a rule to ſhew cauſe why the trial ſhould not be put off till he ſhould be able to procure from St. Chriſtopher's evidence of the debt's having been attached in his hands, in the manner above ſtated. Lord MANSFIELD ſaid, If a bankrupt has money owing to him out of England, as in St. Chriſtopher's, Gibraltar, or like places, the aſſignment under the bankrupt laws ſo far veſts the right to the money in the aſſignees, that the debtor ſhall be anſwerable to them, and ſhall not turn them round, by ſaying, he is only accountable to the bankrupt. In Scotland, they permit aſſignees of a bankrupt in England, to ſue for money owing to the bankrupt, in Scotland; but if, in the mean time, after the bankruptcy, and before payment to the aſſignees, money owing to the bankrupt out of England is attached *bonâ fide*, by regular proceſs, according to the law of the place, the aſſignees, in ſuch caſe, cannot recover the debt (1).—Rule abſolute.

Treſpaſs

(1) That is, they cannot recover from the debtor (the garniſhee) in whose hands the money has been attached, though, according to the foregoing caſes, they

Smith *et al.* v. Milles, Mic. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 475.

Treſpaſs will not lie by the aſſignees of a bankrupt againſt a ſheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the iſſuing of the commiſſion; notwithſtanding he ſells them after the iſſuing of the commiſſion, and after a proviſional aſſignment, and notice from the proviſional aſſignee not to ſell.—This was an action of *treſpaſs brought by the aſſignees of a bankrupt* againſt the defendant, who was ſheriff of the county of Hertford: the firſt count in the declaration was, for breaking and entering the meſſuages, &c. of the plaintiffs, as aſſignees, on the 23d of February, 1786, and ſeizing and taking the deeds and writings, houſehold furniture, &c. (enumerating them particularly) of the aſſignees; the 2d count was for ſeizing and taking the goods, &c. of the plaintiffs, on the 13th of March, 1786. The defendant pleaded, 1ſt, the general iſſue; and 2dly, a juſtification under a *fieri facias*, ſued out on the 13th of February, 1786, at the ſuit of one *Caleb Atkinſon*, againſt the bankrupt, and delivered to him on the 21ſt of February, 1786, to be executed. Replication *de injuriâ ſuâ propriâ abſque tali cauſâ*. On the trial of this cauſe, "the plaintiffs proved a commiſſion of bankrupt, dated the 27th of February, 1786; the trading; and *an act of bankruptcy on the 1ſt of February*, 1786. They alſo proved, that on the 23d of February, 1786, and not before, the defendant, as ſheriff of Hertford, entered the dwelling-houſe of the bankrupt, and there ſeized the ſeveral goods, &c. of the bankrupt, under the ſaid writ of *fieri facias*; that on the 28th of the ſame month of February, *Clarke* was declared a bankrupt, on which day the commiſſioners executed a proviſional aſſignment of the bankrupt's eſtate and effects to their meſſenger, whereof the officer in poſſeſſion under the execution on the ſame day had notice; that on the 13th, 14th, 15th, and 16th days of March, the ſaid goods and chattels were ſold by public auction, under the aforeſaid execution; that on the morning of the ſaid 13th day of March, the ſaid ſheriff had notice from the aforeſaid proviſional aſſignee not to ſell; that on the 17th of March the plaintiffs were choſen aſſignees, &c. of the bankrupt under the ſaid commiſſion, and that an aſſignment thereof was then duly made to them. To this evidence the defendant demurred. Per Cur. It might perhaps have ſufficed for us to ſay, that the point now in queſtion has been ſolemnly determined in this court in the caſe of *Cooper* v. *Chitty*, 1 *Bur.* 20. upon full and mature deliberation, by a full court: and, for that reaſon, whatſoever our opinions might have been (as we are now only two judges ſitting in court), it would not have

may recover from the creditor, who, in ſuch a caſe, has recovered his debt by the attachment.

been very decent in us to have over-ruled the authority of that caſe: but we are relieved from any difficulty on that account, as our opinion entirely coincides with that of the judges in the above caſe. *To intitle a man to bring* treſpaſs, *he muſt* at the time *when the act was done, which conſtitutes the treſpaſs, either have the* actual poſſeſſion *in him of the thing, which is the object of the treſpaſs, or elſe he muſt have a* conſtructive poſſeſſion *in reſpect of the right being actually veſted in him.* Such is the caſe of an action of treſpaſs for an eſtray, or wreck, taken by a ſtranger before ſeizure by the lord: for the *right* is in the lord, and a *conſtructive poſſeſſion* in reſpect of the thing being within the manor of which he is lord: ſo the executor has the *right* immediately on the death of the teſtator, and the right draws after it a *conſtructive poſſeſſion.* The probate is a mere ceremony; but, when paſſed, the executor does not derive his title under the probate, but under the will: the probate is only evidence of his right, and is neceſſary to enable him to ſue: but he may releaſe, &c. before probate. But there is no inſtance where a man who has a new right given him, which, from reaſons of policy is ſo far made to relate back as to avoid all meſne incumbrances, ſhall be taken to have ſuch a poſſeſſion as to bring *treſpaſs* for an act done before ſuch right was given to him. But, at all events, the rule will hold with reſpect to officers and miniſters of juſtice(1). In the caſe of *Lechmere* v. *Thoroughgood* (2), which was an action of treſpaſs brought by the aſſignees of bankrupts againſt a ſheriff's officer, who took goods under an extent, the act of bankruptcy was on the 28th of April; afterwards the ſheriff's officer took the goods under an extent, and then an aſſignment was made to the plaintiffs, who brought treſpaſs: and it was held the action lay not; and the argument turned on this, that the officers ſhall not be made treſpaſſers by relation. The ſame doctrine is recognized in the caſe of *Baily* and *Bunning* (3). Now here the execution was fully completed, and the goods ſold, before the aſſignment to the plaintiffs. In the caſe of *Cooper* v. *Chitty*, Lord *Manſfield* lays down the true ground of diſtinction between the action of *trover* and the action of *treſpaſs*, as applied to this caſe; "The action of trover (he ſays) is maintainable, becauſe the converſion, and not the taking, is the giſt of the action; and the ſale was after the act of bankruptcy was notorious. But (he ſays) that though the property by relation was in the aſſignees, from the time of the act of bankruptcy, yet the taking by the ſheriff, as applied to this ſpecies of action, was lawful. And (he ſays) the ſeeming contrariety and

(1) *Vide* 2 *Ro. Ab.* 561. tit. *Treſpaſs*, *G.* 6. (2) 1 *Show.* 12.
(3) 1 *Lev.* 173.

confuſion

confuſion in the caſes ariſes from the equivocal uſe of the word *lawful*. For (ſays he) to ſupport the act, it is not lawful; but to excuſe the miſtake of the ſheriff, it is lawful; or, in other words, the relation introduced by the ſtatutes binds the property; but men, who act innocently at the time, are not made criminal by relation, and therefore are excuſable from being puniſhable by indictment or action as treſpaſſers. But as a ground to ſupport a wrongful converſion by a ſale after a commiſſion publicly taken out, and an actual aſſignment made, it was not lawful." The plaintiffs, therefore, are not injured, as it is competent to them to recover the *value* of the goods by bringing a proper action, namely, an action of trover. But the officer ſhall not be haraſſed by this ſpecies of action, in which the jury *might* give vindictive damages.

If the payee of a bill of exchange give time to the acceptor, on condition that he ſhall allow intereſt, and afterwards the acceptor diſcharge the bill, *having in the mean time committed an act of bankruptcy*, this is not ſuch a payment, in the ordinary courſe of trade, as is protected by the 19 *Geo.* 2. c. 32. and the aſſignees may recover the money from the payee.—The act of bankruptcy was proved on the 2d of May, 1785: two months prior to the bankruptcy the defendant ſold an eſtate to one *Uterſon*, who, in order to pay for it, had drawn a bill of exchange, to that amount, on the bankrupt, in favour of the defendant, payable the 7th of February, in the ſame year: when it became due the defendant applied for it, and was told, that it was not convenient, at that time, to pay; but if he would permit it to remain in the bankrupt's hands, ſhe would allow him intereſt on it; to this he aſſented, and on the 22d of May, 1785, applied for payment, which he received, without knowing of the bankruptcy.—THE COURT were clearly of opinion, that it was not ſuch a payment in the ordinary courſe of buſineſs, as came within the proviſions of the ſtatute 19 *Geo.* 2. c. 32. for they conſidered the tranſaction as a loan of money at intereſt, which became a debt.

Vernon *et al.* v. Hall, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 648.

Money paid by a trader, after a ſecret act of bankruptcy, to a carrier, for the carriage of goods, may be recovered back in *aſſumpſit* by the aſſignees of the bankrupt.—On the trial of an action of *aſſumpſit*, for money had and received, a verdict was taken for the plaintiff for 44*l.* ſubject to the opinion of the Court on a caſe ſtating, that the bankrupt being indebted to the defendant, as a common carrier, in the ſum of 44*l.* for carriage of goods on the 24th of November, 1791, cauſed the bankrupt to be arreſted for ſuch debt, who thereupon paid the ſame to the defendant, *the defendant not then knowing that he had committed any act of bankruptcy*, or was in inſolvent circumſtances: an act of bankruptcy had, however,

Bradley *et al.* v. Clark, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 197.

however, been committed on the 17th of November, 1791, and a commiſſion of bankrupt was thereupon afterwards iſſued againſt him on the 23d December following: and it did not appear that he had carried on any trade after he had committed the ſaid act of bankruptcy. PER CURIAM, Though the defendant, in receiving this money, did not act immorally, we muſt take care in conſtruing the ſtatute 19 *Geo.* 2. c. 32. on which this queſtion ariſes, not to extend the words and meaning of it. Many caſes have been cited to ſhew that the courts extended the conſtruction of ancient acts of parliament beyond the words, and in ſome inſtances beyond the fair import of them; and as ſuch conſtructions have been made, and acted upon, they become the guide for ſucceeding judges. But with regard to the conſtruction of ſtatutes according to the intention of the legiſlature, we muſt remember that there is an eſſential difference between the expounding of modern and ancient acts of parliament. In early times the legiſlature uſed to paſs laws in general and in few terms; they were left to the courts of law to be conſtrued ſo as to reach all the caſes within the miſchief to be remedied. But in modern times great care has been taken to mention particular caſes in the contemplation of the legiſlature, and, therefore, the courts are not permitted to take the ſame liberty in conſtruing them as they did in expounding the ancient ſtatutes. In this caſe we are called upon to put a conſtruction on the ſtatute 19 *Geo.* 2. c. 32.; and, as it is a remedial law, we ſhould give effect to it as far as the words of the act warrant. But it is clear, that the legiſlature did not mean to extend this remedy to all caſes; had ſuch been their intention, they would have ſaid ſo in expreſs terms; inſtead of which, they have choſen to uſe particular words, and to confine the remedy to particular caſes. The ſtatute only extends to two caſes; of which this is neither. We agree that the preamble of an act of parliament cannot reſtrain the plain and poſitive words of the enacting clauſe: but that rule cannot govern this caſe, where the words of the enacting clauſe are as clear as thoſe of the preamble. The latter ſpeaks of the two caſes of a bankrupt paying for goods, and paying bills of exchange; and thoſe two caſes are again repeated in the enacting clauſe as the only two, to which the proviſions of the act were meant to extend. The defendant's argument has, indeed, been frequently uſed on the conſtruction of another ſtatute 7 *Geo.* 1. c. 31. which enables a creditor to prove, under the bankrupt's commiſſion, certain debts not actually due at the time of the bankruptcy: but there the preamble recites a doubt, whether "merchants and other traders in goods," who ſell upon credit, taking bills, &c. as a ſecurity, can prove thoſe bills under the commiſſion

miſſion if they do not become due until after the bankruptcy of the vendee; and the enacting clauſe is general, enabling "all and every perſons" who give credit on ſuch ſecurities to come in under the commiſſion. In conſtruing that act of parliament, the Court has ſaid, that though "merchants and other traders in goods" only are mentioned in the preamble, as the enacting clauſe is conceived in more extenſive terms, the operation of the act ought not to be confined to merchants only. Beſides, on this ſtatute the caſe of *Vernon* v. *Hall* is deciſive, for there the debt originally aroſe in a bill of exchange in the courſe of trade. Whether or not it would have been wiſe to have extended this proviſion to all caſes, we do not preſume to determine; though it muſt be obſerved that, had that been the caſe, all the property of a bankrupt might be conveyed to one creditor to the excluſion of the reſt. In determining on this act of parliament, it is ſufficient to ſay that this caſe is not within the words, nor the intention of the act; though, had it clearly and indiſputably appeared to have come within the meaning of the act, we ſhould have been inclined to have extended it to this caſe.—*Poſtea* to the plaintiffs.

Pinkerton *et al.* v. Marſhall, Tr. Ter. 34 Geo. 3. C. B. 2 *Hen. Black.* 334.

A. having recovered a verdict for a certain ſum of money againſt *B.*, *B.* commits an act of bankruptcy. Afterwards *A.* having had no notice of the bankruptcy, gives time to *B.* and inſtead of entering up judgment and ſuing out execution, takes a bill drawn by *B.* on *C.* at a diſtant period, for the amount of the ſum recovered: this is not a payment protected by the ſtatute 19 *Geo.* 2. c. 32. *A.* therefore is liable to refund the money received for the bill to the aſſignees of *B.*—The defendant, who was a ſhip owner, recovered a verdict againſt *Gale*, who was a merchant, in an action on a charter-party, for 428*l.* 11*s.* 11*d.* Early in the next April, *Gale* committed an act of bankruptcy; afterwards, the defendant *having had no notice of the bankruptcy, was requeſted by* Gale *to give him time for the payment of the ſum recovered by the verdict*, inſtead of immediately entering up judgment and taking out execution. To this he conſented, on receiving a bill of exchange, drawn by *Gale* in his favour, on one *Young Huſband*, who was a debtor of *Gale*'s, for that ſum, at four months after date, and on payment of the coſts to the attorney. When the bill became due, it was paid by *Young Huſband*, by another bill drawn on Sir *James Eſdaile*, and Co. the amount of which, together with the coſts, this action was brought to recover, and a verdict found for the plaintiffs, who were aſſignees of *Gale*, ſubject to the opinion of the Court, whether the debt for which the bill was given, being for money recovered by a verdict for freight, was of ſuch a nature, that the payment of it was protected by ſtat. 19 *Geo.* 2. c. 32. The Court, after conſideration,

ſideration, declared that they thought the authorities of *Vernon* v. *Hall* and *Bradley* v. *Clark* were deciſive of the point in diſpute, particularly the former, where, as well as in this inſtance, a perſonal credit was given to the bankrupt: that if the payment by the bankrupt in thoſe caſes could not be ſupported, neither could it be in the preſent.—*Poſtea* to the plaintiffs.

Brandon *et al.* v. Pate, Ea. Ter. 34 Geo. 3. C. B. 2 *Hen. Black.* 308.

The aſſignees of a bankrupt may recover from the winner, money loſt by the bankrupt before his bankruptcy at play, in an action of debt on the ſtat. 9 *Anne*, c. 14.—This was an action of debt, brought to recover money loſt by the bankrupt at hazard; and the firſt count of the declaration ſtated "that whereas before the bankruptcy of the ſaid *A. B.* and within three months next before the commencement of this action, to wit, on, &c. at, &c. the ſaid *Robert*, the defendant, received to the uſe of the ſaid *A. B.* the ſum of one hundred and ſeventy-eight pounds and ten ſhillings of lawful money of Great Britain, being ſo much money loſt by the ſaid *A. B.* to the ſaid *Robert*, at one ſitting, by then and there playing with him, together with certain other perſons, to the ſaid plaintiffs unknown, at a certain game called hazard; and which money ſo loſt was, on the day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, paid by the ſaid *A. B.* to the ſaid *Robert*, the winner thereof; whereby, and according to the form of a certain act made in the ninth year of the reign of Queen *Anne*, intitled "An Act for the better preventing of exceſſive and deceitful Gaming," an action accrued to the ſaid *A. B.* before he became bankrupt, to demand and have of and from the ſaid *Robert*, the ſaid ſum of one hundred and ſeventy eight pounds and ten ſhillings, parcel of the ſaid ſum of ſeven hundred and fourteen pounds above demanded." The ſecond count ſtated, that before the bankruptcy of the ſaid *A. B.* and within three months next before the commencement of this action, to wit, on, &c. at, &c. the ſaid *A. B.* loſt to the ſaid *Robert*, at one ſitting, by then and there playing with the ſaid *Robert* at the ſaid game called hazard, another large ſum of money, to wit, the ſum of one hundred and ſeventy eight pounds and ten ſhillings, of like lawful money, and on the day and year aforeſaid, at, &c. paid the ſaid ſum of money ſo loſt as laſt aforeſaid, to the ſaid *Robert*, the winner thereof; and which ſaid laſt mentioned ſum of money, was not repaid to the ſaid *A. B.* at any time before his ſaid bankruptcy, &c. The third count ſtated, that the defendant, after the bankruptcy, was indebted to the plaintiffs, as aſſignees, &c. ſimilar to the ſecond count. The fourth count was for money had and received by the defendant to the bankrupt's uſe before his bankruptcy. There was a general demurrer to the three firſt counts, and

nil

nil debet pleaded to the laſt. This demurrer was twice argued. Per EYRE, Ch. J. After two arguments, I ſtill feel a difficulty in ſaying this action can be maintained. It ſeems to me, that unleſs a duty attached in the bankrupt, the action cannot be ſupported. Now, if there was any duty in him, it muſt have been given by the ſtatute, and not in conſequence of any ſuppoſed contract. But though the ſtatute has veſted a right of action in the loſer, liable to be diveſted at the expiration of three months, yet I think no duty veſts in him till the action is brought. If there be a duty in him, on principle, it is difficult to deny that it would go to his executors, or that they might maintain an action againſt the executors of the winner; but the ſtatute enacts, that if the party himſelf does not ſue within three months, any other perſon may bring the action. On principle too, it ſhould ſeem, that if there be a duty, aſſumpſit would lie for it; but that cannot be, as the ſtatute ſpecifies an action of debt. It appears, therefore, to me, to be the plaineſt and beſt conſtruction to ſay, that no duty is fixed in the loſer, till the action is brought. HEATH, J. An executor clearly could not bring the action, which by the ſtatute is limited to the loſer himſelf, within the three months. But the aſſignees of a bankrupt are different from other repreſentatives; for if the party himſelf were to recover the money, he muſt pay it over to the aſſignees. It is to be conſidered as part of the bankrupt's eſtate, which has wrongfully paſſed to the winner; and if ſo, the aſſignees have a right to it, and ought in reaſon to ſue for it. It cannot poſſibly be of any benefit, to hold that the debt does not veſt in the aſſignees, and this being a remedial ſtatute, we are ſo to conſtrue it as beſt to anſwer the purpoſe for which it was made. ROOKE, J. I am of opinion that this action may be maintained. The meaning of the act is, that the money loſt and paid to the winner is part of the property of the loſer. Upon this principle, it was holden in the caſe in *Strange*, 1079, that the loſer might make an affidavit of debt, and hold the winner to bail. This is alſo a remedial act, and there is a clear diſtinction between remedial and penal acts, that in the former, a debt is due to the party aggrieved before the commencement of the action, but not in the latter. As the money then was part of the eſtate of the bankrupt, the aſſignees had a right to ſue for the recovery of it. LAWRENCE, J. Having argued the caſe while at the bar, gave no opinion. Lord Ch. J. As I find that my brothers are of a different opinion from me, I ſubmit to their authority. Therefore let there be judgment for the plaintiffs.

On a rule to ſhew cauſe why the judgment in this caſe for the defendant ſhould not be arreſted, two objections were taken; firſt, that a right of action, to recover real property, was

Smith *et al. v.* Coſlin, Ea. Ter. 35 Geo. 3. C. B. 2 *Hen. Black.* 451.

was not ſuch an intereſt as would paſs, by the aſſignment of the commiſſioners, to the aſſignees of the bankrupt; and 2dly, that if it were ſuch an intereſt as was aſſignable, yet it did not paſs by the deed which was executed in the preſent inſtance. The facts, ſtated and admitted on this record, were theſe: *Thomas Euſtace*, the father, was ſeiſed in fee of the lands in queſtion, and died ſo ſeiſed, on the 1ſt of June, 1767, leaving *Thomas Euſtace*, his ſon, then of the age of ſixteen years, his heir at law. Upon the death of *Thomas Euſtace*, the father, *Hannah Euſtace* abated into the premiſes, and was ſeiſed thereof, and died ſo ſeiſed, on the 12th of December, 1792. On the 3d of February, 1789, *Thomas Euſtace*, the ſon, became a bankrupt, a commiſſion of bankrupt duly iſſued againſt him, and the commiſſioners, by indenture of bargain and ſale, bearing date the 24th of March, 1789, duly inrolled, did order, grant, bargain, and ſell, unto the demandants, the aſſignees, "all and ſingular the *meſſuages*, *lands*, *tenements*, and *hereditaments*, whatſoever and whereſoever, of and belonging to the ſaid bankrupt, in fee-ſimple, fee-tail, or for life, or otherwiſe, with their reſpective rights, members, and appurtenances, and all the eſtate, right, title, intereſt, property, profit, benefit and equity of redemption, claim and demand whatſoever, which the ſaid bankrupt, at the time of his becoming bankrupt, had, of, in, or to, all and ſingular, the ſaid meſſuages, lands, tenements, and hereditaments reſpectively." From the death of his father, in the year 1767, until his bankruptcy, in the year 1789, a period of more than twenty-two years, *Thomas Euſtace*, the ſon, never entered into the premiſes at all, and therefore a right of action only remained in him at the time of his bankruptcy. His entry was taken away by the ſtatute 21 *Jac.* 1. c. 16. which enacts, that no perſon ſhall make any entry into any lands, &c. but within twenty years next after his right ſhall firſt deſcend or accrue, and in default thereof, ſuch perſon ſhall be utterly excluded, and diſabled from ſuch entry after to be made. There is a proviſo in the ſtatute in favour of infants, but the infant muſt, within ten years next after his full age, take the benefit of that proviſo, and at no time after ten years. *Thomas Euſtace*, the ſon, was of full age in the year 1772, and did not become a bankrupt until the year 1789, more than ten years after his full age; during which time, he neither entered, nor ſued for the premiſes, and therefore his entry was taken away at the time of his bankruptcy. Under theſe circumſtances, it was ſubmitted, that judgment ought to be arreſted; firſt, becauſe the commiſſioners have no authority whatever, under the ſtatutes of bankrupts, to grant any rights of action, which a bankrupt may have to any lands or tenements at the time of his bankruptcy; ſecondly, becauſe ſuppoſing they have ſuch authority, this right of action did not

paſs

paſs to the aſſignees, by the bargain and ſale ſtated upon this record.—Lord Ch. J. *Eyre*. This caſe has been very elaborately and ably argued; but that argument goes againſt the moſt expreſs and plain ſpirit of the bankrupt laws, which is, that every beneficial intereſt which the bankrupt has, ſhall be diſpoſed of for the benefit of his creditors. Though this is the ſpirit of thoſe laws, yet advantage may be taken of particular expreſſions to raiſe difficulties, and arguments may be drawn from the ſtrict rules of law, as applied to the letter of the ſtatutes. It has been argued, that though the intent of the legiſlature was, that all the bankrupt's property ſhould paſs, yet that the court is tied up by the expreſſion, "*may lawfully depart withal.*" But it may as well be argued, that becauſe in the ſtatute of *Hen.* 8. the words *bargain and ſale* are uſed, therefore nothing would paſs but what the bankrupt might convey by a bargain and ſale. But thoſe words are omitted in the 13 *Eliz.* and all the bankrupt acts being *in pari materiâ*, are to be conſtrued together. It is true, that on general principles, rights of action are not forfeitable, nor aſſignable, except in a particular mode; but that rule is founded on the policy of the common law, which is averſe to encourage litigation; but in this caſe, the policy of the bankrupt laws requires, that the right of action ſhould be aſſignable, and transferred to the aſſignees, as much as any other ſpecies of property. It is an hereditament, and the words of the ſeveral ſtatutes are large enough to comprehend it, and no caſe has been ſhewn to prove that it ought not to paſs. What then does the whole argument amount to but this, that in many caſes, from the policy of the law, a right of action does not paſs. But here the policy is, that every right, belonging in any ſhape to the bankrupt, ſhould paſs to his aſſignees. And this being the clear intent of the law, a particular recital of this ſpecies of right could not be neceſſary. I therefore think it a clear caſe, both on the words of the acts of parliament and on the ſubject-matter. *Buller*, J. I entirely concur in opinion with my Lord Chief Juſtice on both points. All the ſtatutes of bankrupts are *in pari materiâ*, and are to be taken together, and the object of them was, that every thing belonging to the bankrupt, that can be turned to profit, ſhall paſs by the aſſignment, for the benefit of the creditors. It has been admitted in the argument, that this right may be uſed for their benefit; but then it was ſaid, that the action ought to be brought in the name of the bankrupt himſelf. But was it the intention of the legiſlature, that the bankrupt ſhould bring actions? On the contrary, every thing is given to the creditors, and the aſſignees are to bring actions. —With reſpect to the argument, from the caſes of truſts and a writ of error, neither of them are applicable, for no profit can be made of a truſt, or writ of error. As to the caſe cited

cited from 2 *Vern.* 97. I very much doubt the authority of that caſe; as, at preſent adviſed, I do not ſee why a covenant for the renewal of a leaſe, of which a profit may be made, may not be aſſigned: and that caſe is very much ſhaken by *Higden* v. *Williamſon*, which goes a great way to decide the preſent. There, no diſtinction was thought of between real and perſonal property, but Sir *Joſeph Jekyll* decided, on the ground of the ſtat. 13 *Eliz.* having transferred every thing belonging to the bankrupt to the aſſignees. On the words, indeed, of that ſtatute, there can be no doubt, as it directs, that the conveyance, by the aſſignees, ſhall be good and effectual in law, to *all intents*, *conſtructions*, and *purpoſes*, againſt the offender, and all perſons claiming under him. If this be true, I think there can be no doubt on the words of the deed of aſſignment, which is not a particular conveyance of particular lands, but a general conveyance of all the real and perſonal property of the bankrupt. And the court is bound to conſtrue the bankrupt laws, in the moſt liberal and beneficial manner, for the creditors. I therefore hold, that every ſpecies of right, of which, by any poſſibility, profit can be made, paſſes to the aſſignees. *Heath*, J. I am of the ſame opinion. The argument goes to prove, that even a right of entry, on a vacant poſſeſſion, would not paſs by the aſſignment. But then it was ſaid, the aſſignees are not without remedy, for the action may be brought in the name of the bankrupt; but, ſuppoſe the bankrupt were to releaſe his right of action, or make a fraudulent conveyance, if he were to bring the action, ſuch releaſe or conveyance might be ſet up to defeat it. As to the caſe cited from *Vernon*, I think it a very ſtrange one, for a covenant to renew a leaſe runs with the land. With reſpect to the ſecond point, I am alſo of opinion, that the words uſed in the aſſignment were ſufficient. The commiſſioners are ſtrangers to the bankrupt, and cannot deſcribe every particular ſpecies of his property. We ſhould, therefore, do infinite miſchief, if we were to hold, that every thing belonging to him did not paſs under the general words that are uſed. *Rooke*, J. Of the ſame opinion.—Rule for arreſting the judgment diſcharged.

Holmes *et al.* Aſſ. of Brook, a Bankrupt, v. Walſh, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 458.

By the ſtat. 1 *Jac.* 1. c. 15. ſ. 11 and 12. and 5 *Geo.* 2. c. 30. ſ. 29. after any perſon has been convicted on an indictment, for falſely ſwearing to a debt under a commiſſion of bankrupt (on which indictment, he is to ſuffer the puniſhment inflicted by the ſeveral ſtatutes againſt perjury), the aſſignees of the bankrupt may recover from him double the ſum ſo ſworn to, *in an action*; in which it is ſufficient to ſtate the conviction of the defendant on the indictment, without alſo alleging that the defendant did take ſuch falſe oath. And in ſuch an action, the defendant cannot take advantage of any defect in the judgment on the indictment; that can only be done on a writ

writ of error.—This was an action of debt, brought on the ſtat. 5. *Geo.* 2. c. 30. ſ. 29. againſt the defendant, to recover 2,283*l.* 15*s.* being double the amount of the ſum which he ſwore was due to him under *Brook*'s commiſſion. The plaintiffs, who deſcribed themſelves as aſſignees of *Brook*, ſued "as well for themſelves, being creditors, as for other creditors ſeeking relief under the ſaid commiſſion." The declaration ſtated, that the defendant was indicted at the ſpring York aſſizes, 1795, for perjury, in ſwearing to this debt before the commiſſioners, under *Brook*'s commiſſion (ſetting forth the indictment at large), on which he was convicted at the ſpring York aſſizes, 1796, when it was ordered and adjudged by the court there, that he ſhould be impriſoned for two years, and ſet in the pillory at Halifax, on a given day, within that time; by reaſon of which premiſes, and by force of the ſtatute, &c. an action had accrued to the plaintiffs, as aſſignees, to demand and have, of and from the defendant, to be equally divided among all the creditors ſeeking relief under the ſaid commiſſion, the ſaid ſum," &c. To this there was a ſpecial demurrer, aſſigning for cauſe, that it was not directly and poſitively ſtated in the declaration, that the defendant was guilty of the ſuppoſed offence whereof he was ſo convicted, as in the declaration is mentioned. This caſe was twice argued, and, on behalf of the defendant, four objections were taken; 1ſt, That *no action* could be maintained to recover ſuch a penalty, or, at leaſt, no action could be brought unleſs there be a previous judgment for the penalty on the conviction for perjury; 2dly, That if any action could be brought, *this action* could not be ſupported *by the aſſignees of the bankrupt*; 3dly, That it was not ſtated, that the defendant had committed perjury; and 4thly, That the judgment of conviction, on which the action was founded, was erroneous on the face of it, and could not, therefore, be the foundation of any action. Per Cur. Lord *Kenyon*, Ch. J. There is no weight in either of the objections. The plaintiffs have put the caſe in ſuch a ſhape as to give the defendant an opportunity of taking the opinion of a ſecond jury on his conduct, and the firſt objection taken by his counſel is, that his client ought to be bound by an indictment againſt him on a criminal charge. By adverting to the ſtatute 1 *Jac.* 1. c. 15. it is manifeſt, that the penalty is not to be recovered by a judgment on the indictment, but by action. But even without the aſſiſtance of that act of parliament, when the ſtat. 5 *Geo.* 2. c. 30. ſaid, that this penalty ſhould be recovered and levied as other penalties and forfeitures are upon penal ſtatutes after conviction to be levied and recovered. I ſhould have thought that the defendant was not deprived of his trial by jury *in an action*. When an act of parliament gives a different mode of trial, we look with eagle's eyes to diſcover

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if that privilege be taken away. Nor is it neceſſary to diſcuſs the ſecond objection, ſince the ſame ſtat. 1 *Jac.* 1. removes all difficulty upon that head. But even here again, without the aid of that ſtatute, when this act directed, that the penalty, when recovered, ſhould be equally divided among all the creditors, I ſhould have had no doubt, but that this might be recovered by the aſſignees, who ſue for the benefit of themſelves and the other creditors. The third and fourth objections are equally deſtitute of foundation. If the judgment be improper, it can only be reverſed by writ of error. *Aſhhurſt* and *Groſe*, Juſtices, of the ſame opinion. *Lawrence*, J. With regard to the third objection, I had ſome doubt when the caſe was firſt argued, whether or not the fact of taking the falſe oath ſhould not have been ſtated: but, on further conſideration, I think that was not neceſſary. This is warranted by the proceedings againſt an acceſſary: for though, in ſuch caſes, it is ſometimes ſtated in the indictment, that the principal committed the fact, yet the more uſual way is only to ſtate the conviction againſt the principal, and then to charge the defendant as an acceſſary with him. I have been ſearching for precedents on the ſtat. 9 *An.* c. 14. ſ. 5. the words of which, are very much like thoſe in the ſtat. 5 *Geo.* 2.; and though I have not met with any in print, I have been favoured, by my brother *Buller*, with a manuſcript precedent of the declaration, in *Morgan* v. *Luckup*, on that act, where it is only ſtated, that the defendant had been convicted on an information for the fraudulent gaming, without any allegation that he had committed the fact. That caſe, therefore, as far as it goes, is an authority for the preſent action. As to the laſt objection; the judgment on the indictment muſt be taken to be good until it is reverſed by a writ of error; as in the caſe of proceedings againſt the acceſſary (1). So if there be a judgment againſt the huſband for treaſon, not reverſed by error, it is ſufficient to deprive the wife of her dower. *Per Curiam*, Judgment for the plaintiffs.

Dickſon *et al. v.* Evans, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 57.

To an action brought by the aſſignees of a bankrupt, for a debt due to the bankrupt's eſtate, the defendant cannot ſet off caſh notes, iſſued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unleſs he ſhews further, that ſuch notes came to his hands before the bankruptcy. In an action upon a promiſſory note of the defendant's, payable to the bankrupt; the defendant gave notice of ſet-off, that the bankrupt, *before and at the time of his bankruptcy, was indebted to him to a greater amount upon certain caſh notes*, iſſued by the bankrupt before his bankruptcy, payable to

(1) Vid. 1 *Hale, P. C.* 625.

bearer.

bearer. And at the trial, the defendant produced ſuch notes as were mentioned in his ſet-off, dated prior to the bankruptcy, *but did not prove when they came into his hands*; on which ground it was contended, on behalf of the plaintiffs, that the ſet-off was not eſtabliſhed, it being incumbent on the defendant to ſhew that his ſet-off exiſted at the time of the bankruptcy, for that no debt accruing to him ſubſequently would avail. But the judge being of opinion, that the bearer of ſuch notes was not called upon to prove when he took them, that *primâ facie* they muſt be taken to be fairly obtained, and muſt have reference to the time of the date, which was before the bankruptcy, and that if they had got to the hands of the defendant ſubſequent to the bankruptcy, the *onus probandi* lay on the aſſignees, nonſuited the plaintiffs. On a motion for a new trial, the point was fully argued. PER CURIAM. On the words of the act of parliament, on the reaſon of the thing, and on the authority of decided caſes, the rule muſt be made abſolute for ſetting aſide the nonſuit. The words of the ſtat. 5 *Geo.* 2. c. 30. ſ. 28. are expreſs, that "if it ſhall appear to the commiſſioners that there has been "mutual credit given by the bankrupt, or mutual debts be-"tween the bankrupt and any other perſon, *at any time before* "the bankruptcy, the commiſſioners ſhall ſtate the account, "&c. and what ſhall appear to be due, &c. ſhall be claimed "or paid." That act was founded on good ſenſe; and it provides, that "the aſſignees ſhall not recover againſt a debtor "of the bankrupt what was due to the bankrupt on one "ſide of the account, without alſo taking into conſideration "the other ſide of the account, and ſeeing on which ſide "the balance lies." That is the juſtice of the caſe. But *it would be moſt unjuſt indeed, if one perſon, who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted, by any intrigue between himſelf and a third perſon, ſo to change his own ſituation, as to diminiſh or totally deſtroy the debt due to the bankrupt, by an act* ex poſt facto. In caſes of this ſort, the queſtion muſt be conſidered in the ſame manner as if it had ariſen at the time of the bankruptcy, and cannot be varied by any change of ſituation of one of the parties. It is ſaid, however, that the rule by which we are to proceed in a court of law, under the ſtatutes of ſet-off, is a different rule from that by which the commiſſioners proceed under the ſtatute 5 *Geo.* 2. c. 30: but it muſt be remembered, that that act proceeded on the law of the caſe, and applied the ſame rule to the commiſſioners of bankrupt. The caſes, which have been decided on the ſtatutes of ſet-off, are uniform. In addition to the caſes cited, there is that of *Lucas* v. *Marſh*, *Barnes* 453. 4to edition, in which it was held, that *when an indorſed note is ſet off by the defendant, it muſt be proved, that it was indorſed before the plea was pleaded.* The whole

whole of the preſent caſe is reſolvable into this queſtion, on whom did the *onus probandi* lie? That being ſettled, every thing elſe follows of courſe. Now the caſes of ſet-off are underſtood to be in the nature of croſs actions; and if the defendant, inſtead of ſetting off theſe notes, had brought his croſs action againſt the aſſignees, he muſt have proved every thing neceſſary to conſtitute his demand; and the time when the notes were indorſed, would be one material ingredient in that caſe; then, under this ſet-off, he muſt prove the ſame things. If the commiſſioners had refuſed to allow this ſet-off, and the defendant had applied to the Lord Chancellor by petition, he muſt have ſet forth in that petition, that the notes were indorſed to him prior to the bankruptcy, and he muſt alſo have proved it. Therefore the words of the ſtatute of bankrupts, the ſtatutes of ſet-off, the deciſions on the different ſtatutes, and the forms of proceeding, all lead to this concluſion, that the *onus probandi* lay on the defendant, who wiſhed to avail himſelf of the debt ariſing from the poſſeſſion of the notes, and conſequently that the nonſuit muſt be ſet aſide. For it is a general rule of evidence that, in every caſe, the *onus probandi* lies on the perſon who wiſhes to ſupport his caſe by a particular fact, and of which he is ſuppoſed to be cognizant: but here the aſſignees could have no means of knowing when the defendant received theſe notes, whereas it muſt have been known to the defendant; and as the latter relied upon it as the ground of his ſet-off, and did not prove it, the aſſignees were entitled to recover.—Rule abſolute.

Wilkins *et al.* Aſſ. of Cann *v.* Caſey, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 711.

Money paid to Bankrupt after a ſecret act of Bankruptcy.] In this caſe the defendant, who was a factor, had given his acceptances to his principal for the amount of the goods ſold by him, after a ſecret act of bankruptcy committed by the principal, and which was unknown to the factor; a commiſſion having afterwards iſſued againſt the principal, the defendant, notwithſtanding, paid his acceptances to the reſpective holders of the bills, as they ſeverally became due; and the aſſignees brought this action for money had and received, and on an account ſtated to recover the value of the goods ſold by the defendant, and for which he had ſettled with the bankrupt as aforeſaid, after the ſecret act of bankruptcy, by his acceptances in the manner aforeſaid.—On the trial of the action, there was a verdict for the defendant, ſubject to the opinion of the Court, on a caſe reſerved, which in ſubſtance ſtated the above facts. Per Cur. This is as clear a caſe as can be ſtated. If we had an election given us, for the firſt time, to put either a rigid or illiberal conſtruction on the ſtatute of *James*, we ſhould not heſitate to ſay, that we ought to put a liberal conſtruction upon it; for the object of it was, to protect certain payments made to a bankrupt

bankrupt that common ſenſe and juſtice required ſhould be deemed valid payments, and in this inſtance to correct the rigour of the bankrupt laws. Now, if the defendant had given other goods in exchange for theſe at the time, that would have been a payment to all intents and purpoſes, though not made in monies numbered. And it has always been holden, that giving a bill of exchange is deemed a payment in ſatisfaction, provided the bill be paid when due.—*Poſtea* to the defendant.

Pleadings by and againſt the Aſſignees.] If the aſſignees have brought an action of trover to recover the value of goods belonging to the bankrupt, and failed therein, they are thereby barred from bringing aſſumpſit for the ſame cauſe of action.—This was an action on the caſe, in which the plaintiffs, as aſſignees of the bankrupt, declared, that the defendant being indebted to them in 2,500*l.* for ſo much money had and received by him to their uſe, as aſſignees as aforeſaid, promiſed to pay, &c. On the trial of the action, a verdict was found for the plaintiffs, ſubject to the opinion of the Court, on the following caſe: "The bankrupt being indebted to the defendant to the amount of 2000*l.* on two bonds, and a warrant of attorney to confeſs judgment, the defendant entered up judgment thereon, and upon the 9th day of March ſued out a *fieri facias*, by virtue of which writ, the ſheriff levied 2,155*l.* 6*s.* 5*d.* for debt and coſts, &c. On the 9th of April a commiſſion of bankrupt was awarded, and the bankrupt was thereupon found ſuch. In Michaelmas term, 1769, the plaintiffs, as aſſignees, brought an action of trover againſt the ſheriff and the now defendant, for the goods levied under the *fi. fa.* and at the trial a verdict was given for the defendant, and judgment thereupon was accordingly entered on record. At the trial of the preſent action, it was proved, that *the bankrupt committed an act of bankruptcy before the 9th day of March*, (to wit) *in February*, 1769; and it was admitted, that the defendant received the money levied under the execution, before the plaintiffs brought the ſaid action of trover; and this action being brought to recover the money ſo levied and received by the defendant, THE QUESTION for the conſideration of the Court was, WHETHER, under the facts and circumſtances ſtated in the above caſe, the plaintiffs were intitled to recover?" PER CUR. The legal effect of an act of bankruptcy is to put it in the power of the commiſſioners by relation to diveſt the property of the bankrupt from that time, in caſe a commiſſion be afterwards iſſued. Yet, notwithſtanding this transfer of the property by relation, the ſheriff is certainly no treſpaſſer by taking the goods in execution after the act of bankruptcy, and before

Hitchin *v.* Campbell, Tr. Ter. 12 Geo. 3. C. B. 2 *Black. Rep.* 827. Reported alſo in 3 *Wils.* 304 by the name of Kitchen and others Aſſ of Anderſon, *v.* Campbell.

the commiſſion iſſued. But by ſelling, the ſheriff converts the goods; and then trover is maintainable againſt the ſheriff or his vendee, or the plaintiff in the original action: the aſſignees, however, cannot recover in trover or aſſumpſit, as of their own goods or debts, but muſt declare as aſſignees of the bankrupt, and a defendant may wage his law, or plead the ſtatute of limitations, as the caſe may happen to be or require (1): *The act of bankruptcy being in February*. 1769, and the ſheriff having afterwards, in March, 1769, taken his goods in execution, at the ſuit of the defendant, and paid him the money for which they were ſold, it is queſtioned, in the preſent caſe, Whether an action will lie againſt him for money had and received for the uſe of the aſſignees?—Lord *Hardwicke* was for ſome time of opinion, that this action had never been allowed to lie, and that the aſſignees were tied down to proceed in trover for the tort, but he afterwards altered his opinion; and held, that this action well laid, and practice has certainly extended this action of aſſumpſit, as a very uſeful and general remedy: we are all, therefore, of opinion, that this action well lies; whether the money, for which the bankrupt's goods were ſold, be paid into the hands of a plaintiff on a *fieri facias*, or of any others; whoever has received the money for the bankrupt's goods, is ſuppoſed, in juſtice, to have received the ſame *for the uſe of the aſſignees*, in whom the property of thoſe goods by law was veſted, and to have promiſed to pay the ſame to the aſſignees (2).—Another and much ſtronger objection taken was, that though the aſſignees may have their election to bring either an action of tort or contract, yet they cannot bring both; and having elected to bring trover, the judgment in that bars the action of aſſumpſit. This depends on two conſiderations; 1ſt, Whether a man's having once elected to proceed upon the tort bars him from proceeding upon the contract? 2dly, Whether his proceeding down to judgment, does not bar him from trying the ſame cauſe of action again? As to the firſt, caſes have been cited to ſhew, that where there are two different kinds of remedies, real and perſonal, or otherwiſe ſpecially diſtinguiſhed, a man's election of one, prevents him from uſing the other: he may diſtrain or bring aſſize, but not both, *Co. Lit.* ſ. 588.; may bring writ of annuity or diſtrain, ſ. 219; and his election is determined, even though he ſhould not recover, after he hath counted thereon. *Co. Lit.* 145. But where both remedies are merely real, or merely perſonal, there the election is not determined till the judgment on the merits. For a nonſuit, on an action of account, is no bar

(1) 1 Sid. 171. 1 Lev. 173. Comb. 123. 1 Show. 112. 1 Burr. 32.
(2) 3 Lev. 191. Ld. Ray. 1216. Holt. 95. Vezey 326.

to an action of debt, *Co. Lit.* 146. And ſo muſt *Holt*, in 12 *Mod.* 324. be underſtood to mean, "that if they bring one, they ſhall not afterwards bring the other," *id. eſt.* if the firſt be brought to a due concluſion.——But in the preſent caſe, we are of opinion, that the plaintiffs having brought trover (1) in Michaelmas term, 1769, againſt the ſheriff and the now defendant, to recover the value of the goods of the bankrupt, taken in execution (which action well laid) have made their election; and there being a verdict and judgment upon record in that action againſt the plaintiffs, *they are bound for ever from having the preſent or any other action*; for you ſhall not bring the ſame cauſe of action *twice* to a *final* determination: *nemo debet bis vexari*, and upon this we found our judgment. What is meant by the ſame cauſe of action is, where the *ſame evidence* will ſupport both the actions, although the actions may happen to be grounded on different writs; this is the teſt, to know whether a *final* determination in a former action is a bar or not to a ſubſequent action; and it runs through all the caſes in the books, both in real and perſonal actions: it was reſolved, in *Ferrar*'s caſe, 6 *Rep.* 7. "that where one is bound in any action, real or perſonal, by judgment upon demurrer, confeſſion, verdict, &c. he is bound as to that or the like action, of the like nature, for the ſame thing for ever," for *expedit reipublicæ ut ſit finis litiúm:* but there is a diverſity between real and perſonal actions (which may be well underſtood by reading that caſe). Lord *Coke* means, by *actions of the like nature*, actions of the ſame degree, where you cannot have a writ of a higher nature: a bar in a writ of *aiel* is a bar in a writ of *bes aiel*, and in a collateral action, as *coſinage*, &c. for theſe are *anceſtrel*, and of one and the ſame nature, but will not bar a writ of right. *Perſonal* actions are all of the ſame heighth or degree. In an action of treſpaſs for taking his horſe, which by the count is reduced to a certainty (for you muſt wait for the declaration), it is a good plea to the writ, that a replevin is pending of the ſame taking, where an *averment* is allowed, that all is for one and the ſame taking.—*Nemo debet bis vexari*, is the general rule; but there are ſome exceptions to this rule, as where the plaintiff has miſtaken his character, and ſued as executor not as adminiſtrator, or where the judgment is for faults in the declaration or pleadings (2). It appears, in the preſent caſe, that trover has been brought for the converſion of the goods taken in execution, and that the jury have de-

(1) *Litt.* ſec. 588. 219. *And.* 145. *Co Lit.* 145. *a*, 12 Mod. 324. 6 *Rep.* 7 *Cro. Eliz.* 667. *Skin.* 57. *T. Ray.* 472. 3 *Mod.* 1. 2. *Pollex.* 634. 2 *Show.* 213. 2 *Vent.* 156. *Comb.* 123. *Bro. Ac.* ſur le caſe *Pl.* 97. 105. 4 *Rep.* 92. *Slade*'s caſe. *Moore* 463.

(2) 3 *Rep.* 32. 1 *Mod.* 207.

termined, that the plaintiffs have no right to thoſe goods; and if they have no right to them, they have no right to the produce thereof, or to the money for which they were ſold: it is clear, therefore, that the plaintiffs have no right to this action. In the former action, the judgment is on record, that *the plaintiffs nil capiant per breve ſed eant inde ſine die*, they ſhall never come again, but are for ever barred.—Judgment for the defendant.

Nixon *et al. v.* Jenkins, Ea. Ter. 33 Geo. 3. C.B. 2 *Hen. Black.* 135.

The aſſignees cannot maintain trover for goods fraudulently ſold, without proving a demand and refuſal.—The bankrupt, in contemplation of inſolvency, and with a view to defeat the claims of his other creditors, ſold a large quantity of goods to the defendant, *Jenkins*; ſoon after the ſale he committed an act of bankruptcy, and his aſſignees brought this action of trover to recover the value of the goods; but having failed at the trial to prove a demand and refuſal to deliver, the judge was of opinion, that they could not recover, there being no evidence of a converſion; but the point was reſerved. AND THE COURT afterwards held, that a demand and refuſal were neceſſary to maintain the action. When the ſale was made, the parties were competent to contract, there was no unlawful taking of the goods, though the tranſaction was liable to be impeached by the aſſignees; they might either affirm or diſaffirm the contract; and if they thought proper to diſaffirm it, they ought to have demanded the goods, a refuſal to deliver which would have been evidence of a converſion.—Nonſuit entered.

Whitter *et al. v.* Cazalet, *et al.* Mic. Ter. 29 Geo. 3. 2 *Ter. Rep.* 683.

In an action of trover for goods, by the aſſignees of the bankrupt; and the queſtion being, Whether they were or were not ſold? it was moved, on the part of the defendant, for leave to inſpect the bankrupt's ſale-books.—*The Court* doubted whether they had power to grant ſuch a motion: but, as a diſcovery might be obtained in the court of chancery, they ſaid the regular way was, to ſtay the proceedings here till the party had an opportunity of making ſuch a diſcovery. A rule was therefore granted, to ſhew cauſe why the defendants ſhould not have till the firſt day of next term to plead, unleſs the plaintiffs would produce the books in the mean time, in the courſe of which time, the defendants would have an opportunity of obtaining an anſwer in chancery; and this rule was afterwards made abſolute, after cauſe ſhewn.

Evans *et al. v.* Mann, Hil. Ter. 1 Geo. 3. B.R. *Cowp.* 569.

The aſſignees of a bankrupt, in aſſumpſit, againſt the vendee of goods, ſold by the bankrupt after the commiſſion, need not name themſelves aſſignees in the declaration: but if it be on a contract made by the bankrupt before the commiſſion, they muſt ſtyle themſelves in the declaration to be aſſignees.—Thus, where the bankrupt, ſome years after his bankruptcy,

bankruptcy, and before he had obtained a certificate, continued to carry on his trade as a lighterman, in buying and ſelling lighters, and amongſt others, ſold a lighter to the defendant, who paid him 30*l.* part of the purchaſe money at the time of ſale: the plaintiffs hearing of this ſale, applied to the defendant, and inſiſted upon having the lighter delivered up to them, or the purchaſe money paid; but afterwards it was agreed, that the defendant ſhould keep the lighter and pay the reſidue of the purchaſe money to them, for which this action was brought. On the trial, an objection was taken, on the behalf of the defendant, that the action could not be maintained, becauſe *the plaintiffs did not ſue as aſſignees, nor ſtate themſelves as ſuch in the declaration:* this objection was overruled, and a verdict taken for the plaintiffs. PER CUR. (on a motion for a new trial) If the aſſignees bring an action on a contract made by the bankrupt *before* his bankruptcy, they muſt ſtate themſelves in the declaration to be aſſignees: but here, the contract was after the bankruptcy, when the bankrupt could have no property of his own: the lighter was the property of the aſſignees; and conſequently the ſale by him can be conſidered in no other light than as a ſale by operation of law, as agent or ſervant to the aſſignees, and on their account: therefore it was not neceſſary, that they ſhould ſtate themſelves to be aſſignees in the declaration. In the caſe of an action, at the ſuit of an executor, it is clear, if the action be brought on a contract made by himſelf, reſpecting the goods of the teſtator, he need not name himſelf executor: neither does it appear neceſſary for the plaintiffs, in the preſent caſe, to have gone into evidence of the trading bankruptcy, &c. in ſupport of the action, for there was an actual treaty between the plaintiffs and the defendant, relative to the matter in litigation; and not merely a promiſe by implication. If ſo, the action is founded on an actual contract between the plaintiffs and the defendant, conſequently the plaintiffs are intitled to recover *ſuo jure*.

The aſſignees of *A.* a bankrupt, and alſo of *B.* a bankrupt, under ſeparate commiſſions, cannot recover, in the ſame action, a *joint debt* due from the defendant to both the bankrupts, and alſo *ſeparate debts due to each*. And if in ſuch an action the jury have aſſeſſed the damages ſeverally on the ſeparate counts, the Court will arreſt the judgment on thoſe counts, which demand the debts due to each bankrupt ſeparately. The plaintiffs, in their original writ, deſcribed themſelves as aſſignees of the eſtate and effects of *Lomas*, and alſo as aſſignees of *Edenſor*; there being *no joint commiſſion* againſt the two; and declared for goods ſold and delivered by *both the bankrupts*; and alſo for goods ſold by *each* of the

Hancock *et al.* Aſſignees of Lomas, and alſo Aſſignees of Edenſor *v.* Haywood, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 433.

bankrupts, and for money paid, and money had and received, by the defendant to the uſe of *each of the bankrupts*; and alſo for money had and received to *the uſe of the aſſignees*, on ſeparate counts. A verdict was found for the plaintiffs, not in a groſs ſum, but the damages were aſſeſſed and apportioned to the demands proved on the ſeveral counts reſpectively. And a rule having been obtained to ſhew cauſe why the judgment ſhould not be arreſted, cauſe was ſhewn. Per Cur. We have looked into the caſes, and are clearly of opinion, that the different rights cannot be joined in the ſame action. But the plaintiffs may enter up their judgment on thoſe counts, for the joint debts due to both the bankrupts.—*Buller*, J. Added, on a writ of error, where one count appears bad, and the *verdict is entered generally* on all the counts, the Court muſt reverſe the judgment *in toto* (1); ſince they cannot ſee on which of the counts the damages were given. But that is not applicable to this caſe, where the *damages are aſſeſſed ſeverally* (2) on the ſeparate counts. The plaintiffs, therefore, who are aſſignees of both the bankrupts, may recover as much as the bankrupts themſelves might jointly have recovered.

Streatfield *et al.* Aſſi. of James de Druſina, James Clerk, and J. C. Ridder, bankrupts, *v.* Halliday *et al.* Tr. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 779.

The plaintiffs ſued, as aſſignees of *A.* and *B. and alſo* aſſignees of *C.* for a joint demand due to all the bankrupts, and ſuch declaration was held good on motion in arreſt of judgment after verdict.—The declaration in this caſe was as follows: London, *to wit.* *S. Streatfield*, *D. B.* and *J. M.* aſſignees of the eſtate, &c. of *James de Druſina* and *J. Clerk*, bankrupts, according to the force, form, and effect of the ſtatutes made, and now in force, concerning bankrupts, *and alſo aſſignees of the eſtate, debts, and effects of* J. C. Ridder, *a bankrupt*, according to the force, &c. complain of *John Halliday*, *T. D.* and *S. L.* being in the cuſtody, &c. for that, whereas the ſaid defendants, before the ſaid *J. de D.* and *J. C.* and the ſaid *J. C. R.* were reſpectively become bankrupts, to wit, on, &c. at, &c. were indebted to the ſaid *J. de D.* *J. C.* and *J. C. R.* in 300*l.* &c. for divers goods, &c. by the ſaid *J. de D.* and *J. C.* and the ſaid *J. C. R.* before then, and before they were reſpectively become bankrupts, ſold and delivered to the ſaid defendants, &c. and being ſo indebted they, the ſaid defendants, in conſideration thereof afterwards, and after the ſaid *J. de D.* and *J. C.* and the ſaid *J. C. R.* were reſpectively become bankrupts, *to wit*, on, &c. at, &c.

(1) See *Trevor* v. *Wall*, 1 *Ter. Rep.* 153.

(2) Vid. 5 *Rep.* 58, 59. 1 *Str.* 189. 2 *Str.* 808. 4 *Burr.* 2022. Where the parts of a judgment are ſeparate, it may be affirmed as to part, and reverſed as to the reſt.

undertook,

undertook, and to the ſaid plaintiffs, as aſſignees as aforeſaid, then and there promiſed to pay, &c. There were other general counts laid in the ſame manner. *And after a verdict for the plaintiffs, a motion was made in arreſt of judgment, upon the ground that it appeared, upon the face of the record, that it was a* joint *demand on the part of* all *the bankrupts under* ſeparate *commiſſions, the one taken out* againſt the two former jointly, *and the other againſt the latter* only. For which objection, was cited the caſe of *Allan* and others v. *Hartley* and another, *M.* 25 *Geo.* 3. *B. R. Cooke's Bankrupt Laws*, where, in an action brought by *Allan* and others, as aſſignees of *Marlar*, a bankrupt, together with *Down* ſurviving partner of *Pell*, againſt the defendants, on a bill of exchange due from the defendants to the houſe of *Marlar*, *Pell*, and *Down*, the plaintiffs were non-ſuited, for want of proving the aſſignees of *Marlar* intitled to join in the action with *Pell*, the ſolvent and ſurviving partner. Two commiſſions were proved to have been taken out, the one of which was held bad, being taken out againſt all three of the partners, and two of them only having been found to have committed acts of bankruptcy. As to the other, Lord *Mansfield* ſaid, the objection to it was, that it was a commiſſion againſt two of three partners: that a commiſſion might be joint or ſeveral, but that was neither. Per Cur. The caſe of *Allan* v. *Hartley* turned on comparing a commiſſion of bankrupt to an action, and indeed it has often been ſtyled a ſtatute execution: it was, therefore, held neceſſary, that the aſſignees ſhould make out their title to maintain the action, by ſhewing, that the perſons, under whoſe commiſſion they claimed, would have been intitled to recover in their names alone. That was a caſe of a partnerſhip of three perſons, and therefore a *joint* commiſſion againſt two of them was held bad for that reaſon. The ſame principle holds with reſpect to bonds. If three be bound jointly and ſeverally in a bond, the obligee cannot ſue two of them only, but he muſt either ſue them all, or each of them ſeparately. And though that doctrine has been ſeveral times queſtioned, yet it has been held good law from the time of Lord *Coke*. Now, whether the aſſignees, in the preſent caſe, claim under three ſeveral commiſſions, or one joint commiſſion, does not appear; and in either of thoſe caſes their title would clearly be good. But even ſuppoſing we could ſay that, on the face of the record, there appeared to have been *two* commiſſions, the one a joint commiſſion againſt two of the bankrupts, and the other a ſeparate commiſſion againſt the other, yet, in the manner that the argument was put by the plaintiff's counſel, the verdict may equally be ſupported. For we are not to advert to the demand made in this action to determine the validity of the commiſſions, ſuppoſing there were two, but to what might have been the petitioning cre-

ditor's debts, on which the commiſſions iſſued, and whether they were warranted thereby. Now, for any thing that appears to the contrary, one commiſſion may have been ſued out on a joint debt of *De Druſina* and *Clerk* only, which would clearly have been good, and another commiſſion might have been founded on a ſeparate debt, and act of bankruptcy, of *Ridder:* and then the aſſignees under both commiſſions might join in maintaining an action againſt the defendant for a debt due to both the eſtates. Beſides, the objection ariſes after verdict; and therefore if the Court can intend that the plaintiffs ſtood in ſuch a relation to the bankrupts as will ſupport this action, they are bound to do ſo. Now there is nothing upon the record to ſhew that they do not claim under a joint commiſſion againſt all the bankrupts, or under a ſeparate commiſſion againſt each; in either of which caſes the action may well be maintained. As it muſt therefore be taken that the plaintiffs at the trial proved their title by legal evidence, we muſt intend that they were legally conſtituted aſſignees, there being nothing ſtated on the record to contradict ſuch an intendment.

Parker *et al. v.* Manning, Ea. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 537.

In an action of covenant for rent on an indenture, brought by the aſſignees of the leſſor (a bankrupt), the leſſee cannot plead that the leſſor *nil habuit in tenementis.*—In covenant, the declaration ſtated that one *Steel,* on the 29th of September, 1792, before he became a bankrupt, by indenture demiſed certain premiſes to the defendant for fifteen years, at the yearly rent of 140*l.* by virtue of which demiſe the defendant entered; and the breach aſſigned was the non-payment of 700*l.* for five years rent, due ſince the bankruptcy of *Steel.* The defendant pleaded, *inter alia,* that *Steel,* before the making of the indenture in the declaration mentioned, to wit, on the 20th of September, 1792, became a bankrupt, and ſo continued until and at the time of the making of the indenture; and that before and at the time of the making and ſealing thereof, one *John Watſon* (ſince deceaſed) and one *T. Thornhill,* were ſeiſed in fee of the premiſes thereby alleged to have been demiſed to the defendant, and *Thornhill* is ſtill ſeized thereof, *and that* Steel *had not any eſtate, right, or title, in or to the ſame.* To this plea there was a general demurrer. On the argument it was not diſputed but that where a demiſe is by indenture, *the leſſee is eſtopped to ſay in anſwer to an action for rent brought by the leſſor, that his leſſor had no title:* but it was urged that this was an action not by the leſſor himſelf, but by his aſſignees; and the ſtat. 32 *Hen.* 8. c. 34. only gives an action to the aſſignee of the leſſor in caſes where the right to the eſtate paſſes: and here it was admitted by the demurrer, that no right paſſed to the leſſee.—Per Cur. The general rule is, that a tenant cannot be permitted to controvert the title of his landlord; and it

it is founded on good ſenſe; for ſo long as the leſſee continues to enjoy the land demiſed, it would be unjuſt that he ſhould be permitted to deny the title under which he holds the poſſeſſion. But the rule is otherwiſe where the tenant is evicted; for if the defendant had been evicted, he could not have been compelled to pay rent, and he might have pleaded that fact in anſwer to the plaintiff's demand. That, generally ſpeaking, an indenture operates by way of eſtoppel againſt the tenant, and precludes him from controverting the title of his landlord, is proved by the paſſage in *Co. Lit.* 47. *b.* (1), and by a variety of other caſes. Then it is ſaid, that eſtoppels muſt be mutual, that unleſs they affect both parties they affect neither, and the inſtances of demiſes by infants and femes coverts have been adduced: but that ariſes from their imbecility, for they can do no act to eſtop themſelves. But what is this caſe? It is alleged that the defendant has occupied this eſtate for five years, which is not denied; and as there has been no eviction, he ought to be eſtopped to ſay, that the leſſor had no title. In this caſe the rights of the parties are the ſame as at firſt; for the aſſignees of the leſſor are to all intents and purpoſes conſidered in the ſame ſituation as the leſſor was before his bankruptcy; they ſucceed to all his rights, and are ſubject to all his equities. There is no reaſon why the eſtoppel, that operates as between the leſſor and the leſſee, ſhould not equally operate as between theſe parties. When the parties to this leaſe executed it, the one was taken to be the leſſor, the other the leſſee; both of them executed the leaſe: now it is not pretended that there was not an incipient eſtoppel; if ſo, the eſtoppel muſt continue as long as the privity of eſtate continues: and that deſtroys the foundation of the defendant's argument. Therefore, on principles of law, as well as of honeſty, we are clearly of opinion, that the plea is no anſwer to the declaration, and that the defendant is bound to pay the rent demanded.—Judgment for the plaintiffs.

An action at law does not abate by the plaintiff's becoming a bankrupt(2); therefore, if after the interlocutory judgment and awarding the writ of inquiry, the plaintiff becomes a bankrupt, and afterwards, in his own name, the inquiry is executed, it will be good without ſuing out a *ſcire facias*, at the ſuit of the aſſignees; for PER CUR. We will conſider this as a writ of inquiry executed by the aſſignees in the name of the bankrupt; and the objection coming out of the mouth of the defendant is very unfavourable: there is no caſe in point to be found in the books, but the ſtatute

Bibbins *et al. v.* Mantel, Mic. Ter. 8 Geo. 3. C. B. 2 *Wilſ.* 358.

(1) See alſo *Palmer* v. *Ekins*, 2 Lord *Raym.* 1550.

(2) Neither does bankruptcy in the plaintiff or defendant abate ſuits in equity. 3 *Atk.* 264.

21 *Jac.* 1. c. 19. enacts, that the laws of bankrupts ſhall be in all things largely and beneficially conſtrued for the relief of the creditors.

Hervil *et al.* Aſſ. of Bibbins *et al. v.* Mantel, Ea. Ter. 8 Geo. 3. C.B. 2 *Wilſ.* 372.

The bankrupts, *Bibbins* and others, having thus proceeded to execute a writ of inquiry and to final judgment, the aſſignees of their eſtate and effects, the now plaintiffs, for the benefit of themſelves and the reſt of the creditors, brought a *ſcire facias* againſt *Mantell*, to ſhew cauſe why they ſhould not have execution upon the ſaid judgment againſt him: to which *Mantell* pleaded in bar, that the whole proceedings had been by, and in the name of, the bankrupts; and he prayed judgment, if the aſſignees ought to have execution againſt him, for the damages on the ſaid judgment: the aſſignees demurred generally to this plea, and *Mantell* joined in the ſaid demurrer.—Per Cur. (after argument), Courts of law have interfered equitably in many caſes of bankrupts; and if they can ſee upon the face of the whole record, that the aſſignees are intitled to recover, they will uſe their utmoſt ſagacity and *aſtutia* to give them judgment: that they are intitled to this debt is clear, and the bankrupt has no right to receive this money: therefore, unleſs we are bound down by the rules of law and former determinations, we will not turn the aſſignees round: ſtatutes of bankrupt form one body or ſyſtem of law made for the benefit of creditors; and every act done by the bankrupt for the benefit of his creditors, the courts will literally conſtrue to be right and juſt; but contrary of acts done to the injury or diſadvantage of creditors. It has been objected, that the right and property of this debt was ſo abſolutely diveſted out of the *Bibbins*'s, when they became bankrupts, by the ſtatutes, that they could not ſtir one ſtep farther in the cauſe againſt *Mantell*; in anſwer to this, it appears on this record, that *Bibbins*'s had obtained an interlocutory judgment, and the Court awarded a writ of inquiry before the bankruptcy: the defendant, *Mantell*, afterwards had no day in court, nor could he afterwards plead any thing to the action; the taking the inquiſition and entering final judgment were only the concluſion and neceſſary conſequence of the interlocutory judgment; for the Court themſelves, if they had ſo pleaſed, might, upon the interlocutory judgment, have aſſeſſed the damages, and thereupon given final judgment before *Bibbins*'s became bankrupts; and the inquiſition is only a matter of courſe, taken to inform the conſcience of the court. There is no foundation to ſay, that the bankruptcy was an abatement of the writ againſt *Mantell*, for if the effects of the bankrupts ſhould amount to pay 20*s.* in the pound and more, they might afterwards proceed to final judgment. The final judgment cannot be void, for the interlocutory judgment intitled *Bibbins*'s to recover ſomething, which, by the inqueſt, was aſcertained: the

the aſſignees, by bringing this *ſcire facias*, have expreſsly affirmed the act of *Bibbins*'s proceeding to final judgment; there is no doubt but a *ſcire facias* lies upon an interlocutory judgment; and it was objected, that the aſſignees ought to have taken up the cauſe at the period; but if they had, this plea does not lie in the mouth of the defendant, in anſwer to the aſſignees: indeed, if the bankrupts themſelves had brought a *ſcire facias*, this plea might have been good, becauſe, after they became bankrupts, perhaps they could have no legal right to have execution: upon the whole, the defendant's plea diſcloſes ſuch facts as ſhew the aſſignees ought to recover. BATHURST, J. added, the action certainly doth not abate upon the plaintiffs becoming bankrupts; nor doth it abate if a defendant becomes a bankrupt: we here muſt look on this judgment as a right judgment: while it remains unreverſed by another court, we cannot ſay that a judgment of our own pronouncing is nul and void in law.—Judgment for the aſſignees.

So, in a more modern caſe, where between the interlocutory and final judgment the plaintiff became a bankrupt, and ſued out execution *in his own name*; the Court refuſed to ſet aſide the proceedings.—This was a rule calling on the plaintiff to ſhew cauſe why the defendant ſhould not be diſcharged out of the cuſtody of the marſhal as to this execution for irregularity; the ground of which was, that the plaintiff became a bankrupt between the interlocutory and final judgment, and ſued out the execution in his own name; whereas the aſſignees ſhould have ſued out a *ſcire facias* to revive the judgment, and then have charged the defendant in execution.—THE COURT, after cauſe ſhewn, ſaid, that the bankruptcy of the plaintiff did not abate the ſuit; and that they had, in ſeveral inſtances, permitted the aſſignees to continue a ſuit commenced by a bankrupt in his name; and they therefore diſcharged the rule.

Waugh *v.* Auſtin, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 437.

But if the plaintiff, after judgment and a writ of error allowed, become a bankrupt, his aſſignees cannot ſue out a *ſcire facias* in their own names to compel an aſſignment of errors, till ſome judgment be given: and then it muſt be done immediately after ſuch judgment.—The defendant in error having recovered a judgment againſt the plaintiff in the court of Common Pleas, the plaintiff brought a writ of error, which was duly iſſued, allowed, and ſerved. Afterwards the defendant in error became a bankrupt, and his aſſignees ſued out a *ſcire facias quare executionem non*, reciting the recovery below, and the writ of error. On ſhewing cauſe againſt a rule for quaſhing the writ of *ſcire facias* iſſued to compel the plaintiff to aſſign errors, which rule had been obtained on the ground of the ſuit not having been revived by the aſſignees ſince the bankruptcy.—THE COURT held, that

Kretchman *v.* Beyer, *in error*, Mic. Ter. 27 Geo. 3 B.R. 1 *Ter. Rep.* 463.

that this *ſcire facias* was wrong either way: firſt, as a *ſcire facias quare executionem non*, becauſe it appeared from the recital that a writ of error was depending: 2dly, that as a *ſcire facias to compel an aſſignment of errors*, it was likewiſe wrong, even ſuppoſing it did not take notice of the writ of error depending, becauſe there had been a proceeding ſince the judgment. And the rule is, that *the aſſignees cannot make themſelves parties to the record in any intermediate ſtage of the proceeding, but it muſt be immediately after judgment*; though an interlocutory judgment is ſufficient for that purpoſe. Here *the aſſignees ſhould have gone on with the writ of error in the bankrupt's name till judgment.* Therefore the *ſcire facias* muſt be quaſhed. Rule abſolute.

Winter *et al. v.* Kretchman, Tr. Ter. 27 Geo. 3. B. R. 2 *Ter. Rep.* 45.

And in a declaration in a *ſcire facias* by the aſſignees of a bankrupt, ſtating "that he became a bankrupt, within the meaning of the ſtatutes, &c. and that his goods and effects were afterwards in due manner aſſigned to the plaintiff," is ſufficiently certain; without alleging that the party was declared a bankrupt, or that his effects were aſſigned by deed.—This was a *ſcire facias* to revive a judgment by the aſſignees of a bankrupt. The declaration, after ſtating a judgment recovered by the bankrupt againſt the defendant in the court of Common Pleas, and an affirmance of it in this court, on a writ of error, ſtated, that "after the giving of the ſaid judgment, and alſo after cauſing the ſaid record thereof to be brought before this Court, as aforeſaid, the ſaid *J. Beyer* became a bankrupt within the true intent and meaning of the ſtatutes made and now in force concerning bankrupts; and that all and ſingular the goods, debts, and effects, of the ſaid bankrupt, at the time of his becoming a bankrupt, were after he became a bankrupt, in due manner, aſſigned to the plaintiffs, according to the form of the ſtatute in that caſe made and provided." It then proceeded in the uſual form. To this there was a ſpecial demurrer, which aſſigned the following cauſes: that it did not appear that any commiſſion was ever iſſued; or that, at the time of iſſuing the ſame, the ſaid *Beyer* was a trader, or in anywiſe indebted to any perſon; or that he had committed any act of bankruptcy; and alſo for that it did not appear by whom, or in what manner the goods, debts, and effects, of the ſaid *Beyer*, were aſſigned to the plaintiffs, or that the ſame were aſſigned by deed: nor had the plaintiffs made profert of the deed, &c. And joinder in demurrer.—ASHHURST, J. I cannot diſtinguiſh between a *ſcire facias* and an action brought by the aſſignees of a bankrupt. There is no reaſon why it ſhould be neceſſary to ſtate a title more particularly in the one than in the other. In an action, an executor, or an adminiſtrator, ſtates himſelf *generally* to be ſuch in the beginning of the declaration: but, as from the difference of

forms,

forms, he cannot allege that in the beginning of the declaration in a *ſcire facias*, he is allowed to ſtate it as generally as poſſible in a ſubſequent part.—BULLER, J. It has been held in a variety of caſes, that a *ſcire facias* is an action. As to the caſe of executors, the declarations, in a *ſcire facias* and an action are in ſubſtance the ſame. It appears in both, that an executor ſues as ſuch. Beſides, an executor ſues in a different form from an aſſignee; the executor can only ſue in the *detinet*, though his teſtator might have ſued in the *debet* and *detinet:* but aſſignees of a bankrupt are allowed to ſue both in the *debet and detinet*, becauſe the whole property of the bankrupt is veſted in them by law.—PER CUR. Judgment for the plaintiffs.

Naſh v. Tatlock *et al.* Aſſignees, of Lidiard, Tr. Ter. 34 Geo. 3. C. B. 2 *Hen. Black.* 319.

A tenant from year to year of a houſe, at a yearly rent, became a bankrupt in the middle of the year, and his aſſignees entered and kept poſſeſſion for the remainder of the year; and the Court held that the leſſor could not maintain an action for uſe and occupation againſt the aſſignees for the bankrupt's occupation as well as their own, without proving *their ſpecial inſtance and requeſt* for the bankrupt to occupy during the time that elapſed before the bankruptcy. —In an action for uſe and occupation, the firſt count of the declaration ſtated, that the defendants were indebted to the plaintiffs in the ſum of 70*l.* of lawful money of Great Britain, for the uſe and occupation of two counting houſes, one dining-room, and one chamber, parcel of a certain meſſuage or tenement, with the appurtenances, of the plaintiff, ſituate &c. before that time uſed, occupied, poſſeſſed, and enjoyed, *as well by one* Thomas Lediard, *whoſe term and eſtate therein the defendants afterwards had, as by the defendants, at their ſpecial inſtance and requeſt*, for a long ſpace of time then elapſed, from and under, and *as tenants thereof reſpectively*, to the plaintiff, and by her permiſſion; and being ſo indebted, the defendants undertook, and to the plaintiff faithfully promiſed to pay, &c.: the ſecond count was on a *quantum meruit* for the ſame uſe and occupation by *Lediard*, "whoſe eſtate, term, and intereſt, the defendants had," and by the defendants: there were alſo the common counts. The general iſſue was pleaded, and 12*l.* paid into Court. The verdict paſſed for the plaintiff, ſubject to the opinion of the Court, on the matter of law, ariſing upon the facts appearing in evidence, and found by the jury, conſidered with reference to the declaration, which were as follow: "after "*Lediard* had occupied theſe apartments for a certain part "of the year, under an agreement to pay ſeventy pounds "a year for them, he became a bankrupt, and the defend- "ants, who were his aſſignees, then entered into poſſeſſion "and continued in the occupation of them for the reſt of "the year. After the expiration of the year, Mr. *Tatlock*,

" *lock*, one of the defendants, wrote the following note to " Mr. *Ward*, the ſolicitor for the commiſſion of bankrupt " againſt *Lediard*: ' *Mr.* Tatlock's *reſpectful compliments* ' *to Mr.* Ward, *the bearer is a Mrs.* Naſh, *a widow lady*, ' *whom Mr.* Lediard *rented his houſe in Auſtin Friars of*, ' *there is due to her for rent fifty pounds, we having paid her* ' *twenty pounds ſince the commiſſion; there is alſo five pounds* ' *fifteen ſhillings and ſixpence for coals, likewiſe for our uſe ſince* ' *the commiſſion; now I wiſh you to give an order upon* ' *Mr.* Tatlock *for the above, as we certainly are bound to* ' *pay her. London, 20th July*, 1792.' This paper was " delivered to Mrs. *Naſh*, the plaintiff, by *Tatlock*, to be " delivered to *Ward*, and it was delivered, but ſome diſpute " ariſing, the fifty pounds were not paid, in conſequence of " which this action was brought, and then a proportion of " the annual rent of ſeventy pounds for that part of the " year, during which the defendants were in the occupa- " tion of the premiſes, was paid into Court." THE QUESTION, Whether the plaintiff had proved her caſe ſtated in the declaration, was ſaved for the opinion of the Court, after it had been left to the jury to ſay diſtinctly, whether the agreement was or was not to pay the rent annually, which they found in the affirmative; and whether the ſeventy pounds mentioned in the note of the 20th of July, 1792, was the year's rent, or was a ſum which the defendants had agreed to pay for their own occupation; as to which the jury found, that it was the rent for the whole year, including the time of *Lediard*'s occupation.—PER CURIAM, (after argument, and time taken to conſider), We are called upon to decide the ſtrict queſtion of law, and after having heard a very full diſcuſſion of this caſe from the bar, and taken time to conſider of it, we find ourſelves obliged to pronounce that *the evidence on the part of the plaintiff is not ſufficient to maintain this action.* It is ſtated in both the counts, that the plaintiff's demand is founded upon an uſe and occupation, by *Lediard*, for a part of the year, and by the defendants for the reſidue of the year, both occupations being had by the permiſſion of the plaintiff, *at the ſpecial inſtance and requeſt* of the defendants. Theſe latter words, often mere words of form, are here words of ſubſtance and operative, connecting the occupation of the defendants, for which they were bound to make a ſatisfaction, with the occupation of *Lediard*, a ſtranger, for whoſe occupation, *primâ facie* at leaſt, the defendants were not bound to make a ſatisfaction. In point of fact, it was not at the requeſt of the defendants that *Lediard* was permitted to occupy; the defendants had no relation to *Lediard*, but as his aſſignees, and that elation did not commence till the cloſe of his occupation; that relation, therefore, alone could not have the

effect

effect of making them perſonally liable to anſwer for his occupation before his bankruptcy. The averment that he had been permitted to occupy, at the requeſt of the defendants, is therefore ſubſtance, and not mere form, and a failure in the proof of it is fatal. The framer of this declaration ſeems to have been aware of this difficulty, and to have endeavoured to obviate it by throwing into the declaration the words, "*whoſe term and eſtate therein*" in the firſt count, and the words, "*whoſe eſtate, term, and intereſt*" in the ſecond, the defendants had. This very looſe and general averment ſeems to have been calculated to facilitate the paſſage of the other averment "*of the defendant's requeſt*," through the cauſe at *niſi prius*, and if it had paſſed ſmoothly, there would probably have been the averment, which would have been relied upon after a verdict, and this laſt would have been diſcarded. Looſe, informal, and indiſtinct as it is, it might ſerve to introduce at the trial, that *Lediard* was a tenant for a year at a rent of ſeventy pounds, payable at the end of the year, and that the aſſignees having entered into poſſeſſion as aſſignees, entered under that demiſe, and became aſſignees of the leaſe, and bound to pay the rent which became due after the aſſignment. It might then be with great colour urged, that rent due is recoverable in an action for uſe and occupation, and if the rent is really due, the manner of ſtating the uſe and occupation ſeems to have more form than ſubſtance in it. We were for a time inclined ſo to conſider the caſe, but upon further conſideration of the nature of the action for uſe and occupation, and of the ſcope and purview of the ſtatute 11 *Geo.* 2. we are of opinion, that the circumſtances under which the defendants ſucceeded to the occupation of the premiſes, will not prove or diſpenſe with the proof, that *Lediard*'s occupation was at the requeſt of the defendants. The action for uſe and occupation is in its own nature collateral to the action on a contract for rent upon a demiſe, and it was ſo holden in the caſe of *Johnſon* v. *May*, 3 *Lev.* 150: if the defendant did, in fact, uſe and occupy by the permiſſion of the plaintiff, and had expreſsly promiſed to pay, though the plaintiff had no title, or perhaps an equitable title only, the action lay. Under the ſtatute, a landlord who has rent owing to him, is allowed to recover, not the rent, but an equivalent for the rent, a reaſonable ſatisfaction for the uſe and occupation of the premiſes, which have been holden and enjoyed under the demiſe, by the action for the uſe and occupation; and it is provided, on his behalf, that if the demiſe be produced againſt him, it ſhall not defeat his action, as it would have done before the ſtatute, but the fixed rent ſhall only be uſed as a *medium*, by which the uncertain damages to be recovered in this form of action ſhall be liquidated. What is given by this ſtatute? A reaſonable

ſonable ſatisfaction for the uſe and occupation is the thing intended to be given; the form of action marked out (being enlarged by a neceſſary conſtruction, ſo as to be allowed to be maintained without an expreſs promiſe) is the proper form in which ſuch reaſonable ſatisfaction is to be recovered; but the reaſonable ſatisfaction, which in its own nature muſt apply to ſomething ſpecific, by which it can be eſtimated, being here given for uſe and occupation, and for nothing elſe, it is a remedy, which, in its own nature, is not co-extenſive with a contract for rent, nor does it ſeem to have been within the ſcope and purview of the act to make this remedy co-extenſive with all the remedies for the recovery of rents, claimed to be due by the mere force of the contract for rent. The ſtatute meant to provide an eaſy remedy in the ſimple caſe of actual occupation, leaving other more complicated caſes to their ordinary remedy. In the caſe now under conſideration, the plaintiff muſt be left to ſuch other remedy as ſhe may be adviſed to purſue: ſhe cannot recover in an action for uſe and occupation, without proof of the uſe and occupation alleged; and if ſhe can recover at all in this form of action againſt one man, for uſe and occupation by another (as to which we give no opinion), it muſt be upon the ground of that occupation having been permitted at his requeſt, and that requeſt muſt be proved.—Nonſuit entered, and *poſtea* delivered to the defendants.

VII. *What Debts may be proved under the Commiſſion.*

Aylett *v.* Harford and Richards, Bail of Lowe, Tr. Ter. 19 Geo. 3. C. B. 2 *Black.* 1317.

A creditor, who has obtained a verdict before the commiſſion iſſued againſt a bankrupt, is intitled to prove *his coſts* as well as his debt under the commiſſion, though judgment be not ſigned till after the commiſſion iſſued.—In this caſe, the plaintiff brought an action againſt one *Lowe*, by writ, returnable the firſt return of trinity term, 1778, to which the defendants became bail; on the general iſſue pleaded, the plaintiff recovered a verdict for 100*l.* at the ſittings in trinity term: the defendants moved for a new trial, the rule for which was diſcharged on the 8th of July, 1778, the laſt day of the term: on which day, a commiſſion of bankrupt iſſued againſt *Lowe*. On the 28th of July, the plaintiff proved his debt under the commiſſion, being a promiſſory note for 100*l.* dated the 25th of May, 1778, and his judgment entered on the ſaid verdict, and voted in the choice of aſſignees, but the commiſſioners refuſed to let him prove the coſts, which were laid at 30*l.* becauſe judgment was ſigned ſubſequent to the commiſſion. After this, the plaintiff *ſigned an agreement to permit the bankrupt to keep his houſe ſtill open for trade, and to*

to make him an annual allowance. The bankrupt afterwards deſerted his houſe, and abſconded; upon which, the plaintiff proceeded to fix the bail, and ſerved execution upon them: a motion was made to ſet this execution aſide as irregular. And PER CUR. The commiſſioners were miſtaken in not ſuffering the plaintiff to prove his coſts: the verdict was found before the commiſſion iſſued, and 40*s.* coſts; and the coſts *de incremento* were taxed, as annexed to theſe, and became conſolidated by a fair and equitable relation of law: the great ſeal, on petition, will do the plaintiff right in this particular.—There are ſome inſtances, it muſt be admitted, in which the court of chancery permits a creditor to do certain acts, ſuch as proving his debt and voting for aſſignees, without binding him to come in under the commiſſion and renounce his legal remedy. But the plaintiff has gone much farther, eſpecially by the agreement: he has made his election, has acquieſced under the commiſſion, and ſhall not, on a ſubſequent unforeſeen event, at the diſtance of a twelvemonth, deſert the commiſſion, and come upon the bail by ſurprize.—Rule abſolute.

So, where the defendant ſuffered judgment to go by default in this action, which was treſpaſs for the meſne profits after a recovery in ejectment. On executing the writ of inquiry, the jury gave their verdict for the rent of the premiſes, but did not include the coſts of the ejectment. *The defendant became a bankrupt after the judgment in ejectment,* and before the preſent action was brought. A rule having been obtained to ſhew cauſe why the inquiſition ſhould not be ſet aſide, becauſe the jury had not given the coſts of the ejectment in their damages, it was, on ſhewing cauſe againſt the rule, inſiſted, that *the coſts of the ejectment were become a liquidated debt, which might have been proved under the commiſſion of bankrupt which had iſſued againſt the defendant*; and for this was cited *Aylett* v. *Harford.* PER CUR. This is an application to the diſcretion of the Court to ſet aſide the inquiſition, becauſe the damages given by the jury are too ſmall, and is like a motion for a new trial, which is made to the diſcretion of the Court. There is no doubt but that the plaintiff had another remedy for the coſts of the ejectment; for being a liquidated debt, he certainly might have proved it under the commiſſion. And as he has neglected to do that, and choſen to take the chance of recovering in an oblique way, more than he could have recovered in a direct manner, and has failed, we are not diſpoſed to aſſiſt him. Though, in many inſtances, in actions of treſpaſs for meſne profits, the jury take into conſideration the coſts incurred in recovering the poſſeſſion by ejectment, and give them as conſequential damages in their verdict; yet it does not appear,

Gulliver v. Drinkwater, Hil. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 261.

under all the circumſtances of this caſe, that they were bound to do ſo here. For the ſtatutes relative to bankrupts were made for the benefit of unfortunate perſons, who, in giving up their whole ſubſtance for a fair and equal diſtribution among their creditors, are intitled to be diſcharged of all debts due previous to their bankruptcy.—Rule diſcharged.

Longford *v.* Ellis, Tr. Ter. 25 Geo. 3. B. R. 1 *Hen. Black.* 29. (*n.*) 1 *Cooke*, 227.

So, where in an action for words, and verdict for the plaintiff, damages 10*l.* the defendant, between the verdict and judgment, became a bankrupt, and was afterwards taken in execution upon the judgment: it was moved, to diſcharge him out of cuſtody, and *Aylett* v. *Harford* was cited. On the other ſide it was inſiſted, that this was different, being neither debt nor aſſumpſit, but a tort; and the damages uncertain at the time of the bankruptcy. BUT the Court held, that there was no diſtinction between a tort and a contract, where a judgment follows the verdict. The cauſe of action exiſts before the verdict, and where a verdict is obtained, the damages are known and become a debt, and the judgment, when given, relates back to the time when the plaintiff obtained his verdict.—Rule for diſcharging the defendant abſolute.

Hurſt *v.* Mead, Tr. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 365.

So, if a plaintiff become a bankrupt after he is nonſuited, and before the taxation of coſts, the coſts of the nonſuit are a debt proveable under the commiſſion. For the taxation of coſts is merely the aſcertaining of the amount of the debt: the debt, in ſuch caſe, exiſted previous to the bankruptcy.

Phillips *v.* Brown, Ea. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 282.

So, if a creditor recover a judgment againſt a trader before his bankruptcy, and revive it by *ſcire facias* after the bankruptcy, the coſts of the *ſcire facias* relate back to the judgment, and may be proved under the commiſſion.—A commiſſion of bankrupt iſſued againſt the defendant in December, 1782, on which he afterwardss obtained his certificate. In Auguſt, 1787, the plaintiff brought an action againſt the defendant on the balance of accounts, and obtained an interlocutory judgment in Michaelmas term following. On the 19th of January, 1788, a ſecond commiſſion of bankrupt iſſued againſt the defendant. On the 31ſt of the ſame month, final judgment was ſigned by the plaintiff, on which a writ of error was brought. On the 16th of June, 1789, the defendant obtained his certificate under the ſecond commiſſion, but under this commiſſion he did not pay 15*s.* in the pound. On the 30th of May, 1790, the writ of error was non-proſſed, and the coſts of it taxed at 40*l.* to the plaintiff. In Trinity term, 1794, the plaintiff ſued out a *ſcire facias* to revive the judgment, to which the defendant pleaded his certificate in bar; and iſſue having been joined on that, on the trial, a verdict was given for the plaintiff for 269*l.* 12*s.* 5*d.* and alſo for 40*l.* for the coſts in error; and the coſts of the *ſcire facias* were taxed

taxed at 36*l.* to the plaintiff. On the 2d of April, 1795, the defendant's goods were taken in execution for the 269*l.* and the 40*l.* and on the ſame day the defendant himſelf was taken in execution for the 36*l.* for the coſts of the *ſcire facias:* but a friend of the defendant's paid that ſum to obtain his releaſe, till the opinion of the court could be taken reſpecting the propriety of that arreſt; to obtain which, a rule was granted, calling on the plaintiff to ſhew cauſe why the ſum of 36*l.* which had been paid into the ſheriff's hands, ſhould not be reſtored to the defendant, and why the defendant ſhould not be diſcharged, as to any future arreſt, on account of the ſame. After cauſe ſhewn, *The Court* took time to conſider of their opinion, which was now delivered by Lord KENYON, Ch. J. We have looked into all the caſes (1), and are clearly of opinion, that *the certificate delivers the defendant from the coſts of the* ſcire facias *as well as from the original judgment.* It has been carried farther in practice, though I am not aware of any judicial determination upon the point, that where a writ of error is brought to reverſe a judgment, which is frequently a dilatory proceeding, and which in many caſes is reprehenſible, yet as it ſprings out of the original debt, which is the ſubſtratum of the whole, the certificate which diſcharges the bankrupt from the original debt alſo diſcharges him from the coſts of proſecuting the writ of error. In the preſent caſe, the *ſcire facias* was ſued out by the plaintiff, to enable him to reap the fruits of his judgment; it was a ſtep to lead to execution for his original demand, and the defendant being diſcharged as to the original judgment, we think that all the means that conduce to that end muſt be conſidered as conſequential upon, and included in, the original demand.—Rule abſolute.

So, where it was moved, on the authority of the laſt caſe, to ſet aſide a *ca. ſa.* iſſued and executed on a judgment of nonſuit in this cauſe, and then to have the ſum levied thereon reſtored; the facts appeared to be as follow: "The plaintiff was nonſuited in an action againſt the defendant in Hilary term. On the 26th of April following, a commiſſion of bankrupt iſſued againſt the plaintiff; and on the 7th of May, being the fourth day of Eaſter term, coſts were taxed, and the judgment of nonſuit afterwards ſigned. On the 30th of June, the plaintiff obtained his certificate; and on the 5th of Auguſt following, the defendant ſued out a *ca. ſa.* under which the ſheriff levied."—THE COURT at firſt doubted, but, upon conſideration, they made the rule abſolute. PER EYRE, Ch. J. The nonſuit at *niſi prius* is that which neceſ-

Watts *v.* Hart, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Boſan.* 174.

(1) *Aylet* v. *Harford*, ante p. 208. *Lewis* v. *Pierry*, infra.

farily produced the judgment of nonſuit. It will be difficult to diſtinguiſh this caſe from the caſe of *Longford* v. *Ellis*, where an action of ſlander was brought, and damages given by the jury: and before the day in bank, a commiſſion of bankrupt iſſued againſt the defendant, who, on this ground, was diſcharged out of execution: there was no original debt previous to the verdict in that caſe, any more than before the nonſuit at *niſi prius*, in the caſe of *Hurſt* v. *Mead*. *I do not think either of the caſes founded on principle*(1), but the queſtion is, whether we ought not to adhere to a decided caſe rather than contradict it, where the demand is ſuch as the Court cannot look upon with favour.—Rule abſolute.

Perkins *v.* Kempland *et al.* Tr. Ter. 16 Geo. 3 C. B. 2 *Black.* 1106.

Annuities.] An annuity-bond, if forfeited before the bankruptcy, ſhould be valued and proved under the commiſſion; but if not forfeited till after, it cannot be ſo proved, and the obligor may be taken in execution on a judgment thereon.—This caſe was as follows: "One *Kempland*, on the 18th of January, 1770, joined with Sir *William Deſſe*, in conſideration of 240*l.* (for which *Kempland* alone ſigned the receipt on the back of the bond, though he alleged he acted only for *Deſſe*, who being a banker, did not chuſe to appear to be the borrower) in a bond for 480*l.* to *Perkins*, to ſecure an annuity to him of 40*l.* payable half-yearly, for *Kempland*'s life, which *Deſſe* paid up regularly to the 18th of January, 1775. On the 18th of March, 1773, a commiſſion of bankrupt iſſued againſt *Kempland:* the plaintiff ſaid he ſhould look upon *Deſſe* as his paymaſter, and did not prove any part of his demand under the commiſſion, though a quarter's annuity became due on the 18th of April, 1773, and *Kempland*'s certificate was allowed on the 15th of July, 1773. In June, 1775, Sir *William Deſſe* became a bankrupt; and the plaintiff

(1) His Lordſhip, on the firſt argument, expreſſed his doubts whether the bankrupt could be relieved, in the following manner, the Judges *Heath* and *Rooke* concurring: "I would go as far as I could towards relieving the bankrupt, and if it could be made "out that the ſubſtance of the debt were conſtituted by the nonſuit, and nothing "more than the mere taxation were neceſſary to reduce it into a practical ſhape, in "which it might be recovered, it might be conſidered in the ſame manner as if the "taxation were made on the very day of the verdict given: but *if a nonſuit at niſi* "prius *be only a ground on which the Court* is to pronounce judgment, *then the judg-* "*ment being that which conſtitutes the debt, and being after the bankruptcy*, I do not, "as at preſent adviſed, know how to refer the debt to the time of the nonſuit; "there ſeems to be only an incohate intereſt ariſing on the nonſuit at *niſi prius*. "You could not tax the coſts till after the day in Court, and the poſtea returned; "the nonſuit alone is nothing. *When the record is returned into Court, the Court is to* "*deal with it, and to pronounce the judgment of the Law upon it*; *upon which the coſts* "*attach*; but in order to make the judgment complete, the coſts are firſt taxed. "*The coſts are given with reference to the judgment of nonſuit, and not to the nonſuit at* "niſi prius; and therefore, as at preſent adviſed, we cannot agree to the caſe of "*Hurſt* v. *Mead*."

did

did not prove his demand under that commiſſion, though a quarter's annuity became due on the the 18th of April, 1775. *Deſſe* afterwards obtained his certificate: and on the 27th of May, 1776, *Kempland* was arreſted in execution for the year's annuity, due the 18th of January, 1776, and paid the money in queſtion to be diſcharged. On a motion for the reſtitution of this money, THE COURT were of opinion, that as the bond was not forfeited at the time the commiſſion iſſued, there was no debt then due in law; but it was a mere contingency, which might or might not become a debt *in futuro*. All the caſes in chancery are where the bond is actually forfeited: to redeem which forfeiture, it is allowed, that a value be ſet on the annuity: but neither there, nor at law, can the debtor be protected for a debt that ariſes after the date of the commiſſion. And it was ſo reſolved in *Young* v. *Hockley*, C. B. Mic. 13 *Geo.* 3. *and therefore they diſcharged the rule that had been obtained, for the ſheriff to ſhew cauſe why he ſhould not return the money paid to him by the defendant to procure his diſcharge.*

However, upon a ſubſequent application to the Court, the former ſtate of facts appeared erroneous, the bond having been *frequently forfeited by non-payment of the annuity when due*; upon which, THE COURT ſaid, that the defendant had made a new caſe, which was as clearly for him, as the former was againſt him: that the bond being forfeited, became a debt at law: that the equitable redemption of that forfeiture, by payment of the arrears, and the growing annuity, was the proper ſubject of valuation; and the debt ſo appreciated, ought to have been proved under the commiſſion. PER CUR. The conſequence is, that the defendant, having obtained his certificate, ought not to have been taken in execution, nor of courſe to pay for his diſcharge.—Rule abſolute.

And the receiving payment of the arrears of an annuity-bond, after the forfeiture has once taken place, will not be a waiver of the forfeiture.—In this caſe, the queſtion reſerved for the opinion of the Court was, Whether the plaintiff's cauſe of action accrued before the bankruptcy? On the trial of an action of debt, on an annuity-bond, it appeared, that a quarter's annuity became due on the 25th of December, 1776; that the arrears, due on that day, were paid on the 18th of March, 1777, and then the defendant became a bankrupt, and a commiſſion iſſued againſt him, under which he obtained his certificate. Lord MANSFIELD, Ch. J. delivered the opinion of the Court as follows: The queſtion is, Whether there was any debt due at the time of the bankruptcy? and as between the parties, on general principles, when a forfeiture lies in compenſation, and the perſon intitled to the compenſation receives ſatisfaction after the forfeiture,

Wyllie *v.* Wilkes, Mic. Ter. 21 Geo. 3. B. R. 2 *Doug.* 519.

he can never reſort back to the penalty, like the common caſe of rent. If the payment is made after the day, you can never recur to the forfeiture. All forfeitures are odious if carried beyond their true intent; beſides (I here ſpeak my own opinion), in queſtions between the parties, I ſhould exceedingly incline to ſay, that annuity-bonds are within the reaſon, though not the letter, of the act of the 4 and 5 *Ann.* c. 16. ſ. 12. an act made to remove the abſurdity which Sir *Thomas More* unſucceſsfully attempted to perſuade the judges to remedy, in the reign of *Hen.* 8.; for he ſummoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, intereſt, and coſts: and when they ſaid they could not relieve againſt the penalty, he ſwore, by the body of God, he would grant an injunction. This is a remedial law, and if a caſe is within the miſchief, the remedy ought to extend to it. I ſhould have thought, therefore, that payment after the day might be pleaded to an action on an annuity-bond. In the caſe of *Webſter* v. *Banniſter*, as far as it was neceſſary to conſider the point, we were all inclined to think, that even without an expreſs agreement to give further time, the receipt of the money after the day would have been ſufficient. But inſolvent acts differ from the bankrupt laws (1); there is no authority, no commiſſioners, under the inſolvent acts, to ſet a value upon the annuity. The preſent caſe ariſes upon a bankruptcy. It is to be lamented, that ſo large a claſs of creditors as annuitants are, ſhould be left without any expreſs proviſion in the bankrupt laws. It is hard upon them, that they ſhould be excluded from proving under the commiſſion (when, perhaps, the other creditors may receive fifteen ſhillings in the pound under it), and ſhould be left only to a fruitleſs remedy againſt the bankrupt. It is alſo hard upon an honeſt bankrupt, who has given up his all to his creditors, that he ſhould ſtill continue anſwerable for debts which he has nothing to ſatisfy. This is a great defect and chaſm: it is a pity that the legiſlature ſhould be ſilent, and ſhould force the Courts, in order to attain the ends of juſtice, to invent legal ſubtleties, which do not come up to the common underſtanding of mankind. That has been done in the caſe of annuities: *the court of chancery has laid hold of this ſubtlety: it has ſaid, the penalty is the debt, if the forfeiture has been once incurred; and you may have a value ſet upon your annuity, and come in as a creditor, under the commiſſion.* If it is objected, that the forfeiture was waived, the Court anſwers, no matter for that, it ſhall be ſtill in force, becauſe it is for the benefit both of the creditor and the bankrupt that it ſhould be ſo:

(1) See *Cotterel* v. *Hooke*, in vol. i. p. 599.

this

this has been ſettled, and we all adhere to the determination as far as this caſe goes, as a legal ſubtlety, eſtabliſhed for good purpoſes, but not to be drawn into principle or argument in other caſes. It has been the foundation of practice in the court of chancery, and has received a ſolemn conſideration in the court of common pleas, in the caſe of *Perkins* v. *Kempland* (*ante* 212), which is an authority directly in point. That Court thought annuity-bonds were not within the ſtatute of Queen *Anne*, and for that part of their opinion, relied on what Lord *Hardwicke* ſaid, in a caſe *ex parte Wincheſter*, viz. that the words "at a day or place certain" are material words in the ſtatute; and that bonds, not given for the payment of a leſſer ſum, at a day or place certain, are not within it. I hardly think he would have conſidered thoſe words as ſufficient to take a caſe out of the ſtatute, which is clearly within the reaſon and meaning of it, if it had not been to give the party the advantage of the equitable ſubtlety by which he was enabled to prove under the commiſſion; we conſider ourſelves as bound by the authorities, as far as the preſent caſe goes, but no farther.—*Poſtea* to the defendant(1).

Debts payable at a future day.] A bond for payment of an annuity for a term of years, is within the ſtatute 7 *Geo.* 1. c. 31. and may be proved under the commiſſion; and ſo are all bonds, bills, notes, and other perſonal ſecurities, payable at a future day certain, though not given by the bankrupt for goods ſold and delivered to him in the courſe of his trade.—This was an action of debt upon bond, dated the 15th of May, 1770, conditioned for the payment of an annuity; the defendant pleaded bankruptcy. Upon the bond being produced in evidence, the condition recited a leaſe for a term of years, commencing in the year 1761, from the Biſhop of *Carliſle* to *Hole* and others, which, by aſſignment, veſted in the plaintiff's teſtator. The plaintiff's teſtator aſſigned this leaſe to the defendant for an annuity, and the condition of the bond was for the regular payment of the annuity during the reſidue of the term, and for the performance of the covenants. At the trial it was proved, that the leaſe had been ſurrendered to the biſhop, ſo that the bond ſtood merely as a ſecurity for payment of the annuity: *at the time of the act of bankruptcy, and the commiſſion iſſued, the penalty was not forfeited*, the annuity having been regularly paid up to that time—a verdict was given for the plaintiff, ſubject to the opinion of the Court, on this queſtion: WHETHER this was a ſecurity within the ſtatute 7 *Geo.* 1. c. 31. all the payments being fixed at certain periods, though the bond itſelf

Pattiſon v. Bankes, Hil. Ter. 17 Geo. 3. B.R. *Coxp.* 540. 1 *Doug.* 165. (n. 12.)

(1) See *Touſſaint* v. *Martinant*, in vol. i. p. 321.

was not given for goods ſold and delivered, or for a debt contracted in the courſe of trade? THE COURT (after argument) were of opinion, that this was a debt within the ſtatute. PER CUR. The ſtat. 5 *Geo.* 2. c. 30. ſ. 22. without conceiving a doubt, takes it for granted, that the ſtat. 7 *Geo.* 1. c. 31. is not merely confined to *ſecurities for goods ſold* and delivered in the courſe of trade, but that it extends *generally to all perſonal ſecurities for a valuable conſideration*, where the time of payment is certain, though poſtponed to a future day: and it corrects the blunder in the preamble of the ſtat. 7 *Geo.* 1. which, after ſpecifying particular ſecurities, adds, *or other perſons ſecurities*, which clearly ſhould have been *other perſonal ſecurities*. A few years after, Ld. Ch. Juſt. LEE, in the caſe of *Swayne* v. *De Mattos*, at *niſi prius*, Tr. 17 *Geo.* 2. 2 *Strange* 1211. looked upon it as a general propoſition, and a ſettled point. Theſe alone are ſtrong grounds for extending it to *all ſecurities*. But to conſider it upon the conſtruction of the act itſelf, the preamble is certainly ſpecial and particular. Therefore, without expreſs words in the enacting part, the operation of it muſt be confined to the preamble: but there are a variety of caſes where it has been determined, that ſtrong words in the enacting part of a ſtatute may extend it beyond the preamble. Here there are expreſs words in the enacting part, which are more large than the preamble.—The preamble ſays, the conſideration muſt be *goods ſold upon truſt* by merchants or *traders*: the enacting part ſays, "*all perſons* who ſhall give credit on *ſuch* ſecurities as aforeſaid, upon *a good and valuable conſideration* bonâ fide *for every ſum or ſums of money or other matter or thing whatſoever*." The words, ſuch ſecurities, are only referable to the ſecurities before particularly mentioned, and in which the day of payment is certain, though not yet come. If the words were leſs general than they are, their meaning is fully explained by the ſtat. 5 *Geo.* 2. c. 30. ſ. 22. and the opinion of LEE, Ch. J. at *niſi prius*; the conſtant practice of the commiſſioners is alſo very material. Therefore, we are well ſatisfied, that the act extends to all perſonal ſecurities for money or other valuable things where the day of payment is certain, though not yet come (1).—*Poſtea* to the defendant.

Brooks *et al. v.* Samuel and Edward Lloyd, Mic. Tr. 26 Geo. 3. B.R. 1 *Term Rep.* 17.

So, where *Samuel Lloyd*, being indebted in 54*l.* for goods ſold and delivered by the plaintiff, was arreſted for the ſame; and in order to procure his diſcharge, prevailed on *Edward Lloyd* to become ſurety with him in a bond given to the plaintiff, bearing date the 27th of September, 1784, which was payable by inſtalments; and before the firſt default, the

(1) See the caſes of *Goddard* v. *Vanderheyden*, and *Young* v. *Hockley*, infra.

defendant

defendant, *Edward Lloyd*, became a bankrupt, and a commiſſion iſſued, under which the defendant neglected to prove his debt. The plaintiff having recovered in an action on this bond, a *fieri facias* was ſued out and executed: and it was now moved to ſet this writ aſide, upon the ground that the bond might have been proved under the commiſſion of bankrupt which had iſſued againſt the ſecond of theſe defendants, who had obtained his certificate.—PER LORD MANSFIELD, Ch. J. after cauſe ſhewn, They are both principals, and both are liable: the credit was given to the defendant, *Edward Lloyd*, as well as to *Samual Lloyd*. And as, under the ſtatute, the plaintiffs could have proved the bond under the commiſſion, and they neglected to do it, the rule muſt be made abſolute.

So alſo inſurances upon lives are within the ſtat. 19 *Geo.* 2. c. 32. ſ. 2.—This was an action brought upon a policy of inſurance on the life of *J. H. Boyde*, lately gone to the Eaſt-Indies, on the event of his dying between the 5th of April, 1780, and the 5th of April, 1783: the defendant pleaded, 1ſt, bankruptcy generally; and that the cauſe of action accrued before the bankruptcy: 2dly, that the policy was made prior to the time of his becoming a bankrupt; then the trading; act of bankruptcy; petitioning creditors debt; commiſſion; proceedings and certificate ſpecially; and that he was thereby diſcharged from the ſaid policy, and all debts due at the time of the bankruptcy, without ſaying that the cauſe of action accrued before the bankruptcy. To this laſt plea there was a general demurrer; in ſupport of which, it was inſiſted, that this was a contingent debt, and not diſcharged by the bankruptcy and certificate, not being within the act of 19 *Geo.* 2. c. 32. ſ. 2. for that, though the enacting words are general, viz. *the aſſured* IN ANY POLICY *of inſurance*, yet as the preamble only mentions the caſes of inſurance *on ſhips or veſſels, and the goods and merchandizes loaded therein*; the conſtruction ought to confine the operation of the enacting part to ſuch caſes.—SED PER LORD MANSFIELD, Ch. J. Though the preamble does not mention inſurances of this ſort, yet they are within the ſame miſchief, and the enacting words are ſufficient to comprehend them; the ſtat. 7 *Geo.* 1. is ſimilar to this, and the caſe of *Pattiſon* v. *Bankes* is in point. BULLER, J. In *Mace* v. *Cadell* (p. 130, *ſupra*), it was determined, that the general enacting words of 21 *Jac.* 1. c. 12. ſ. 11. are not reſtrained by the particular words of the preamble.—Judgment for the defendant.

Cox v. Liotard, Hil. Ter. 24 Geo. 3. B. R. 2 *Doug.* 166.

When a creditor has a demand on his debtor which is capable of being aſcertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as a debt under the commiſſion. But if a perſon borrow ſo much ſtock, to be replaced as ſtock, *without naming any particular*

Utterſon v. Vernon *et al.* Aſſ. of Tyler, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 539.

particular day, and afterwards become a bankrupt, the party who lent ſuch ſtock cannot come in under the commiſſion for the price of the ſtock on the day of the bankruptcy.—This was an iſſue directed by the Lord Chancellor, on the hearing of a petition in bankruptcy, preferred by the plaintiff, in order to try the following queſtion; "WHETHER *E. Tyler was indebted to the petitioner at the time of becoming a bankrupt in any, and what, ſum of money in reſpect of* 10,000*l.* three per cent *conſolidated annuities, for which he gave her, on the 27th of Auguſt*, 1781, *a letter of attorney to ſell out that ſtock?*"—At the trial a verdict was taken for the plaintiff, ſubject to the opinion of the court, on a caſe, ſtating in ſubſtance as follows: "On the 27th of Auguſt, 1781, the plaintiff agreed to lend the bankrupt 10,000*l. three per cent* conſolidated annuities, upon her engaging to replace it in his name, and to pay him the dividends in the mean time, as the ſame would have become due, had the ſtock remained in his name; and he accordingly, on that day, gave her a power of attorney to ſell out the ſtock; and the bankrupt at the ſame time ſigned and gave him the following memorandum: "London, 27th of Auguſt, 1781, I do hereby promiſe to replace and pay the dividends of 10,000*l.* conſolidated *three per cent* annuities, in the name of *J. Utterſon*, eſq.; for the ſale of which he has given me a power of attorney, dated the 27th of Auguſt, 1781: as a ſecurity for the above, Mr. *Utterſon*, the plaintiff, has got my aſſignment to the ſhip Lady Townſhend, which he is to return on my fulfilling the above." At the time this memorandum was ſigned, the bankrupt gave to the plaintiff the grand bill of ſale or aſſignment to her of the ſhip Lady Townſhend: but no bill of ſale or aſſignment of the ſhip was made by her to the plaintiff. Upon receiving theſe papers, the plaintiff gave the bankrupt the following receipt: "London, 27th of Auguſt, 1781, Received of Mrs. *Elizabeth Tyler*, her aſſignment to the ſhip Lady Townſhend, as a ſecurity for the replacing and paying the dividends of 10,000*l. three per cent* conſolidated annuities; for the ſale of which I have given her a power of attorney; dated this 27th of Auguſt, 1781; which aſſignment I promiſe to deliver to her, on her fulfilling her agreement." The ſtock was ſold out by the bankrupt, as follows; on the 30th of Auguſt, 1781, 5000*l.*; September 4th, 2000*l.*; 12th October, 3000*l.*; producing in the whole 5,670*l.* The bankrupt gave credit to the plaintiff in account, with his privity and conſent, for 150*l.* for the half-year's dividends, which would have become due to the plaintiff on the ſtock in December, 1781, and alſo 300*l.* a-year for the ſubſequent annual dividends, as they would have become due, in caſe the ſtock had not been ſold out, up to the time of her bankruptcy.

ruptcy. *On the 2d of May*, 1785, *the bankrupt committed an act of bankruptcy, never having replaced the ſtock or any part thereof:* on the 9th of March, 1786, a commiſſion of bankrupt was iſſued againſt her, under which ſhe was declared a bankrupt, and the defendants were choſen her aſſignees. *The market price of* three per cent. *conſolidated annuities on the 2d of May*, 1785, *when Mrs.* Tyler *became a bankrupt, was* 57½l. per cent. *at which rate the* 10,000*l.* three per cent. *annuities would have produced the ſum of* 5,750*l.* The market price of the ſame ſtock on the 6th of March, 1786 (the date of the commiſſion of bankrupt), was 70⅛ *per cent*, at which rate the 10,000*l. three per cent* annuities would have produced 7,012*l.* 10s.—PER LORD KENYON, Ch. J. This is an iſſue directed out of the Court of Chancery, to try whether the bankrupt was indebted to the plaintiff in any and what ſum of money, in reſpect of ſome ſtock which the plaintiff gave her a power of attorney to ſell out of the funds. The produce of that ſtock increaſed the property of the bankrupt. And the queſtion is, Whether or not this created a debt to the plaintiff, ſo as to be capable of being proved under the commiſſion. Now *where it is perfectly contingent whether or not a debt will become due, or where the demand ariſes on account of ſome tortious act, in neither of thoſe caſes can the debt be proved.* But the rule with regard to demands payable at all events, on a future day, though the amount of them is uncertain, falls under a different conſideration. *Where a father covenants that he will make a proviſion for his wife and children, and becomes a bankrupt, that cannot be proved as a debt under the commiſſion, though the amount of it be ſpecified*, unleſs *he has ſtipulated to do it within a reaſonable time, and given* a bond *for the performance of it, which is forfeited at law:* for then, uncertain as the ſum is, the court of Chancery proceeding on the rules of law, will order a part of the effects to be ſet apart to ſecure it; therefore *the mere uncertainty* of the ſum, provided there be a *legal remedy* before the bankruptcy happens, will not deprive the creditor of relief under the commiſſion. The caſe of *Dutch* v. *Warren*, 1 *Strange*, 406, and 2 *Burr.* 1010, 1011 (1), though different in one reſpect from the preſent, goes a great way to ſupport the plaintiff's argument. It differs indeed in this reſpect, that in that caſe *a ſpecific day*

(1) That was an action for money had and received, to recover back the commiſſion money paid, upon an agreement to transfer ſome ſhares in the Welch copper mines on a certain day, which the defendant had afterwards refuſed to transfer; an objection was taken at *Niſi Prius*, that this form of action did not lie, but that the action ſhould have been brought for the non-performance of the contract: BUT THE CHIEF JUSTICE over-ruled the objection, and left it to the jury to conſider, whether they would not make the price of the ſtock as it was upon the day when it ſhould have been delivered the meaſure of the damages, which they did.

was

was mentioned, on which the ſtock was to be transferred; but that caſe anſwers the argument urged on the ground of uncertainty, for the amount of the damages in that caſe was not more certain than in the preſent; they both depend on the ſame denomination of property. I cannot forbear alluding to, and laying conſiderable ſtreſs on, the ſtat. 7 *Geo.* 1. *c.* 31. though it does not meet this very caſe. That act, after reciting that doubts had ariſen whether bills, bonds, &c. payable at a future day, could be proved under the commiſſion, enacted and *declared* that they might. Now it is to be obſerved, that the word "declare" is always inſerted in acts of parliament with great caution, and it does not occur in any other of the bankrupt laws. This, therefore, was declaratory of the common law; and the common law would probably have been held to apply to this caſe as well as to thoſe mentioned in the ſtatute, if it had been clear what the common law was. For here (not money indeed, but) money's worth was lent by the plaintiff to the bankrupt, to be recovered on the ground of the contract, and not in a tortious action. The plaintiff had a cauſe of action which he might have enforced when he choſe, and not at the option of the bankrupt. I am, therefore, of opinion, that in this caſe the plaintiff has a right to come in under the commiſſion for a ſatisfaction; and the only remaining queſtion is, What ſhall be the amount of that ſatisfaction, which depends on the time when the price of the ſtock is to be taken? Now I have no difficulty in ſaying, that it ought to be computed on the day of the bankruptcy, which was the laſt poſſible time. This is not like the caſe of an action for not performing a contract for the delivery of goods; for that ſounds merely *in damages*, and there is nothing to guide the judgment of the Court: but here the price of the ſtock is the criterion, and it is capable of being reduced to a certainty.—ASHHURST, J. *(contra)*, *Although the inclination of my mind would induce me to ſay that debts, which ought in juſtice to be proved under a commiſſion of bankrupt, might be ſo proved, yet I have great doubt on admitting the preſent. I have always underſtood it to be a general rule that nothing is provable under a commiſſion that cannot be recovered in the form of an* indebitatus aſſumpſit; *and that wherever it is neceſſary to have recourſe to a* ſpecial action on the caſe, or treſpaſs, to recover damages, *the party cannot come in under the commiſſion. The action for meſne profits, though* in form *it is an action of* treſpaſs, *yet* in effect *it is to recover the* rent, *which is at leaſt as certain in its nature as the ſtock in this caſe. It is true there may be ſome caſes where the jury are not bound by the amount of the rent, but may give extra damages. But why may not the plaintiff in that caſe waive the extraordinary damages, if he pleaſe, and reſt content with the rent alone?* and yet in ſuch a caſe

caſe he cannot come in under the commiſſion. *The form of the action then, in which this demand was to be recovered, ſeems material in this caſe as well as in that. I cannot, therefore, at preſent, bring myſelf to think, that the plaintiff ought to be permitted to prove his demand under the commiſſion.*—BULLER, J. I cannot by any means agree, that the form of the action can decide this queſtion, which ariſes on the bankrupt laws. The form of the action very properly decided the caſe of *Goodtitle* v. *North* (1); but that has no application to the queſtion in this ſtage of it. There the action was brought to recover damages, and there were no means by which the Court could aſcertain the amount of them; they were uncertain in their nature, depending on a variety of circumſtances, to be ſubmitted to the conſideration of a jury, who alone could aſcertain them. And, therefore, there is great weight in what Lord *Mansfield* ſaid; for he thought that the only difficulty aroſe from the nature of the action which the plaintiff had brought, *which was for damages.* But *the rule is this; if the creditor wiſh to prove a debt under a commiſſion of bankrupt, it is neceſſary that he ſhould be able to aſcertain the amount of it without the intervention of a jury; and if it be ſo certain that he can ſwear to it, he is intitled to prove it under the commiſſion.* In ſome caſes the form of the action is material, in others not. If money be levied by the ſale of goods under an execution, and the execution be afterwards ſet aſide, there if the party, whoſe goods have been ſeized, inſiſt on contingent damages for keeping him out of his goods and ſelling them, it cannot be proved as a debt under the commiſſion: but if he demand only the value of the goods, he may come in under the commiſſion, becauſe the debt is capable of being aſcertained, and he may ſwear to the amount of it. So, the caſe put at the bar, of *an action for not delivering goods according to an agreement*, admits of the ſame diſtinction; *if the party has actually paid for the goods, there he may recover the preciſe value in caſe of non-delivery, and conſequently may prove it as a debt under the commiſſion; but if he will not be content with recovering the preciſe value of them, but goes for contingent damages, ariſing from the fluctuation of the market, he cannot come in under the commiſſion, becauſe thoſe damages are uncertain.* There is alſo another caſe, which ſhews that the form of the action is not the criterion. Suppoſe money has been lent on intereſt, and the principal has been paid, and the only point in diſpute be on the intereſt, *indebitatus aſſumpſit* will not lie for it *eo nomine* as intereſt, but the party muſt have recourſe to a ſpecial action on the caſe to recover it; and yet, as the amount of the intereſt is a matter of

(1) See this caſe, *infra*.

computation,

computation, he may prove it as a debt under the commiſſion. Beſides which, I am alſo of opinion, that this caſe falls within the principle and good ſenſe of the ſtatute 7 *Geo.* 1. c. 31. though not within the very words of it. The object of that act was that all demands that exiſted prior to the time of the bankruptcy, though not payable till a future day, might be proved under a commiſſion of bankrupt, *provided they were capable of being aſcertained.*—GROSE, J. *Where a demand reſts merely in damages, and is not capable of a clear, certain liquidation, it cannot be proved under a commiſſion of bankrupt:* but I conſider this as a contract to do a ſpecific act, which the bankrupt is rendered utterly incapable of performing by the bankruptcy; and his incapacity to perform it is attended *with a certain damage* to the plaintiff. The value of the ſtock is mixed in the general maſs of the bankrupt's property, of which the aſſignees and the other creditors are poſſeſſed; and there is no reaſon why in ſubſtantial juſtice the plaintiff ſhould not have the ſame advantage which the reſt of the creditors have, eſpecially as the amount of his demand is capable of being aſcertained. Several caſes have been mentioned, the principles of which fully warrant us in deciding in favour of the plaintiff. I perfectly concur with my Lord Chief Juſtice in the obſervations which he has made on the caſe of *Dutch* v. *Warren*, and in thoſe made by BULLER, J. on that of *Goodtitle* v. *North*. Much has been ſaid reſpecting the form of the action: but I do not, by any means, think it concluſive; it may illuſtrate, but cannot decide, the queſtion. On the whole, I am of opinion, that this being a caſe of clear liquidated damages for the not performing a ſpecific act, which the bankruptcy has rendered impoſſible to be done, the plaintiff may come in under the commiſſion, and the time of the bankruptcy is the time when the amount of it is to be aſcertained by the price of the ſtock on that day. LORD KENYON alſo mentioned this inſtance; where a perſon is guilty of a tort, as by cutting down trees, and then dies, no action lies againſt his repreſentatives for damages ariſing out of the tortious act, but the value of the timber may be recovered out of his aſſets. THE COURT ordered the verdict to be entered for the plaintiff for 5,750*l.* the price of ſtock on the day of the bankruptcy.

Utterſon *v.* Vernon *et. al.* Aſſ. of Tyler, Hil. Ter. 32 Geo 3. B. R. 4 *Ter. Rep.* 570.

The Lord Chancellor, however, entertaining ſome doubts about the determination of this caſe, deſired it to be reconſidered: and it was accordingly put in the ſhape of a feigned iſſue, and a ſpecial verdict was taken by conſent, ſtating the ſame facts as before. The caſe was twice argued, and the queſtion was reconſidered by the Court, whoſe unanimous opinion was now delivered by LORD KENYON, Ch. J. *It is never too late to correct an error in*

in the adminiſtration of juſtice; and I am very glad that this caſe has been returned to us, becauſe, *on further conſideration, we are all of opinion that the former determination cannot be ſupported.* The queſtion in this caſe depends on a ſimple principle of law, which cannot be doubted. It is clear that *where one perſon, previous to his bankruptcy, is indebted to another in a preciſe ſum which is aſcertained, the latter may prove his debt under the commiſſion: but it is as clear that where there is only a cauſe of action exiſting, where the debt is to ariſe on a ſtipulation, which has not been broken previous to the time of the bankruptcy, and where the debt remains to be enquired into, there the creditor cannot prove his debt under the commiſſion,* and the demand will remain undiſcharged by the certificate. The circumſtance which had too great an effect on our minds on the former occaſion, was the extreme hardſhip of the caſe; for it appeared hard, that the plaintiff, who had advanced this money to the bankrupt, and which conſtituted a conſiderable part of her fund to be diſtributed among her creditors, ſhould be himſelf excluded from receiving any proportion of this fund in ſatisfaction of his own debt. We alſo laid too great a ſtreſs on the caſe of *Dutch* v. *Warren*, reported by Sir *John Strange*, 1 *Strange*, 406. but better in the caſe of *Moſes* v. *Macferlane*, 2 *Burr.* 1010.; for there is a material diſtinction between that caſe and the preſent. *There the party was to replace the ſtock on a day fixed, namely, on the opening of the books; and that day being paſſed, the debt aroſe.* But here the ſtock was to be replaced at the requeſt of the plaintiff who lent the ſtock, and no ſuch requiſition having been made previous to the bankruptcy, no certain debt aroſe, but it reſted altogether in damages to be aſcertained by a jury. On this ſhort ground, therefore, at the ſame time referring to the opinion delivered by my brother *Aſhhurſt*, on the former occaſion, we are all of opinion, that judgment ſhould be given for the defendants.

VIII. *Dividend.*

Brown *et al.* Executors of Graan action for money had and received, brought by the plaintiffs, as executors, againſt the defendant, who was the aſſignee of a bankrupt, to recover the amount of a dividend due to the plaintiffs teſtator, there was a verdict for the plaintiffs, with liberty to move to ſet the ſame aſide, and enter a nonſuit.—The defendant refuſed to pay the dividend, alleging, that there was a balance due from the teſtator to the bankrupt, and he had delivered a notice of ſet-off. At the trial

vatt, v. Bullen, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 407.

it

it was contended, on the part of the defendant, 1ſt. That the action could not be maintained, the only method of recovering debts proved under a commiſſion of bankruptcy, being by application to the great ſeal. 2dly. That if the action was maintainable, the conſideration and circumſtances of the debt muſt be gone into and proved, as in other actions of aſſumpſit. 3dly. That if this was not incumbent on the plaintiff, yet it was competent to the defendant to avail himſelf of the notice of ſet-off. Lord MANSFIELD overruled all theſe points, and thought, 1ſt. That the action was maintainable. 2dly. That the only way to queſtion the proof of the debt taken by the commiſſioners was, by petition to the Chancellor: that, by the ſtatutes, the oath of the party is to be the proof of the debt; and a particular penalty is impoſed for ſwearing to a falſe debt. 3dly. That as the commiſſioners have a power of ſetting off mutual debts, the ſum proved muſt be taken to be the balance due; but if it ſhould happen that only one ſide of the account appeared before the commiſſioners, or that any article was omitted on either ſide, on application to the great ſeal, the account might be again opened, and referred to the commiſſioners, or, in caſe of difficulty, to the maſter. On a motion to ſet the verdict aſide and enter a nonſuit, all theſe points were diſcuſſed and fully conſidered. AND THE COURT held, that the action was maintainable, on the ground that the ſhare of the dividend was money poſitively and expreſsly paid into the hands of the aſſignee for the plaintiffs uſe: and further, that after a debt is liquidated before the commiſſioners, it cannot be litigated but by an application to the great ſeal.

IX. *Rights and Privileges of a Bankrupt.*

Foſter *v.* Allanſon, Ea. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 479.

Until a commiſſion is iſſued, it is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy, of which the defendant had notice, no commiſſion having iſſued, nor proceedings had for that purpoſe.—This was an action on an account ſtated, and other common counts. Plea the general iſſue. On a rule to ſhew cauſe why the verdict which had been obtained by the plaintiff ſhould not be ſet aſide, and a nonſuit entered; it appeared *inter alia* that the plaintiff committed an act of bankruptcy, which was known to the defendant, but no commiſſion had ever been taken out on it. The motion to ſet aſide the verdict was made on two grounds (1); one of which was, that the plaintiff having committed an act of bankruptcy, which was known to the defendant, the latter

(1) For the firſt, ſee vol. i. p. 368.

was

was not warranted in paying him the money, as he would be anſwerable again to the aſſignees if at any time a commiſſion ſhould be ſued out. PER CUR. (after cauſe ſhewn), If this objection were to prevail, it would equally hold at any diſtance of time, though it were never in the contemplation of any creditor to ſue out a commiſſion. But apart from that conſideration, it does not lie in the defendant's mouth to make the objection. Where a perſon pays voluntarily, with notice of the bankruptcy, there the rule holds; but not where he pays by the coercion and judgment of a court of law. An act of bankruptcy cannot over-reach a judgment recovered. If, indeed, there were any fraud by the defendants uniting with the bankrupt in ſuffering judgment to be recovered againſt him, that would be a different caſe. But there is no pretence for ſaying that there is any colluſion in the preſent caſe.—Rule diſcharged.

Kenyon *et al.* v. Salomon, Mic. Ter. 15 Geo. 3. B.R. *Cowp.* 156.

The 5 *Geo.* 2. c. 30. allows a bankrupt forty-two days to ſurrender in, but the ſooner he ſurrenders the better for his creditors: therefore, to induce bankrupts to ſurrender, a privilege is held out to them by the ſame ſtatute, namely, "that on coming to ſurrender, they ſhall be free from arreſt; and alſo, after actual ſurrender for the ſpace of forty-two days, or ſuch further time as ſhall be allowed for finiſhing their laſt examination." But this is a particular privilege to enable them to ſurrender; and until actual ſurrender, confined to the act of their going with that view; not a general privilege during the whole time which the act of parliament allows them to ſurrender in: nevertheleſs, if a bankrupt be abroad, and upon his return with an intention to ſurrender, is arreſted on his landing, before he can conveniently make his ſurrender, the privilege ſhall extend to him; but it muſt appear that he was actually going to ſurrender.—Thus, where one *Levi Salomon*, a bankrupt, came from Holland to England within the forty-two days, with intent to ſurrender himſelf upon the forty-ſecond day, but finding that his time for ſurrendering was enlarged to a further day, he then laid aſide his deſign of ſurrendering himſelf upon the forty-ſecond day, and did not mean to ſurrender until the inlarged day: in the intermediate time he was arreſted by one of his creditors. Upon a motion that he might be diſcharged out of cuſtody, THE COURT ſaid, if a bankrupt be abroad, as this man was, and upon his return with an intention to ſurrender, is arreſted on his landing, or within a day or two after his arrival, before he can conveniently make his ſurrender, it would be too rigorous a conſtruction of the ſtatute to ſay, he ſhall not have a reaſonable time in which to execute ſuch intention; becauſe, in fact, he is on his way to ſurrender: but here the bankrupt, inſtead of ſurrendering on his arrival,

ſwears he had no intention of doing ſo till the laſt moment of the time allowed him for finiſhing his laſt examination: there is no pretence, therefore, for ſaying he is within the privilege of being free from arreſts in coming to ſurrender, which muſt be confined, like the caſes of witneſſes arreſted in attending the court, to a reaſonable time, *eundi et redeundi*, and beyond that the privilege does not extend.

Darby *v.* Baughan, *et al.* Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 209.

The acceptor of a bill, which becomes due, and is paid by him *after the bankruptcy* of the drawer, cannot arreſt the drawer during the time allowed him by 5 *Geo.* 2. c. 30. ſ. 5. for attending the commiſſioners to be examined.—This was an application to diſcharge the defendants out of cuſtody on meſne proceſs, they being bankrupts, and having ſurrendered to the commiſſioners on the 26th of February: after which, and before the expiration of the enlarged term, beyond the forty-two days, which had been granted by the Lord *Chancellor*, they were arreſted by the plaintiff as acceptor of bills of exchange drawn by them, which had not become due, nor were paid, until after the act of bankruptcy. Per Cur. (after cauſe ſhewn), The words of the ſtatute 5 *Geo.* 2. are general, and extend to all caſes, provided the bankrupt be not already in cuſtody. And this protection from arreſt is analogous to many other caſes; for the commiſſioners of bankrupt are a court of juſtice; and the bankrupt is as much bound to attend them as any other witneſs is in any court of juſtice. Here the legiſlature have expreſsly protected bankrupts from arreſts during the forty-two days, the ordinary time allowed for their examination, and ſuch further time as in particular caſes may be given. The caſe of bail comes within the exception in the act; the principal is conſidered as being in cuſtody of the bail, who are his gaolers, and may ſurrender him when they pleaſe. And there is a proviſo, that the act ſhall not extend to "*bankrupts in cuſtody at the time of ſuch ſurrender and ſubmiſſion to be examined.*" But the general words of the act extend to all caſes except that one which is particularly mentioned as an exception.—Rule abſolute.

Thompſon *et al.* *v.* Councell, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 157.

A bankrupt is not intitled to any maintenance out of his effects during his examination.—On the trial of an action of trover for ſeveral articles of plate, by the aſſignees of a bankrupt, the jury found a verdict for the plaintiffs, ſubject to the opinion of the Court, on the following caſe:—"On the 9th day of July, 1785, the bankrupt committed a ſecret act of bankruptcy. On the 27th of July the bankrupt was ſurrendered, in diſcharge of bail, to the cuſtody of the marſhal of the King's-Bench. On the 2d of Auguſt a commiſſion of bankrupt was iſſued againſt him. On the 5th and 6th of the ſame month of Auguſt, *the bankrupt, having a family of ſix children, applied to the defendant, who was his*

ſiſter-

ſiſter-in-law, to take out of his houſe ſo much plate as would raiſe 20*l. for the maintenance of himſelf and family.* She borrowed 20*l.* upon the plate, for the ſupport of the bankrupt and his family, all of which ſhe expended in the maintenance of the bankrupt and his family for the ſpace of fifty-five days, beſides advancing 14*l.* more of her own money for that purpoſe. The defendant knew of the commiſſion of bankrupt having iſſued, when the plate was taken from the bankrupt's houſe. The queſtion for the opinion of the Court is, Whether the plaintiffs are intitled to recover in this action? And on the argument, two queſtions were made: 1ſt. Whether, under any of the ſtatutes relating to bankrupts, the bankrupt is intitled to receive any maintenance from his effects during his examination? 2dly. Whether, ſuppoſing he has a right to any ſuch maintenance, any other perſons than the aſſignees can allow it? PER CUR. This is a very cruel caſe; but if the aſſignees inſiſt upon their claim, this Court cannot aſſiſt the defendant; for ſuppoſing the bankrupt ought to be maintained out of his effects during his examination (1), yet this defendant cannot be juſtified in taking the property of *A.* to maintain *B.*—*Poſtea* to the *plaintiffs.*

A ſecond bankruptcy does not protect future effects, unleſs fifteen ſhillings in the pound are paid under the ſecond commiſſion, notwithſtanding the prior commiſſion was ſuperſeded. —In an ACTION for money had and received, THE PLEAS were, 1ſt. The general iſſue. 2dly. A bankruptcy on the 10th of February, 1774. REPLICATION, that the defendant, on the 6th of November, 1754, was diſcharged as a bankrupt, and again on the 2d of June, 1764, and that his eſtate had not produced 15*s.* in the pound under the laſt commiſſion. REJOINDER, that the two firſt commiſſions were duly ſuperſeded. SURREJOINDER, that the two firſt commiſſions were ſuperſeded on the petition of the defendant, *by and with the conſent of all the creditors.* DEMURRER and joinder in demurrer. PER CUR. (after argument), The only queſtion is, Whether a ſuperſedeas can make a thing not to have been done, which, in fact, has been done? The defendant was diſcharged under the former commiſſions, which is all that need be inquired about. But beſides, the act ſays, that if a bankrupt has compounded his debts, he muſt pay 15*s.* in the pound under a ſubſequent commiſſion of bankruptcy, in order to protect his future effects. Here the creditors had compounded, if the former bankruptcies were to be conſidered as never having exiſted, for they accepted of

Thornton *v.* Dallas, Mic. Ter. 19 Geo. 3. B. R. 1 *Doug.* 46.

(1) See the exception in 5 *Geo.* 2. c. 30. ſ. 1. in the bankrupt's laſt examination of what has been laid out in the ordinary expence of himſelf and his family.

the dividend in lieu of their whole debt—the bankrupt laws were made for the benefit of the creditors, not of the bankrupt.—Judgment for the plaintiff.

Philpott *v* Corden, Tr. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 287.

And a perſon, againſt whom a ſecond commiſſion of bankrupt has been iſſued, and who has not paid 15*s.* in the pound, is liable to an action by any of his creditors, notwithſtanding they have ſigned his certificate; by 5 *Geo.* 2. c. 30. ſ. 9.—To an action of aſſumpſit, againſt the defendant, as acceptor of two bills of exchange, and for the hire of certain carriages, the defendant pleaded the general iſſue; and alſo, that he became a bankrupt on the 4th of April, 1787; and that the plaintiff's cauſe of action accrued before that time. Upon the trial, a verdict was found for the plaintiff, damages 93*l.* ſubject to the opinion of this Court, upon the following caſe: "The bills of exchange in queſtion were accepted by "the defendant; and the ſum of 17*l.* 14*s.* 6*d.* was alſo due "for the hire of carts. The defendant had been a bank- "rupt in the year 1783; and paid a dividend of 1*s.* and 9*d.* "in the pound under that commiſſion, and obtained his cer- "tificate: but the preſent plaintiff was not a creditor under "that commiſſion. After the plaintiff's debt accrued, *the* "*defendant became a bankrupt a ſecond time, on the 4th of* "*April*, 1787. *The plaintiff proved the debt, for which the* "*preſent action is brought, under that commiſſion, and after-* "*wards ſigned the defendant's certificate*, which was allowed "by the Lord Chancellor, on the 19th of February, 1788. "A dividend was declared, under the ſecond commiſſion, in "December, 1789: but it did not amount to 15*s.* in the "pound." PER CUR. (after argument), In this caſe the plaintiff is intitled to recover, unleſs he be precluded by ſome of the bankrupt laws. Under the old ſtatutes, bankrupts were univerſally conſidered as criminals, particularly ſo in the ſtatute of *Henry* the 8th (1). The ſtatute 13 *Eliz.* c. 7. ſ. 10. expreſsly provides, that the creditors ſhall only be barred from recovering ſo much of their debts as they ſhall receive under the commiſſion. And ſo the law continued until the ſtatute 4 and 5 *Ann.* c. 17 which is the firſt act that gives any kind of diſcharge to bankrupts. But we find nothing relative to certificates until the ſtatute 5 *Geo.* 2. c. 30.; upon which act, the firſt thing to be obſerved is, that it appears to be a clear legiſlative expoſition of the ſtatute of *Anne*; and the legiſlature ſeem, by this act, to conſider that the ſtatute of *Anne* did not extend to the caſe of a ſecond bankruptcy. The caſe of a ſecond bankruptcy is for the firſt time provided for by the 5 *Geo.* 2. c. 30. ſ. 9.; and under that, the bankrupt is diſcharged from all his debts if he pay

(1) 34 & 35 *Hen.* 8. c. 4.

15*s.* in the pound under the commiſſion: but his perſon only is protected, if his effects be not ſufficient to make ſuch a dividend. It has been objected, however, that the plaintiff cannot recover, becauſe the aſſignees under the ſecond commiſſion have a right to take all the bankrupt's property until they pay 15*s.* in the pound: but if that argument were to prevail, it would defeat the plaintiff's action at any diſtance of time, ſince there may be a poſſibility that the bankrupt's future effects may be ſufficient to pay 15*s.* in the pound; but the legiſlature did not look forward to any event ſo remote. The ſtatute ſays, in expreſs terms, that unleſs the bankrupt's eſtate is ſufficient to pay 15*s.* in the pound, only his perſon ſhall be protected, but his future eſtate ſhall remain liable as before: in this caſe the bankrupt has not paid to ſuch an amount, and conſequently his perſon only is protected. And as his future eſtate and effects are not protected againſt the plaintiff's demand, by the words of the act, we cannot give that protection.—*Poſtea* to the plaintiff.

And if a defendant rely on a certificate under a ſecond commiſſion of bankrupt againſt him, under which he has not paid 15*s.* in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commiſſion, and prove that he ſubmitted to it, without proving the trading, the act of bankruptcy, and the other facts which are neceſſary to ſupport the commiſſion as againſt third perſons.—FOR PER LORD KENYON, Ch. J. Where the bankrupt ſurrenders under the firſt commiſſion, and ſubmits to it throughout, ſuch evidence is ſufficient as againſt him; though, as againſt other perſons, proof of all the facts to ſupport the commiſſion, muſt be given. Even in the caſe of a fraudulent bankruptcy (*Rex* v. *Perrot*, *p.* 72, 74. *ſupra*), as the perſon himſelf ſubmitted to it, yet as he concealed part of his effects, he ſuffered a capital puniſhment.

Haviland *v.* Cook, Tr. Ter. 34 Geo. 3. B. R. 5 *Ter. Rep.* 655.

Where an exception is in the enacting clauſe, giving a right or a forfeiture, the party ſuing for the right or forfeiture muſt negative the exception in his declaration, &c. Therefore, in a *ſcire facias* on a judgment againſt a perſon, who has been twice a bankrupt, under the ſtatute 5 *Geo.* 2. c. 30. ſ. 9. which ſays "the future eſtate and effects of ſuch perſon ſhall be liable to his creditors, *unleſs* the eſtate ſhall produce ſufficient to pay 15*s.* in the pound, &c." it is neceſſary for the plaintiff to aver that the bankrupt's eſtate has not paid 15*s.* in the pound.—The plaintiff ſued out a *ſcire facias* on a judgment againſt the defendant for 1,100*l.* in debt, and 10*l.* 10*s.* for damages, &c. It ſtated, that on the 16th of December, 1782, the defendant became a bankrupt, that he afterwards obtained his certificate; that on the 20th of April, 1791, he again became a bankrupt, &c. after which the plaintiff obtained the judgment in queſtion againſt him

Gill *v.* Scrivens, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 27.

on a debt which became due after the above certificate, and charged him in execution; that on the 5th of June, 1792, the defendant obtained his certificate under the ſecond commiſſion, and was, on the 10th of June, 1792, diſcharged out of cuſtody on ſuch execution by virtue of the ſtatute 5 *Geo.* 2. c. 30. "The eſtate of the ſaid defendant *not having at any time* produced clear, after all charges, ſufficient to pay every creditor under the ſaid laſt commiſſion 15*s.* in the pound for their reſpective debts." And then, after ſtating that the defendant was poſſeſſed of divers goods whereby the plaintiff might be ſatisfied his debt and damages, it commanded the ſheriff to make known to the defendant that he ſhould ſhew why the plaintiff ought not to have his execution againſt the goods and chattels of the defendant, which had become his goods and chattels ſince the time of his obtaining his certificate under the laſt commiſſion (the tools of trade, the neceſſary houſehold goods and furniture, and neceſſary wearing apparel of the defendant, his wife and children only excepted) for the debt and damages aforeſaid. To this the ſheriff of Middleſex returned *nihil*; on which this writ iſſued, directed to the ſheriffs of London, ſuggeſting that the defendant had goods, &c. in the bailiwick of the ſheriff of London; and both parties appearing at the return, the plaintiff prayed execution againſt the goods and chattels, &c. except, &c. The defendant pleaded that at the time of iſſuing the firſt writ of *ſcire facias* he had not any goods and chattels *in the bailiwick of the ſheriff of Middleſex*, which had become his goods ſince the time of obtaining his certificate under the ſecond commiſſion, whereby the plaintiff might be ſatisfied his debt and damages (the tools of trade, &c. excepted). To this plea there was a general demurrer.—PER CUR. The writ ought to ſtate all thoſe circumſtances that intitle the plaintiff to the execution prayed by him, and one of thoſe is the non-payment of a certain dividend out of the bankrupt's eſtate at the time of ſuing out the writ. In 1 Lord *Raym.* 120. TREBY, Ch. J. ſaid, "The difference is where an exception is incorporated in the body of the clauſe, he who pleads the clauſe ought alſo to plead the exception (1): but when there is a clauſe for the benefit of the pleader, and afterwards follows a proviſo which is againſt him, he ſhall plead the clauſe and leave it to the adverſary to ſhew the proviſo." Now here the exception is not in a ſubſequent proviſo, but in the body of the clauſe which ſubjects the bankrupt's future eſtate and effects to the payment of debts; "the future eſtate, &c. ſhall re-

(1) See alſo *R.* v. *Spurling*, 1 *Stra.* 497; *R*, v. *Jarvis*, 1 *Burr.* 148. 153; and *R.* v. *Pratten*, 6 Ter. Rep. 559.

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main liable, &c. *unleſs* it ſhall produce ſufficient, &c." Therefore, according to the rule laid down in Lord *Raymond*, it ought to have been alleged by the plaintiff in this caſe, that the bankrupt's eſtate had not paid 15*s.* in the pound at the time of ſuing out the writ; inſtead of which he has only alleged that the bankrupt's eſtate had not paid that dividend at the time of the bankrupt's diſcharge out of cuſtody.—PER CURIAM, Let the writ be quaſhed.

It is a ſettled rule, that a bankrupt may be a witneſs to diminiſh the fund, though he has not obtained his certificate; becauſe, in ſo doing, he ſpeaks moſt manifeſtly againſt himſelf: for he may not only defeat his title to the benefit which the law allows him, if the fund is of a certain amount; but he hazards the diſpleaſure of all his other creditors. But he is not a good witneſs for the purpoſe of enlarging the fund, unleſs he gives a releaſe. Walker v. Walker, Mic. Ter. 13 Geo. 3. B. R. *Coup.* 70. and Butler v. Cooke, Ea Ter. 14 Geo. 3. B. R. *Coup.* 70.

The Court will not diſcharge a bankrupt on common bail, where the commiſſion appears to be groſsly fraudulent.—Thus, on a motion to diſcharge the defendant on common bail, he having been a bankrupt and obtained his certificate: the cauſe ſhewn was, that the debt aroſe on a bill of exchange for 60*l.*; that the defendant lived in Ruſſel-ſtreet, Bloomſbury; that the commiſſion deſcribed him as of the pariſh of St. Faith the Virgin, in London, where he never lived; and that the plaintiff never heard of the commiſſion till after he had ſued out the writ: on theſe circumſtances the court left the defendant to take what advantage he might of this bankruptcy at the trial, and diſcharged the rule with coſts. Sowley v. Jones, Mic. Ter. 11 Geo. 3. C. B. 2 *Black.* 725.

So, in this caſe, where it appeared by affidavits, that the defendant's certificate was obtained by palpable fraud, many fictitious creditors having proved debts under the commiſſion, and others having received money for ſigning the certificate. THE COURT (after cauſe ſhewn againſt a rule which had been obtained to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody on a common appearance) were clearly of opinion, that the defendant was not intitled to his diſcharge, as it plainly appeared that the certificate was obtained by fraud.---Rule diſcharged, with coſts. Vincent v. Brady, Mic. Ter. 32 Geo. 3. C. B. 2 *Hen. Black.* 1.

The teſtator and the defendant, both being reſident in this country, the defendant contracted a debt to the teſtator for work and labour, for which the executrix held him to bail. Upon this a rule was obtained, to ſhew cauſe why he ſhould not be diſcharged on entering a common appearance, on the ground that he had become a bankrupt in Ireland, and there obtained a certificate.—PER EYRE, Ld. Ch. J. The ground ought to be perfectly plain, where the Court is called upon to interfere in a ſummary way. If there is the leaſt doubt, the party muſt put the matter upon record, by pleading: we Quin, Executrix of Quin, v. Keefe, Mic. Ter. 36 Geo. 3. C. B. 2 *Hen. Black.* 553.

cannot decide the queſtion on this application. BULLER, J. It is enough to ſay againſt this motion, that the point is new in this court. It is not new in the King's Bench, though I do not know that there is any caſe in print on the effect of a certificate in Ireland upon a debt contracted here. As to the order which Mr. J. ASTON is ſtated to have made for the diſcharge of a defendant, in *Lynch* v. *M. Kenny*, in that caſe the defendant carried on trade, and became a bankrupt here, and the debt which was contracted in Ireland, might have been proved under the commiſſion here.—Rule diſcharged (1).

Evans *v.* Gill, Tr. Ter. 37 Geo. 3. C. B. 1 *Pull* et *Boſan.* 52.

The Court will ſet aſide a regular judgment on an affidavit of merits, upon the ground that it was the intention of the defendant to plead his bankruptcy.—FOR PER CUR. Suppoſing this to be a fair bankruptcy, we ought to permit the party to make uſe of it as a defence: when he has given up all his effects it would be cruel to charge him from a neglect in the attorney; the neceſſary conſequence of which would be, that he muſt go to gaol: in all caſes of fair bankruptcy, we think the party ſhould have an opportunity of taking advantage of it.

Walker *et al. v.* Giblett *et al.* Ea. Ter. 12 Geo. 3. C. B 2 *Black.* 811.

Until the bankrupt's certificate is allowed it is nothing, and it has no relation back to the time of its being ſigned.—On a motion to diſcharge the bail in an action, out of the cuſtody of the warden of the Fleet, on a ſuggeſtion, by affidavit, that the plaintiff had proved his debt and coſts under a commiſſion of bankrupt againſt the principal, which debt had accrued before the bankruptcy; and that the defendant had obtained his certificate: it appeared that the certificate was allowed on the 7th of July, 1768; the original action was brought in 1765; the certificate was ſigned in 1766; the *ca. ſa.* againſt the principal was returnable in Hil. Ter. 1768;

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(1) In conſequence of the refuſal of the Court to interfere, the defendant pleaded "For a general plea in this behalf, according to the form of the ſtatute in "ſuch caſe made and provided (being the act of parliament after mentioned), that "he, the ſaid defendant, after the 24th day of June, 1772, mentioned in a certain "act of parliament, intitled 'An Act to prevent Frauds committed by Bankrupts,' paſſed in a certain parliament of our lord the now king, of his kingdom of Ireland, holden at Dublin, in the ſaid kingdom of Ireland, in the 11th "and 12th years of the reign, &c. to which ſaid parliament the right and authority of making laws in this behalf in the ſaid kingdom of Ireland belonged, and "before the ſuing out of the original writ of the plaintiff, to wit, on the 26th of "July, 1793, at Dublin aforeſaid, became a bankrupt, within the intent and "meaning of the ſaid ſtatute, and of other the laws then and now in force in the "kingdom of Ireland concerning bankrupts, to wit, at London, &c. and that the "ſaid ſeveral cauſes of action aforeſaid did accrue before ſuch time as the defendant ſo became a bankrupt as aforeſaid," and concluded to the country. At the trial at Guildhall, a caſe was reſerved, ſtating the facts above mentioned, which was to have been argued, BUT the Court obſerved, that in the form in which the plea ſtood upon the record, it was clearly bad, and therefore the plaintiff was intitled to judgment, without entering further into the queſtion.

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the plaintiff having previouſly, on the 25th of June, 1767, proved his debt under the commiſſion, merely in order to diſſent from the certificate, but he never received any part of his debt. The judgment on the *ſci. fa.* againſt the bail was ſigned on the 4th of June, 1768, in Trinity Term. In the next vacation, the bail brought a writ of error, which was non-proſſed in May, 1769.—PER CUR. It is a ſettled point that the allowance of the certificate has no relation back; and till the certificate is allowed it is nothing; the plaintiff's proving his debt with intent to obſtruct the certificate did not prevent him from purſuing his legal remedies: and even had he received his debt, or part of it, under the commiſſion, ſtill he might proceed to fix the bail, who would be intitled to their remedy, ſo far as they were oppreſſed by *audita querela*, or by motion.—Rule diſcharged.

So an execution againſt the goods of a bankrupt taken out after his certificate is ſigned by the creditors, and before it is allowed by the chancellor, is valid.—On a rule to ſhew cauſe why the execution, which had been levied by the ſheriff under a writ of *fieri facias*, ſhould not be ſet aſide, and the money levied under it reſtored to the defendant. It appeared that the defendant had been declared a bankrupt; and his certificate had been ſigned by four parts in five in number and value of the creditors, but *not allowed*, at the time the writ was executed. The debt exiſted previous to the bankruptcy. This application was made on the authority of *Graham* v. *Benton* (1), where the bankrupt, who had not obtained his certificate till after judgment, was diſcharged out of execution on that judgment. And the caſe of *Bromley* v. *Goodere* (2) was cited to ſhew that "the operative "force of a certificate ariſes from the conſent of the cre- "ditors; that the reaſon of an allowance by the chancellor "is to prevent ſurprize; and that the certificate, when con- "firmed, has its effect from the beginning."—PER CUR. (after time taken to conſider), As it has been argued, that the ſtat. 5 *Geo.* 2. c. 30. extends to *executions againſt the goods* as well as againſt the *perſon of the bankrupt*, and the caſe of *Graham* v. *Benton* was cited in ſupport of it, the Court took time to look into the ſubject: but on examination, that caſe is found to apply only to the diſcharge of the *perſon:* and it would be directly contrary to the very words of the ſtatute to extend it to an execution *againſt the goods* of the bankrupt, therefore the rule muſt be diſcharged.

Callen v. Meyrick, Tr. Ter. 26 Geo. 3. B. R. 1 *Ter Rep.* 361.

A bankrupt cannot call on his aſſignees for his allowance under the ſtat. 5 *Geo.* 2. c. 30. ſ. 7. (his eſtate paying 10*s.* in the pound), if his certificate be not allowed before payment

Groome v. Potts *et al.* Hil. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 548.

(1) *Stra.* 1196. 1 *Wilſ.* 41. (2) *Atk.* 77.

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of the dividends.—Aſſumpſit by the plaintiff, a certificated bankrupt, againſt the defendants, who were the executors of *Neal*, the aſſignee, under the plaintiff's commiſſion, to recover 25*l.* 6*s.* 7*d.* for money had and received to the plaintiff's uſe, for his allowance under the ſtat. 5 *Geo.* 2. c. 30. ſ. 7. his eſtate having paid 10*s.* in the pound to his creditors. The commiſſion iſſued in June, 1788, and the aſſignee had, previous to the month of July, 1795, paid two dividends, which had exhauſted all the effects. *In July*, 1795, *the plaintiff obtained his certificate.*—THE COURT held that the action could not be ſupported under theſe circumſtances. LORD KENYON, Ch. J. If this defendant were anſwerable in this action, the aſſignees of a bankrupt would be in a very unfortunate ſituation: they are mere truſtees, and act wholly under the direction of the commiſſioners. When a dividend is declared, a right of action againſt the aſſignees accrues to every creditor for his proportion (1). In this caſe two dividends were declared at a time when the plaintiff had not obtained his certificate, and when it was uncertain whether ſuch certificate ever would be granted; the aſſignee paid the creditors under theſe orders of the commiſſioners; and the bankrupt, having four years afterwards obtained his certificate, now calls on the repreſentatives of the aſſignee for his allowance under the ſtatute: but it would be monſtrous to ſubject them to this demand. A bankrupt muſt put himſelf in a ſituation to demand this allowance, by obtaining his certificate, before payment of the dividends by the aſſignees.—Rule abſolute.

Fowler *v.* Down, Ea. Ter. 37 Geo. 3. C.B. 1 *Pul. et Boſan.* 44.

An uncertificated bankrupt has a right to goods acquired by him ſince his bankruptcy, againſt all the world, but his aſſignees, and may maintain trover for them.—This was an action of trover brought by an uncertificated bankrupt: the plaintiff had carried on buſineſs for ſome time, and in a conſiderable way ſince his bankruptcy, and had advanced ſeveral ſums of money to one *Davidſon*, in part payment of which *Davidſon* gave an order for delivering to the plaintiff fifty barrels of beef belonging to him, and then in the hands of the defendant. The defendant, on demand, refuſed to deliver up the beef ſo aſſigned by *Davidſon* to the plaintiff, on which this action was brought; and the cauſe being tried, a verdict was found for the plaintiff, with liberty to the defendant to move to ſet it aſide and enter a nonſuit: a rule *niſi* for the above purpoſe having been obtained, cauſe was ſhewn.—EYRE, Ch. J. What ſhall be done between the bankrupt and the aſſignees or creditors is one thing, and what between

(1) See *Brown* v. *Bullen*, in p. 223, *ſupra*.

him

him and a ſtranger is another. This narrow ground, that the bankrupt has a right againſt every body but the aſſignees, which is maintained by authorities, is ſufficient to ſupport the verdict. It is not true, that in caſes of ſpecial property the party muſt once have had poſſeſſion in order to maintain trover; for a factor to whom goods have been conſigned, and who has never received any of them, may maintain ſuch an action. But this is not a caſe of ſpecial property, it is a ſtronger caſe; it is entire property, though deſeaſible, or to ſpeak more correctly, liable to be diveſted. It is not competent to a third perſon to diſpute the bankrupt's title to recover, who, ſuppoſing his creditors had no claims upon him, would be intitled to his action, becauſe whether they have ſuch claims or not is nothing to the ſtranger. I confeſs the theory of the caſe inclines me to go further. The bankrupt laws principally and moſt directly relate to that eſtate which the bankrupt had at the time of the aſſignment; there are proviſions for taking the account and aſcertaining the eſtate of the bankrupt at the time of the aſſignment; I recollect no ſuch proviſion for the future effects; nor was it neceſſary, for where future effects are ſpoken of, they are ſuppoſed to be ſpecific effects, to be ſpecifically conveyed by aſſignment, as was done in the caſe of *Tudway* v. *Bourn*, 2 *Burr.* 716. It is true, that unleſs the bankrupt's eſtate is ſufficient to pay 20*s.* in the pound, the creditor will be intitled to a ſatisfaction for his debt out of effects acquired ſubſequent to the firſt aſſignment. But it cannot, therefore, be ſaid, that the property is not his own until ſuch aſſignment, or that it is not his own becauſe he is uncertificated. The operation of a certificate is ſimply to diſcharge the bankrupt from the old debts. A certificate is not like a pardon; it is not neceſſary to make him a new man. In my apprehenſion it could not be enough for a creditor or an aſſignee to ſay that he is uncertificated; even to intitle *them* to an aſſignment of future effects under the ſtatute, they muſt ſhew that they have debts unpaid; *à fortiori* a ſtranger ought not to take advantage of his being uncertificated, which affords but a preſumption, at moſt, that there are debts unpaid. The bankrupt who has not obtained his certificate (which is all that is meant by the word uncertificated) ſtands on the footing of the 13 *Eliz.* c. 7.; by which, if the effects, at the time of the bankruptcy, are inſufficient to ſatisfy the creditors, his future effects are made liable to be aſſigned. That is but in the nature of an execution, and is reaſonable, and the Court will give effect to the demands of the aſſignees or creditors, as long as any debts are due, in the mode pointed out by the ſtatute, but I think not otherwiſe. The hardſhip and inconvenience, nay, the injuſtice as it ſeems to me, of this diſabling doctrine, is enough

enough to condemn it. BULLER, J. This is clearly a caſe of property acquired ſubſequent to the bankruptcy. *Evans* v. *Mann* (*ante*, p. 196) and *Martyn* v. *O'Hara* (*ante*, p. 67) were queſtions between the bankrupts and the aſſignees; all the other caſes agree very well with *Aſhley* v. *Kell*, 2 *Strange*, 1207. There the Court thought that the bankrupt had a property in goods acquired after the bankruptcy, and might aſſign to a *bonâ fide* purchaſer. But the aſſignees may claim, and if they do, they ſhall ſucceed. So in *La Roche* v. *Wateman*, *Peake's*, *N. P.* 140, Lord *Kenyon* ſaid, "If the aſſignees take any ſteps to diſaffirm the title, they may do ſo; "but if they do not, the bankrupt being the oſtenſible owner, "may convey a title, and it is not competent to third perſons to object." Allowing that the aſſignees might demand the money, ſtill it would be no bar to this action. Why? becauſe a third perſon has treated with the bankrupt as capable of receiving credit. All the authorities go this length. HEATH, J. The 13 *Eliz.* c. 7. ſ. 7. directs, that the future property of a bankrupt ſhall be "bargained, ſold, "extended, delivered, and uſed for and towards the payment "of the creditors." The ancient practice was, for the commiſſioners to aſſign ſpecific parts of the bankrupt's property to each particular creditor: and the 5 *Geo.* 2. is the firſt ſtatute which directs the choice of aſſignees for the benefit of all the creditors. When it became the practice to make over all the property to the aſſignees, the general aſſignment was held ſufficient to paſs the future effects. But the queſtion here is, not whether the bankrupt can ſell, but whether a ſtranger having purchaſed of him can diſpute his title. *He has a defeaſible property, which none but the aſſignees can defeat.* He is like an alien, who may purchaſe lands and maintain an action for them, unleſs the crown interpoſe. The aſſignees may allow the bankrupt to trade, and will have a right to recover the fruit of his contract. ROOKE, J. If a ſtranger is under any difficulty about defending himſelf againſt the aſſignees in a ſubſequent action, he has only to give them notice of the firſt, and inquire whether they chooſe to defend it, and thereby he would be ſecured.—Rule diſcharged.

Webb v. Fox *et al.* Mic. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 391.

So where, to trover for goods, namely, three hundred yards of quilting, the defendants pleaded, firſt, not guilty, on which iſſue was joined; and, ſecondly, the bankruptcy of the plaintiff before the time of the converſion ſtated in the declaration, ſetting forth particularly the trading, petitioning creditor's debt, bankruptcy, commiſſion, and the aſſignment of all the plaintiff's effects to the aſſignees, &c. The plaintiff replied, that after the aſſignment, he "became and was *lawfully* poſſeſſed of the ſaid goods, &c. and was and continued ſo poſſeſſed thereof without any claim, interruption, moleſtation,

moleſtation, or denial, of the ſaid *T. R.* &c." (the aſſignees) until the defendants took the ſaid goods, &c. The defendants rejoined, that the plaintiff had not obtained his certificate. —To this rejoinder there was a general demurrer.—Lord Kenyon, Ch. J. I cannot commend the mode in which this queſtion is brought before the Court, ſince the whole merits of the caſe might have been gone into on the general iſſue: whereas here the defendants have, in addition to the plea of not guilty, pleaded a ſpecial plea, which would have been bad on a ſpecial demurrer, and which will be attended with additional expence to the parties. I will deliver this caſe in the outſet from one of the arguments urged on the part of the defendants. I admit, in general, the propriety of arguing, by analogy, to caſes of real property: but this caſe can never be compared to caſes reſpecting real property, unleſs it can be ſhewn that a ſpecial property may be recovered in ejectment, while the abſolute legal property remains in ſome other perſon. The immediate right to real property muſt be veſted in one perſon only; whereas a ſpecial property in the caſe of perſonalty may be in one, as in the inſtance of carriers, while the abſolute right to it may exiſt in another. When a competition alſo ariſes between thoſe two perſons, the right of the latter muſt prevail: but, as againſt all other perſons, a ſpecial property is ſufficient. Now, here it ſeems to be admitted, that an uncertificated bankrupt may go to market with goods in his poſſeſſion, and transfer the property to any other perſon; then he muſt have, in ſome degree, a ſpecial property in them againſt every one but his aſſignee. Let us ſee how this caſe appears on the pleadings; the plaintiff claims the goods in queſtion, alleging that he was poſſeſſed of them as of his own proper goods; the defendants, in anſwer, ſay, that they cannot be the goods of the plaintiff, becauſe he (the plaintiff) was a bankrupt, and that all his effects had been aſſigned to the aſſignees under the commiſſion; and as far as reſpected the property at the time of the bankruptcy, there is no doubt but that it all paſſed under the aſſignment: but the plaintiff replies, that ſince his bankruptcy he has acquired theſe goods, and that he is now *lawfully poſſeſſed* of them. And why may he not be lawfully poſſeſſed of them, though acquired ſince his bankruptcy? It is admitted, that if they were the produce of his earnings and labour he may be. The plaintiff is poſſeſſed of theſe goods, and *primâ facie* the poſſeſſor of perſonal property is the owner of them; that which the defendants ſtated in their plea, in anſwer to the plaintiff's claim, did not conclude the queſtion, and the replication explains the whole. Therefore, on principle, and without adverting to authorities, I am of opinion that nobody has a right to take this property from the bankrupt but thoſe who regularly claim under the commiſſion.

commiſſion. With regard to the authorities; I certainly ſhould not rely on the caſes decided before me at *Niſi Prius*, but thoſe caſes have ſince been recogniſed in the late caſe in the court of Common Pleas; and I ſubſcribe to the opinion given by that court, that the bankrupt has a right to theſe goods againſt the defendants, who are wrong doers. Convenience and ſound policy alſo require a ſimilar deciſion. If the plaintiff had brought an action of treſpaſs inſtead of trover, his poſſeſſion would have intitled him to recover againſt a wrong doer; and the form of the action cannot alter the law. But, according to the defendant's argument, if the bankrupt gets poſſeſſion of goods ſubſequent to his bankruptcy, it is an invitation to all the world to ſcramble for the poſſeſſion of them, though the aſſignees do not chooſe to diſpute the queſtion with the bankrupt. Therefore, on principle, on the authority of decided caſes, and on the grounds of policy and convenience, I am of opinion that this action may be maintained. ASHHURST, J. I take the general rule to be, that a bankrupt has a right againſt all perſons but the aſſignees: here a lawful poſſeſſion in him is admitted, and that is ſufficient againſt wrong doers. GROSE, J. This caſe leads us to conſider the ſituation of an uncertificated bankrupt and that of his creditors, as to the goods of which the bankrupt is poſſeſſed ſubſequent to his bankruptcy. The creditors who have not received 20*s.* in the pound are intitled to receive a ſatisfaction to that amount; but it muſt be through the medium of his aſſignees. But the creditors, who are not aſſignees, have no property in goods acquired by the bankrupt after his bankruptcy; if they take them, they are treſpaſſers. If ſuch goods be ſtolen from the bankrupt, it may be alleged in an indictment for the felony, that they were his property. If he ſell them, he may receive the money for them; and if they be pawned by him, he may redeem them on tendering the money for which they were pledged. So here, he may maintain trover; and if he could not, all the inconveniences ſuggeſted by Lord *Kenyon* would probably enſue. LAWRENCE, J. In order to maintain an action of trover, it is neceſſary that the plaintiff ſhould have either the abſolute or a ſpecial property in the goods that are the ſubject of the action: he need not have both; either the one or the other is ſufficient. Abſolute property is where one, having the poſſeſſion of chattels, has alſo the excluſive right to enjoy them, and which can only be defeated by ſome act of his own. Special property is, where he who has the poſſeſſion holds them ſubject to the claims of other perſons. There may be ſpecial property in various inſtances. There may be ſpecial property without poſſeſſion; or there may be ſpecial property, ariſing ſimply out of a lawful poſſeſſion, and which ceaſes when the true

owner

owner appears. Such was the caſe of *Armory* v. *Delamirie*, 1 *Str.* 504. where a chimney-ſweeper's boy, having found a jewel, carried it to a goldſmith to know what it was, who refuſed to return it; and it was holden, that though the plaintiff did not, by ſuch finding, acquire an abſolute property, yet he had ſuch a property as would enable him to keep it againſt all but the rightful owner, and conſequently that he might maintain trover for it againſt the goldſmith, who was a wrong doer. Now that appears to me to go the whole length of deciding this caſe. I agree with the defendant's counſel, that it is not ſufficient to ſtate, in a declaration in trover, that the plaintiff is poſſeſſed, without adding that the property of the goods is in him: but it was not neceſſary to repeat, in this replication, that the property was in the plaintiff, ſince the replication ſhews thoſe circumſtances, in anſwer to the plea, from which the law will infer a ſpecial property in him, ſuch a property as enables him to maintain trover.—Judgment for the plaintiff.

Besford v. Saunders, Tr. Ter. 33 Geo. 3. C.R. 2 *Hen. Black.* 116.

On the trial of an action of aſſumpſit, where the pleas were non-aſſumpſit, and the general plea of bankruptcy, the plaintiff proved two ſeveral applications to the defendant, who admitted the debt after he had obtained his certificate, and ſaid, the plaintiff ſhould be no loſer, but *that he would pay when he was able* (1). Lord LOUGHBOROUGH, Ch. J. held, that this promiſe was abſolute, and the benefit of the certificate waived, as to this debt: in conſequence of which, a verdict was found for the plaintiff. A new trial being afterwards moved for, GOULD, J. and HEATH, J. were of opinion, that this was a conditional promiſe, and that the plaintiff ought to have ſhewn that the defendant was able to pay: but Lord *Loughborough* retained his former opinion, that the promiſe was not conditional, and that an inquiry into the circumſtances of the defendant could not be a point in conſidering whether there was a debt or not.—Rule for new trial abſolute.

Alſop v. Brown. Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 191, 192.

In an action upon a bond it was ſtated, that intereſt had been paid on the bond after the defendant had obtained his certificate; but it did not appear whether ſuch intereſt was paid by the bankrupt, or one of his ſureties. Lord MANSFIELD, Ch. J. ſaid, that if the intereſt was not paid by the bankrupt, there was no queſtion: but that if it was, it would be an admiſſion by him that the principal was then due, and he might be liable as on a new contract.

(1) See the Caſe of *Trueman* v. *Fenton*, in vol. i. p. 250.

X *The Certificate.*

Johnſon *v.* Spiller, Hil. Ter. 24 Geo. 3. B.R. 1 *Doug.* 167, 168.

What Debts are barred by the Certificate.] In an action for money had and received, money paid, money lent, and on an account ſtated, the defendant pleaded his bankruptcy, and certificate; and that the cauſe of action accrued before the bankruptcy. The trial came on at Guildhall, before BULLER, J. at the ſittings after Michaelmas term, 1783, when a verdict was found for the plaintiff, with 378*l.* damages, ſubject to the opinion of the Court, on a caſe reſerved, which ſtated, that "on the 7th of October, 1782, the plaintiff being in want of 1,800*l.* applied to the defendant to indorſe his (the plaintiff's) promiſſory note for that ſum, for the purpoſe of diſcounting it at the bank; and as a ſecurity or indemnity, the plaintiff depoſited in the defendant's hands three ordnance debentures, with the uſual aſſignments thereon, executed by the plaintiff, ſo as to render them negociable, for which the following memorandum was ſigned, viz. *Received the 4th of September*, 1782, of *Mr.* James Johnſon, *three ordnance debentures (ſpecifying them) amounting to* 2,077l. 4s. 10d. *which I hold as a collateral ſecurity for his note of hand to me, dated the 5th of Auguſt, at three months, for* 1,800l. *due the 8th of November next.* J. Spiller, J. Johnſon. The note for 1,800*l.* was afterwards renewed, for the accommodation of *Johnſon*, by another, dated the 7th of October, 1782, payable in three months. On the 12th of November, 1782, the defendant pledged one of the debentures for 779*l.* 4*s.* 2*d.* with Meſſrs. *Tibbits*, as a ſecurity for 500*l.* for which he alſo gave his note of hand, payable two months after date. On January 10th, 1783, the plaintiff paid his renewed note of hand for 1,800*l.* to the bank, to whom the defendant had indorſed it. On the 1ſt of January, 1783, the defendant became a bankrupt, and on the 29th of March following obtained his certificate. On the 13th of October, 1783, the plaintiff redeemed the debenture for 779*l.* from Meſſrs. *Tibbits*, by paying 378*l.* 15*s.* 3*d.* the remainder of the 500*l.* having been received by them, as a dividend under the defendant's commiſſion." THE QUESTION was, Whether the debt could have been proved under the commiſſion? Lord MANSFIELD, Ch. J. This is a very plain caſe; *Johnſon* wanting money, prevails on *Spiller* to lend him his name, by indorſing his note to be diſcounted at the bank, giving him, as a ſecurity, this debenture, among others: this put it in the defendant's power to diſpoſe of it, and he pledged it with Meſſrs. *Tibbits*. Afterwards, on the 10th of January, 1783, *Johnſon*'s note was paid at the bank; from that time *Spiller* became his debtor, for money had and received, and was immediately liable in a action of aſſumpſit: this was before the

the bankruptcy; *it was a debt which might have been proved under the commiſſion, and therefore it is diſcharged by the certificate.* BULLER, J. It is not to be taken for granted that a demand in trover cannot be proved under a commiſſion of bankruptcy; where the demand can be liquidated, it may (1). It is only perſonal damage; as for an aſſault, or the like, that cannot be proved, but here the plaintiff might have had a ſpecial action of aſſumpſit, as ſoon as the debenture was pledged: we are not to preſume the conſent of *Johnſon:* it was only depoſited with the defendant to be kept as a ſecurity: as to the uncertainty of the demand in ſuch an action, would it have been more uncertain than the demand in a common action of aſſumpſit, on a *quantum meruit* for goods ſold?

If a ſurety for the payment of a ſum certain, take an abſolute bond from the principal, payable the day before the original bond will become due, and the principal become a bankrupt before the day of payment, the ſurety may prove this debt under the commiſſion, and the bankrupt's certificate will be a bar to an action on the counter-bond.—On the trial of an action of debt, on a bond and a plea of bankruptcy, a verdict was found for the plaintiff, ſubject to the opinion of the Court, on the following caſe:—The plaintiff, the defendant, and one *Richard Francombe*, entered into a bond to *William Leak*, on the 5th of July, 1786, conditioned for the payment of 401*l.* and intereſt thereon, on the 5th of July, 1787, being for the debt of the defendant. On the 6th of July, 1786, the defendant entered into bond, with condition to pay to the plaintiff 401*l.* with intereſt, on July 4, 1787; upon the back of which bond was indorſed the following memorandum: "The within bond is given and executed by the within-bounden *Richard Francombe*, and *Charles Court*, to the within-named *Henry Martin*, to indemnify him for having, on the 5th of July inſtant, at the requeſt, and for the proper debt, of the within-named *Richard Francombe* and *Charles Court*, entered into and executed a joint and ſeveral bond to *William Leak*, for the payment of the ſum of 401*l.* and intereſt, on the 5th of July, 1787. Dated this 6th of July, 1786." The firſt money paid by the plaintiff on the original bond was, on the 17th of Auguſt, 1787. The defendant became a bankrupt on the 17th of April, 1787, and has ſince obtained his certificate. The queſtion was, Whether the plaintiff is entitled to recover? *The Court* were of opinion, that the plea of bankruptcy opened the whole merits of the caſe; and that this caſe fell within the principle of

Martin v. Court, Tr. Ter. 28 Geo. 3. B. R. 2 *Term Rep.* 640.

(1) See the caſe of *Parker* v. *Norton* infra, in which Lord *Kenyon* explained the meaning of the above words of Mr. Juſtice *Buller*. See alſo the caſe of *Utterſon* v. *Vernon*, ante p. 217.

Touſſaint v. *Martinnant* (1). PER CUR. In the caſe of *Touſſaint* v. *Martinnant*, though the plaintiff was only a ſurety in the original buſineſs, yet it was apparent that he would not lend his name to the defendant generally, but only for a particular time: ſo here the plaintiff has acted on the ſame principle. He inſiſted on having the money ſecured to him on the 4th of July, which was the day before the time when he could be called upon to pay the original bond. This bond then became a debt veſted at the time of the bankruptcy, which the plaintiff might have proved under the commiſſion; and conſequently he is barred in this action by the defendant's certificate.—*Poſtea* to the defendant (2).

Rolfe v. Caſſon, Mic. Ter. 36 Geo. 3. C. B. 2 *Hen. Black.* 570.

So, where the plaintiff drew a bill of exchange on the defendant, payable to his own order, which the defendant accepted; and the defendant drew another bill of exchange on the plaintiff, payable to his own order, which the plaintiff accepted: this being for their mutual accommodation; the two bills being preciſely alike in the dates, ſums of money contained in them, and times of payment, and neither party having effects of the other in his hands. THE COURT were clearly of opinion, that the two bills were mutual engagements, conſtituting on each part, a debt, the one being a conſideration for the other: that the bill in queſtion was not given as an indemnity, which was in its nature conditional, but created an abſolute debt from the beginning, which was capable of being proved under the defendant's commiſſion; and being ſo proveable, was neceſſarily barred by the certificate.

Bouteflour v. Coates, Hil. Ter. 14 Geo. 3. B.R. *Coup.* 25.

A certificate diſcharges a bankrupt from a debt accruing before the act of bankruptcy, though judgment is not obtained till after the certificate is allowed. Thus, where a bankrupt had given a bail-bond to the ſheriff, which was forfeited before the bankruptcy for non-appearance, and an action brought upon this bail bond, but judgment not obtained till after the certificate allowed. THE COURT held, that there was a breach, and the penalty forfeited, therefore the debt was due, though execution could not be taken out for more than the damages.

Goddard v. Vanderheyden, Mic. Ter. 12 Geo. 3. C.B. 3 *Wils.* 269, 270, 272.

What Debts are not barred by the Certificate.] It ſeems both juſt and reaſonable, that every fair and *bonâ fide* creditor of a bankrupt, who cannot be permitted to come in and prove his debt under the commiſſion, ought not to be barred from having his action againſt the bankrupt, for ſuch debt as was not due and owing at the time of the act of bankruptcy committed, and ſo could not be proved under the commiſſion.

(1) Vol. i. p. 321.

(2) See *Dobſon* v. *Lockhart*, in p. 109. ſupra.

Thus,

Thus, if *A.* has a bond of indemnity from *B.* and the condition be broken, and afterwards *B.* becomes bankrupt before *A.* has been ſued or damnified: though *A.* had a good cauſe of action againſt *B.* before the act of bankruptcy, yet, as *A.* had not been damnified by paying any certain ſum of money by reaſon of *B*'s breach of the condition, *A.* cannot poſitively ſwear to any debt due and owing from *B.* at the time of the act of bankruptcy.

Suppoſe a leſſee ploughs up meadow ground, for which he is bound to pay the leſſor a certain ſum of money as a penalty, Can that penalty be proved as a debt under a commiſſion of bankrupt? it certainly cannot. Or, ſuppoſe a man be bound in an obligation, in a certain ſum, to perform covenants, and the obligor, before he becomes a bankrupt, breaks thoſe covenants, Can the obligee prove this as a debt under the commiſſion? clearly he cannot.

So, in ejectment, where there was a verdict at the ſummer aſſizes for the plaintiff, and nominal damages, and afterwards in the vacation the defendant became a bankrupt. In Michaelmas term following, the plaintiff ſigned a final judgment, and had coſts *de incremento* then taxed and allowed to him: Lord *Henley*, in a caſe *ex parte Todd*, held, that theſe coſts did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the ſame as a debt under the commiſſion (1).

Debts payable upon a contingency, which may poſſibly never happen, cannot be proved under a commiſſion of bankrupt, but by the ſtat. 7 *Geo.* 1. c. 31. perſons who have given credit for goods ſold, and taken bills, bonds, &c. payable at future days, and the buyers become bankrupts before the monies become due, the perſons ſo giving credit ſhall be intitled to a proportionable ſhare of ſuch bankrupt's eſtate, deducting a rebate of intereſt, and diſcounting ſuch ſecurities at 5*l.* per cent. per annum; and bankrupts ſhall be diſcharged from ſuch bonds, &c. Whoever, therefore, will come in under a commiſſion of bankrupt, muſt ſwear to a debt due and payable at, or before the act of bankruptcy, or due then, and payable upon bills, bonds, &c. at a certain time afterwards, which will certainly come to paſs: but *one having only a cauſe of action cannot come in and prove it as a debt.*

The Court alſo ſaid, that where a perſon had a verdict for damages and coſts in an action of aſſault and battery, againſt one who afterwards became a bankrupt, the Court were of opinion, that as the plaintiff had not judgment till after the certificate, he could not come in and prove it as a debt under the commiſſion, for that it was not a proveable debt, or a debt due at the time of the bankruptcy. *Walter* v. *Sherlock*, Hil. 23 *Geo.* 2.

(1) But is now ſettled otherwiſe, ſee the caſes in p. 208, 209, 210, ſupra.

Goddard v. Vanderheyden, Mic. Ter. 12 Geo. 3 C. B. 3 *Wils.* 262. 2 *Black. Rep.* 794.

In this caſe, where the defendant was arreſted by virtue of a writ of ſpecial *capias ad reſpondendum*, and the plaintiff, at the defendant's requeſt, became bail to the ſheriff, and entered into a bail-bond, and the defendant undertook to ſave harmleſs, and indemnify the plaintiff therefrom. The defendant neglecting to put in ſpecial bail at the return of the writ, the bail-bond was duly aſſigned, and in Trinity term, 1763, an action was brought thereon in the King's Bench, againſt the preſent plaintiff; and in Michaelmas term, 1763, judgment was obtained thereon againſt the preſent plaintiff, and thereupon he brought a writ of error, returnable in the Exchequer chamber, and proſecuted the ſame till the affirmance of the judgment. On the 10th of March, 1764, the preſent defendant became a bankrupt, and on the 12th of the ſame month a commiſſion iſſued againſt him, upon which he was declared a bankrupt. In Trinity term, 1764, judgment was affirmed in the Exchequer chamber, upon which the preſent plaintiff brought a writ of error, returnable in parliament. In January, 1765, the writ of error in parliament was non-proſſed; and on the 21ſt of the ſame month, a writ of *fieri facias* iſſued againſt the preſent plaintiff's goods, and thereupon he paid to the plaintiff, in the original cauſe, his debt due from the preſent defendant, and coſts. On the 22d of May, 1765, the defendant having conformed to the laws relating to bankrupts, his certificate was allowed.—THE QUESTION was, Whether the plaintiff was intitled to recover? or, in other words, Whether the debt, for which this action was brought, could have been proved under the commiſſion of bankrupt? AND THE COURT were all of opinion, that it could not; for that the plaintiff *Goddard*, could not ſwear that this debt was due and owing to him before he actually paid the debt and coſts upon the judgment on the bail-bond in January, 1765, which was ten months after the act of bankruptcy.—PER CUR. The bankrupt acts do not ſay what kind of debts ſhall come under the commiſſion. The ſtat. 4 and 5 *Ann.* c. 17. ſays, perſons becoming bankrupts, and conforming, ſhall be diſcharged from all debts due and owing at the time of the bankruptcy; and if ſued for any ſuch debt, may plead in general, that the *cauſe of action* accrued before ſuch time as he became bankrupt: we think that the words, *cauſe of action*, mean, ſuch a debt as is due and owing, and payable in all events. The creditor muſt ſwear to the ſum due; and if he ſwears to more than is due, he will be guilty of perjury. A debt may be due at the time of the bankruptcy, though not demandable till ſome time afterwards, and therefore the ſtat. 7 *Geo.* 1. c. 30. was made to let in ſuch debts to be proved under the commiſſion; and though the preamble of that ſtatute ſpeaks only of bonds, &c. given for *goods in trade*, yet the enacting words extend to

to all ſorts of bonds for payment of money; and the words, *ſuch ſecurity*, do not mean ſecurity for ſuch a ſort of debt, but ſecurity by bonds, bills, notes, &c. *Swayne* v. *De Mattos*, at Guildhall, Per LEE, Ch. J. Tr. Ter. 17 *Geo.* 2. upon the opinion of the Court of B. R. in *Tully* v. *Sparkes*, 2 *Stra.* 867, 868. touching debts payable upon contingencies which may never happen, the parliament interpoſed and made the ſtat. 19th *Geo.* 2. and extended the bankrupt laws to *reſpondentia* bonds, &c. and ſee 2 *Pere Wms.* 497. the caſe *ex parte Caſwall* and others: there was a caſe *ex parte Mitchel*, 23d of December, 1751, a trader, on his marriage, gives a bond to a truſtee, to ſecure a ſum of money to his wife, becomes a bankrupt, and pays 9*s.* in the pound; the wife petitioned to come in as a creditor, on the principle of the ſtat. 7 *Geo.* 1.; nobody oppoſed her. Lord HARDWICKE doubted, and had it ſpoke to again, and then thought it improper; but at laſt, by the conſent of the aſſignee, ſhe was allowed to come in; but it is now ſettled, that upon ſuch a proviſion for a wife, ſhe cannot be admitted a creditor. In caſe of debts uncertain in point of liquidation, as between two merchants in balancing accounts, there the matter reſts upon a claim, to aſcertain the ſum that was due at the time of the bankruptcy.—This is an action on the caſe upon a verbal promiſe, ſounding wholly in damages. At the time of the bankruptcy, the plaintiff, *Goddard*, had ſuſtained no damage; it was then wholly uncertain whether he would ſuffer any damage; we cannot ſay what certain debt he could ſwear to: he brings a writ of error upon the judgment recovered againſt him on the bail-bond, and thereby would induce the court of exchequer chamber to believe that the judgment was erroneous, and that he owed nothing thereupon; How, then, can he go at the ſame time before the commiſſioners, and ſwear the defendant owed him ſo much money on that account, when he had not paid a farthing of it? The plaintiff could not have ſworn to a debt in this caſe, ſo as to have held *Vanderheyden* to ſpecial bail.—Judgment for the plaintiff.

So, where the plaintiff declared in covenant, that the defendant had agreed to build and cover in eighteen houſes within a year and a quarter, yet that the defendant did not, within the time preſcribed, do ſo: the defendant pleaded his bankruptcy after the ſaid year and a quarter, and after the ſaid breach of covenant; to this there was a general demurrer. AND the Court held, that the bankruptcy of the defendant did not diſcharge him from the plaintiff's demand, which was not a debt certain, but uncertain, and unliquidated damages, which could not be aſcertained without the intervention of a jury.—Judgment for the plaintiff. Baniſter v. Scott, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 489.

The certificate does not diſcharge a bankrupt from his own expreſs collateral covenant, which does not RUN with the Mayor v. Steward Tr. Ter. 9 Geo. 3. B. R. 4 *Burr.* 2439.

the land.—In this caſe, there was a covenant by the bankrupt, in an aſſignment of a leaſe to him, to indemnify the aſſignor againſt the covenants contained in ſuch leaſe. After the aſſignment he became bankrupt, and the plaintiff brought covenant: the breach aſſigned was in non-payment of the rent, in not repairing the premiſes, and in not indemnifying the plaintiff. The defendant pleaded three pleas: 1ſt. That he became a bankrupt, after the making of the indenture of aſſignment, and that *the cauſe of action* accrued to the plaintiff before he (the defendant) became a bankrupt; the two others were ſpecial pleas in bar, one as to the non-payment of the rent, and not indemnifying the plaintiff; the other, as to the not repairing: they were both to the ſame effect, ſtating the commiſſion, &c. and that he (the defendant) had conformed and obtained his certificate. To the firſt plea, the plaintiff joined iſſue: to the ſecond and third, he demurred generally, and there were joinders in demurrer. On the trial of the iſſue, a verdict was found for the plaintiff, ſubject to the opinion of the Court, upon the caſe ſtating, in ſubſtance, the above facts. YATES, J. obſerved, that the proper queſtion of debate would be, "WHETHER the bankrupt, being "diveſted of his all, and diſabled from paying any thing, is "not alſo diſcharged from all covenants?" but that this queſtion could never come to a determination upon this iſſue; and he added, that the demurrer ought to have been argued firſt, and then the queſtion would have come properly before the Court, "WHETHER the bankrupt is "not diſcharged from the expreſs covenant, when he is "rendered abſolutely incapable of performing it, by having "ſurrendered his all to his creditors under the commiſſion, "in conformity to the ſtatutes concerning bankrupts?"—The demurrers were accordingly argued; after which, THE COURT declared, that they were clearly of opinion, that as this was not a caſe between leſſor and leſſee (in which caſe, it might have ſeemed hard to leave the leſſee liable to the covenants, when an act of law had diveſted him of the emoluments, and veſted them in his creditors), but a diſtinct, detached, collateral, independant covenant and contract between the plaintiff and defendant, the plaintiff could have had no remedy under the commiſſion: that the bankrupt was not diſcharged by the certificate: that it was his own expreſs collateral covenant; not a covenant that runs with the land, and a third perſon ought not to be prejudiced by the bankrupt's breach of it—the plaintiff could not have been admitted, under the commiſſion, to have proved this as a debt, for it was not a debt at the time of the bankruptcy: it might, perhaps, never have been one.—Judgment for the plaintiff upon the demurrer; and on the ſpecial caſe, plaintiff to have the *poſtea* delivered to him.

Neither

Mills v. Auriol, Tr. Ter. 30 Geo. 3. C. B. 1 Hen. Black.

Neither is the bankruptcy of the leſſee a bar to an action of covenant brought againſt him.—This was a covenant for rent; pleas *non eſt factum*; *riens arrere*; and the bankruptcy of the defendant, before the rent became due; in which plea it was ſtated, that the commiſſioners aſſigned the leaſe, in which the covenant was inſerted, to the aſſignees for the reſidue of the term, and that by virtue of ſuch aſſignment, all the eſtate, intereſt, and term of years then to come, &c. of the defendant, in the leaſe, was, and ſtill is, veſted in the aſſignees. To the latter plea there was a general demurrer and joinder; and, after two arguments, judgment was given for the plaintiff.—LORD LOUGHBOROUGH, Ch. J. There is no degree of doubt but that the law is eſtabliſhed, that an action of covenant may be brought on a covenant to pay rent, though the leſſee be not in poſſeſſion of the land, and after acceptance of rent from the aſſignee by the leſſor. This is by privity of contract; but the diſtinction is clear between debt and covenant. Then when the term is taken under the aſſignment of commiſſioners of bankrupt, the queſtion is, Whether it is not by the act of the bankrupt himſelf? It is taken from him becauſe he has contracted debts, and inſtead of any ſingle creditor ſuing out a *fieri facias*, the common law execution, there being many creditors, they join in taking out a commiſſion of bankruptcy, which is in the nature of a ſtatute execution. By this the property is veſted in the aſſignees, but not ſo abſolutely as in the vendee by a ſale under a *fieri facias* made by the ſheriff; becauſe if the effects were ſufficient without it, the term would remain to the leſſee. Covenant, then, may well be brought againſt him. Though he is out of poſſeſſion, yet he is placed in that ſituation by his own act. I am, therefore, of opinion, that the demurrer ought to be over-ruled. GOULD, J. of the ſame opinion. HEATH, J. of the ſame opinion. WILSON, J. The plea of the defendant is not ſupported by any adjudged caſe. It has never yet been decided that an action of covenant would not lie upon a covenant, by a leſſee, which runs with the land, and which was entered into before, but broken after the bankruptcy of the covenantor. I entertained no doubt on this queſtion except what aroſe from the hints thrown out by ſome of the judges of the court of King's Bench whenever the queſtion has come before them, on account of the dictum of Mr. Juſtice *Yates*, in *Mayor* v. *Steward*, that as the bankrupt is diveſted of his whole eſtate, and rendered incapable of performing the covenants, it would be a hardſhip upon him if he ſhould ſtill remain liable to it, when he is diſabled by the act of parliament from performing it. But this opinion was clearly extra-judicial, for, under the circumſtances of that caſe, the court held the plea to be bad. In *Wadham* v. *Marlow*, Lord

Mansfield ſpoke of the opinion of Mr. Juſtice *Yates*, as deſerving great weight, though it was extra-judicial (1). But in that caſe it was not ſtated that the plaintiff had accepted rent from the aſſignee as his tenant, and it was contended that debt, as well as covenant, would lie againſt the leſſee, becauſe the leſſor had done no act to ſhew his aſſent to the aſſignment. But the court decided, on the ground that the plaintiff had virtually aſſented to the aſſignment, every man's aſſent being implied to an act of parliament, and not on the ground that an action of debt would not lie. Thus the queſtion ſtands with reſpect to judicial deciſions. The ſeveral ſtatutes relating to bankrupts prior to the 4 *Anne*, c. 17. left the bankrupt not only liable to all contingent debts, but to the remainder of the debts which his effects had been unable to

(1) Wadham *v.* Marlow, Mic. Ter. 25 Geo. 3. B.R. 2 *Hen. Black* 437.

This was an action of debt for rent, reſerved on the *redendum* of a leaſe: the defendant pleaded as to part, that it became due ſince the bankruptcy, and that he had obtained his certificate; to this plea there was a demurrer.—Per Lord Mansfield, Ch J. (after argument), Two points were argued for the plaintiffs; 1ſt, If there had been no bankruptcy, but the leſſee had merely aſſigned to another, he would ſtill remain liable, in debt, till the leſſor had aſſented to the aſſignment: 2dly, Bankruptcy being an act done by the bankrupt himſelf, he ſhall remain liable like any other leſſee: as to the firſt point, it is not neceſſary that there ſhould be an actual acceptance of rent by the leſſor, in order to diſcharge the leſſee from the action of debt on the *redendum*; but any aſſent is ſufficient; the action on the *redendum* is founded, not merely on the terms of the demiſe, but on the enjoyment of the tenant. In *Warren* v. *Conſett*, 2 Lord *Raym.* 1500. it was agreed, that "levied by diſtreſs, and *fic nil debet* was a good plea" to debt for rent on an indenture. What ſhall be deemed an enjoyment by the tenant hath been much agitated as a queſtion of law; but he cannot deſtroy the tenantry without the aſſent of the leſſor: on behalf of the defendant, it was argued, that notice, to the leſſor is a ſufficient diſcharge of the leſſee; but in the caſes in *Brownl.* and *Cro. Jac.* there was an expreſs acceptance; and in *Sider*, 447. though the caſe is ſhort and confuſed, it muſt be ſo underſtood. In 2 *Saund.* 181. it is ſaid, he may ſue either aſſignee or leſſee. In the preſent caſe there is neither acceptance of rent nor aſſent; and if there were nothing but notice, we are all of opinion, that the leſſee would be liable to the action. This brings me to the ſecond point, on which there are only two caſes; thoſe caſes are *Mayor* v. *Steward*, (p. 245 *ante*), and *Cantrell* v. *Graham*; the firſt was determined on the ground that the covenant was collateral, but there is a ſtrong, though *obiter dictum* of *Yates*, J. that it would be hard to leave the leſſee liable to the covenants, when the rules of law had diveſted him of the emoluments, and veſted them in his creditors. In *Cantrell* v. *Graham* (*a*), the Court made a direct determination on the point. We have a fuller note of it than in *Barnes*. The counſel ſaid, it was merely an effort made to relieve the defendant on account of the hardſhip of the caſe; but the Court would not have diſcharged him, unleſs they had been ſatisfied that the action was not founded; this caſe is preciſely in point, and we agree with the determination: the bankrupt's eſtate is veſted in the aſſignees by act of parliament. Every man's aſſent ſhall be preſumed to an act of parliament. It was agreed, that if a man be diveſted by act of law, without his own default, he is diſcharged. This is as ſtrong, becauſe, though it was his own act originally, on which the aſſignment was founded, yet the immediate effect produced is by the act of parliament; *et in jure, non remota ſed proxima ſpectantur.*—Judgment for the defendant.——

(*a*) That was a motion to diſcharge the defendant out of cuſtody on a common appearance, he having been arreſted for rent accrued due on a leaſe ſubſequent to his bankruptcy: the certificate was produced, duly allowed, and as neither the poſſeſſion nor the legal intereſt of the eſtate remained in the defendant, a common appearance was ordered to be accepted, 1 *Barnes*, 61.

ſatisfy. The hardſhip was the ſame, for the bankrupt was deprived of his all, and yet left without any protection againſt his creditors. The ſtatutes, previous to that time, meant to give an execution for the equal benefit of all the creditors, and if they were not fully ſatisfied by it, to leave them, for what was unſatisfied, to every remedy againſt the bankrupt which they had before. Neither that ſtatute, nor the now exiſting ſtatutes upon the ſubject, extend to this caſe. The 34 *Hen.* 8. c. 4. ſ. 1. directs that the Lord Chancellor, and other great officers, ſhall have power to ſell and diſpoſe of the lands and goods of bankrupts in as full a manner as the bankrupt himſelf might have done. Subſequent ſtatutes have impowered the aſſignees to make the ſame diſpoſition. The intent of theſe ſeveral ſtatutes was, that the act of the aſſignees ſhould do no more than the act of the bankrupt himſelf. I therefore do not ſee how the maxim "*In jure, non remota, ſed proxima ſpectantur*" is applicable. The act of parliament only aſſigns the intereſt of the bankrupt in the land, but does not deſtroy the privity of contract between leſſor and leſſee. An action of covenant remains after the eſtate is gone; but generally ſpeaking, when the land is gone, the action of debt is alſo gone, debt being maintainable becauſe the land is debtor. Covenant is founded on a privity collateral to the land. A covenant of this kind is mixed, it is partly perſonal and partly dependent on the land, it binds both the perſon and the land. This brings the caſe within the principle of *Mayor* v. *Steward*.—Judgment for the plaintiff.

Auriol v. Mills, in Error, Mic. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 94.

The above judgment in the court of Common Pleas, was afterwards removed into the court of King's Bench, by writ of error, and THE COURT, after the caſe had been fully argued, ſaid, it would be proper, before they gave judgment, to look into the caſes. On the next day Lord KENYON delivered the opinion of the Court. It was not owing to any doubt that we entertained on this queſtion that we did not pronounce judgment when the caſe was argued; but as a caſe was alluded to in *Hobart*, 82, which was not argued upon at the bar, we wiſhed to have an opportunity of examining that caſe before we gave our opinion. But on looking into it, we think that it does not preſs upon the preſent caſe; and we are all of opinion, that the judgment of the Court of Common Pleas muſt be affirmed. It is extremely clear that a perſon, who enters into an expreſs covenant in a leaſe, continues liable on his covenant, notwithſtanding the leaſe be aſſigned over. The diſtinction between the actions of debt and covenant, which was taken in early times, is equally clear: if the leſſee aſſign over the leaſe, and the leſſor accept the aſſignee as his leſſee, either tacitly or expreſsly, it appears by the authorities that an action of debt will not lie againſt

againſt the original leſſee; but all thoſe caſes with one voice declare that, if there be an *expreſs covenant*, the obligation on ſuch covenant ſtill continues. And this is founded not on precedents only, but on reaſon; for when a landlord grants a leaſe, he ſelects his tenant; he truſts to the ſkill and reſponſibility of that tenant; and it cannot be endured that he ſhould afterwards be deprived of his action on the covenant to which he truſted by an act to which he cannot object, as in the caſe of an execution. In ſuch a caſe the leſſor has no choice of the under-tenant: ſo here the aſſignees are bound to ſell the term, and perhaps they may aſſign to a perſon in whom the leſſor has no confidence. Then it remains to be conſidered whether any exception to that general rule has taken place in the caſe of a bankruptcy. It ſeemed admitted in the argument, and indeed it cannot be diſputed, that, where a diſpoſition of the leaſe has been made by virtue of a *fieri facias*, or an *elegit*, the leſſee continues liable on his covenant, notwithſtanding the eſtate be taken from him againſt his conſent. On the ſame principle the South-Sea Director was held liable, although he was diveſted of his property by the act of confiſcation. So in the caſe of an attainder, and other caſes, which it is not neceſſary to mention particularly, as they are all collected in the report of this caſe in the Common Pleas. Then what is there peculiar in the caſe of a bankrupt, which ſhould differ it from thoſe caſes? No act of parliament has ſaid that he ſhall be diſcharged from his covenants; neither is there any reſolution in either of the courts of law to that effect: but on the contrary, it has been uniformly determined in all the various caſes on that ſubject that, for all contracts which are not to be performed till a period ſubſequent to the bankruptcy, the bankrupt ſhall ſtill be liable, notwithſtanding he is ſtripped of all his property; as in the caſe of *Goddard* v. *Vanderheyden*, and many others. So in this caſe the defendant's liability to pay happened after the bankruptcy; and therefore, on the principle of thoſe caſes, he remains liable, notwithſtanding the commiſſion of bankrupt diveſted him of all his property; for a certificate would only have made him a new man from the time when the act of bankruptcy was committed. But inſtances have occurred where perſons, who have been declared bankrupts, have been poſſeſſed of conſiderable property after paying all their debts; as in that of Sir *S. Evans*. Then in reaſon, why ſhould a perſon not continue liable on his covenant, when his affairs are arranged. Then it was contended that the bankruptcy put an end to the privity of contract: but that argument is not well founded; for it was aſked by Lord *Hardwicke* in the caſe of *Hornby* v. *Houlditch*, as it is reported in 1 *Ter. Rep.* 93. "What is there here to diſcharge the privity of contract or

"eſtate

« eſtate between the leſſor and leſſee? Or what is there to « diſcharge an expreſs covenant?" In the language of Lord *Hardwicke*, I may aſk the ſame queſtions in this caſe. Has the landlord done any act to diſcharge the leſſee? Even in caſes where the landlord has expreſsly conſented to receive the aſſignee as his tenant, the original leſſee has always been held liable on his covenant; and thoſe are, in my opinion, much ſtronger caſes than the preſent, where the aſſignees are forced upon the landlord without his conſent. This is like the caſe of an execution, and, indeed, in ſome of the books it is called a ſtatute execution. In every view of the queſtion, therefore, I am clearly of opinion, that this caſe was properly decided in the court of Common Pleas, and that the judgment ought to be affirmed.—Judgment affirmed.

Hodgſon *et al.* *v.* Bell. Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 97.

In the year 1778, the defendant prevailed on *Slack*, the plaintiff's teſtator, to become his ſurety for 500*l.* to *J. Greenwell*, and accordingly they executed a joint and ſeveral bond, dated the 10th of Auguſt, 1778, to *Greenwell*, in 1000*l.* conditioned for the payment of 500*l.* and intereſt *on the 10th of February then next.* Two years afterwards *Slack* conſented to become ſurety for the defendant for 300*l.* to *T. Wheldon*; and on the 1ſt of March, 1780, *Slack* and the defendant executed a bond to *Wheldon*, in 600*l.* conditioned for the payment of 300*l.* and intereſt to *Wheldon* on the 1ſt of September following. The defendant, on the 4th of March, 1780, gave his bond to *Slack*, on which the action is brought; and the condition (after reciting the two former bonds and conditions) was, that the defendant ſhould pay to *Greenwell* and *Wheldon* reſpectively, the ſaid two ſeveral ſums of 500*l.* and 300*l.* with intereſt, according to the true intent and meaning of thoſe two bonds, and in full diſcharge and ſatisfaction thereof; *and alſo* that he (the defendant, ſhould ſave *Slack*, his executors, &c. harmleſs and indemnified from all damages, &c. which he or they ſhould ſuffer by reaſon of *Slack*'s having become bound, &c. On the 15th of April, 1786, the defendant became a bankrupt, and on the 12th of April, 1788, he obtained his certificate. *Wheldon* proved the bond given to him under the defendant's commiſſion, and afterwards called on the plaintiffs, as *Slack*'s adminiſtrators, who paid the principal and intereſt on the 27th of May, 1796.—On the trial of an action of debt, brought by the plaintiffs on the above bond of the 4th of March, in which the defendant had pleaded his bankruptcy, a verdict was given for the plaintiffs, ſubject to the opinion of the Court on a caſe reſerved, which ſtated the above facts. Per Cur. This queſtion has been at reſt for more than half a century. *Where the debt accrues ſubſequent to the bankruptcy, it cannot be proved under the commiſſion.* Many caſes of that ſort happened in the time of Lord *Hardwicke*, who regretted

regretted that he could not permit the creditors to come in under the commiſſion: but this is one of thoſe caſes in which he would have had no difficulty; he would have been enabled, by the rules of law, to do what the juſtice of the caſe required, permitted the plaintiffs to prove their debt under the commiſſion. *Where there is a legal debt prior to the bankruptcy, there is no doubt but that the creditor may come in under the commiſſion*, as was held in the caſe *ex parte Wincheſter*, 1 *Atk.* 116. in which caſe, and alſo in that *ex parte Groome*, Lord *Hardwicke* took this diſtinction; if the bond be forfeited at law before the bankruptcy, though, in equity, the money is not then payable, the Court will avail itſelf of the debt at law to protect the party who is in conſcience intitled: but if the bond be not forfeited before the bankruptcy, the creditor cannot prove his debt under the commiſſion. Then the queſtion here is, Whether the bond, on which the action is brought, were or were not forfeited before the defendant became a bankrupt; and of that there can be no doubt. If the plaintiff's teſtator had only become ſurety for the defendant on the firſt bond, there might have been ſome defence; but he had joined in two bonds, and the bond in queſtion was given to indemnify him againſt both thoſe bonds; now if any part of the condition of this bond were broken before the defendant's bankruptcy, the bond was forfeited at law, and the plaintiffs might have come in under the defendant's commiſſion, according to the caſes alluded to. In *Perkins* v. *Kempland*, 2 *Bl. Rep.* 1106, a bond given to ſecure an annuity was held to be forfeited becauſe one payment was not made on the day when it was due, the 19th of January, though the money was paid on the 1ſt of February following (1). Now that caſe ſeems to be an authority for our determination in this, that the bond on which the action is brought was forfeited before the defendant became a bankrupt, and therefore might have been proved under his commiſſion.—Judgment of nonſuit.

Chilton v. Whiffin and Cromwell, Tr. Ter. 8 Geo. 3. C. B. 3 *Wilſ.* 13.

No debt can be barred by the certificate, but what was a debt contracted with certainty before the act of bankruptcy.—In a ſpecial action on the caſe, the plaintiff declared that the defendants, in conſideration that the plaintiff would accept a bill of exchange, drawn on him by the defendants, promiſed to indemnify him; that he afterwards accepted the bill, which became due the 16th of May, 1766; that the indorſee ſued out proceſs from B. R. on the 15th of September, 1766, and cauſed the plaintiff to be arreſted for the amount of the bill; that on January 1, 1767, he was charged in execution: the defendant pleaded, 1ſt, the general iſſue; 2dly, that on the 16th day of Auguſt, 1766, the defendants became bankrupts, and that the plaintiff's cauſe of action

(1) See alſo, *Wyllie* v. *Wilkes*, p. 213, *ante*.

accrued

accrued before they became bankrupts, and that the defendants had obtained their certificates, upon which iſſues were joined.—At the trial it was proved, that the defendants promiſed, and undertook, to indemnify the plaintiff from all coſts and damages he might be put unto by reaſon of his accepting the ſaid bill, and that the defendants would find money to pay and take up the ſame; that the bill became due and payable before the defendants became bankrupts; that afterwards they became bankrupts; that the indorſee proceeded to judgment, and charged the plaintiff in execution; in the King's Bench, the jury gave a verdict for the plaintiff, ſubject to the opinion of the Court, WHETHER the plaintiff was intitled to recover?—PER CUR. We are all of opinion, that the *poſtea* muſt be delivered to the plaintiff, and he muſt have his judgment, for no debt was due or owing from the defendants to the plaintiff until he was charged in execution; and his body being in priſon upon judgment and execution for a certain ſum, we hold to be the very ſame thing as if the plaintiff had paid the debt and coſts due on account of the bill; and then, and not before, the defendants became indebted to the plaintiff; which being after the defendants became bankrupts, the plaintiff could not come in under the commiſſion. It was rightly argued at the bar, Whether the cauſe of action was before the bankruptcy, and whether the plaintiff could have come in under the commiſſion as a creditor? if he could he is barred; if he could not he is not barred: we being all of opinion that the plaintiff could not come in as a creditor under the commiſſion of bankruptcy, it would be abſurd to ſay, that he is barred in this caſe (1). No debt can be barred but what was a debt contracted with certainty before the act of bankruptcy. Did the defendants owe to the plaintiff, *Chilton*, any thing before he rendered his body in ſatisfaction thereof? which we take to be the ſame thing as if he had actually paid the debt and coſts; they certainly did not: they had promiſed to pay the money, to furniſh the money to take up the bill and to ſave the plaintiff harmleſs; they broke their promiſe: the plaintiff was terrified and arreſted: there is an injury to a certain degree, but no debt owing by the defendants to the plaintiff before his body was in execution for the certain ſum: how could the plaintiff, at the time of the commiſſion of bankruptcy iſſued, have ſworn to a debt before he had advanced a ſhilling for the defendants: he certainly could not, but now his body being in execution, he has thereby paid the debt, ſo the *poſtea* muſt be delivered to the plaintiff, and he muſt have judgment.

(1) The Court mentioned the following caſes as applicable; *Tully* v. *Spurks*, 2 *Strange*, 867. 2 Lord *Raym.* 1546. 1549. 1570. *Huckley* v. *Mary*, 2 *Strange*, 1043. *Crookſhank* v. *Thompſon*, 2 *Strange*, 1160.

And

Young *et al.* v. Hockley, Mic. Ter. 13 Geo. 3. C.B. 3 *Wilſ.* 346. 2 *Black.* 839.

And in a caſe where the bankrupt, on the 25th of June, 1769, drew a bill of exchange on *Young* for 57*l.* 5*s.* 4*d.* payable one month after date, to his own order, which *Young*, on the ſame day, accepted: on the 12th of July, a commiſſion of bankruptcy was iſſued; the bill became due the 28th of July, when *Young* paid it; the bankrupt obtained his certificate on the 5th of September, 1769, which was allowed on the 23d of October.—THE COURT were clearly of opinion, that the certificate was no bar to an action brought by *Young:* for no debt was owing by the defendant to the plaintiffs before the act of bankruptcy, and the plaintiffs could not ſwear that the debt was due and owing to them before they had actually paid the ſum, which was not until after the act of bankruptcy, and therefore they could not come in for any dividend under the commiſſion: and, the Court ſaid, this caſe was exactly like *Goddard* v. *Vanderheyden*, in p. 244 *ante*, and therefore they gave judgment for the plaintiffs.

Vanderheyden v. De Paiba, Hil. Ter. 14 Geo. 3. C.B. 3 *Wilſ.* 528.

So, where the defendant drew a bill, on the 3d of June, 1772, on the plaintiff, payable two months after date, and at the ſame time (the plaintiff having accepted ſuch bill) gave an undertaking in writing, whereby he promiſed to pay it himſelf when it became due; the bill became due on the 6th of Auguſt, 1772, and was proteſted by the holder, to whom it had been indorſed, for non-payment: the holder could not diſcover where the plaintiff lived, till about a year afterwards; but then hearing where he lived, he again demanded payment, which not being complied with, the plaintiff was arreſted, at the ſuit of the holder of the bill, on the 3d of November, 1773, and then paid the amount of the bill, together with intereſt and coſts. On the 17th of November, 1772, a commiſſion iſſued againſt the defendant; and he afterwards, on February 3d, 1773, obtained his certificate.—THE QUESTION was, WHETHER the plaintiff was intitled to recover of the defendant the ſum paid by the plaintiff as aforeſaid? PER CUR. This caſe cannot be conſidered in any other light than as an indemnity, and is exactly like the caſe of *Chilton* v. *Whiffin*, which was a promiſe to pay the money upon the bill when due, or to furniſh money for that purpoſe: that was a parol promiſe; in the preſent caſe, the promiſe is in writing: there was no debt owing by the defendant to the plaintiff, before he paid the money to the indorſee of the bill, and therefore the plaintiff could not come in and prove any debt under the commiſſion: the caſe of *Goddard* v. *Vanderheyden*, is, in reaſon and ſpirit, alſo in point with the preſent caſe. The Court alſo held, the declaration in this caſe, which was for *money paid, laid out, and expended*, well enough; for in truth, the plaintiff had paid, laid out, and expended money for the defendant after he became a bankrupt.—Judgment for the plaintiff.

So

So where, on the 13th of June, 1782, the defendant applied to the plaintiff to accept a bill for 300*l.* which they would draw upon him, and which he did, not having any effects of theirs in his hands: the bill being indorſed over by the defendants, and becoming due on the 10th of Auguſt, the plaintiff then paid it: at the time when it was drawn the defendant gave the plaintiff a paper, in the following words; "Received the 13th of June, 1781, of Mr. *R. D. H.* his "acceptance for 300*l.* due the 16th of Auguſt, which we "promiſe to pay, when due. *J. W.* and Co." On the 22d of July, the defendants became bankrupts, and afterwards obtained their certificate.—PER LORD MANSFIELD, Ch. J. The note was, clearly, nothing but an indemnity to the plaintiff, againſt the conſequence of his acceptance. BULLER, J. This caſe is not diſtinguiſhable from *Chilton* v. *Whiffen*; the money was not payable at all events, in the preſent caſe, to the plaintiff; the defendant might have taken up the bill, and then the plaintiff would have had no demand againſt them.—Judgment for the plaintiff. Heſkuyſon v. Woodbridge *et al.* Mic. Ter. 24 Geo. 3. B.R. 1 *Doug.* 165. (n. † 55.)

So, where the plaintiff, who was payee and indorſer of two promiſſory notes, brought this action againſt the defendant as maker; who pleaded, *inter alia*, his bankruptcy, and certificate in bar. It appeared, that theſe notes had been delivered by the defendant, before his bankruptcy, to one *Green*, with the indorſement of *Howis* upon them. After the bankruptcy, *Green* ſued *Howis* as indorſer, and recovered againſt him; who now brought this action. On this evidence, Lord *Kenyon* was of opinion at the trial, that the certificate was no bar; and a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonſuit, if the Court ſhould be of a different opinion; which motion being now made, THE COURT ſaid, that the plaintiff had no legal ſecurity for the debt, which he could have proved at the time of the bankruptcy, but that the property in the bill then belonged to another perſon; and that his ſubſequent act of paying the amount of the note to the indorſee, was not referable to any time antecedent to the bankruptcy, ſo as to enable him to prove the debt under the commiſſion. But that, when the plaintiff paid the bill, a new cauſe of action aroſe againſt the drawer; for, at the time of the bankruptcy, this plaintiff had no demand againſt the bankrupt. That the plaintiff could not have been the petitioning creditor, becauſe he had not paid the money at the time of the bankruptcy. And that *Vanderheyden* v. *De Paiba*, was in point. —Rule refuſed. Howis v. Wiggins, Tr. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 714.

So, where the defendant, on the 7th of May, 1788, drew a bill for 100*l.* on one *Hughes*, payable forty-five days after date, in favour of the plaintiff, merely for the purpoſe of raiſing Brooks v. Rogers, Ea. Ter. 31 Geo. 3 C. B. 1 *Hen. Black.* 640.

raiſing money: this bill, the plaintiff indorſed in blank, and, without tendering it for acceptance, diſcounted it at the *Olney* bank on the credit of his own name, and paid the money over to the defendant. On the 16th of May the defendant committed an act of bankruptcy, on the 23d a commiſſion iſſued, and on the 18th of June the certificate was allowed. When the bill became due, *Hughes*, having no effects of the drawer in his hands, refuſed to pay it; upon which, the *Olney* bank, in whoſe poſſeſſion it remained, called on the plaintiff for repayment of the money which had been advanced in diſcounting the bill: the plaintiff accordingly repaid the money, took back the bill, and brought this action againſt the defendant. On the trial, the point reſerved for the conſideration of the Court was, Whether the action was barred by the certificate? AND THE COURT were unanimouſly of opinion, that the plaintiff was intitled to recover, notwithſtanding the certificate. The caſes of *Chilton* v. *Wiffin*, *Goddard* v. *Vanderheyden*, and *Young* v. *Hockley*, were not confined to an expreſs indemnity, but were decided on the ground that the plaintiff could prove no debt till he had actually paid the money, and the payment was after the bankruptcy.—Judgment for the plaintiff (1).

Cowley, Aſſ. of Peters v. Dunlop, Ea. Ter. 38 Geo. 3 B. R. 1 *Ter. Rep.* 565.

But, where *A.* and *B.* exchanged acceptances, and each party having negociated the reſpective bills, became bankrupt; and *B.*'s aſſignees were afterwards obliged to pay a dividend, as drawer, on the bills accepted by *A.* as well as to pay *B.*'s own acceptances: the Court being divided in opinion, it was not finally decided, whether *A.*'s certificate was a bar to an action brought againſt him by *B.*'s aſſignees for money paid, &c. The tranſaction between the parties was ſhortly this:—The *Peters* accepted bills to a large amount for the *Dunlops*, in exchange for other bills accepted by the *Dunlops* to as large an amount for the *Peters*, which bills were negociated by both the parties. The houſes of *Peters* and of *Dunlops* afterwards became bankrupt, in conſequence of which, the aſſignees of the *Peters* were obliged to pay a dividend, as drawers, on the bills accepted by *Dunlops*, as well as to pay the bills accepted by the *Peters*; all of which was done ſubſequent to the bankruptcy of the *Dunlops:* and the queſtion for the conſideration of the Court was, Whether the certificate of the *Dunlops* was a bar to the plaintiff's claim? LAWRENCE, J. and GROSE, J. were of opinion in the affirmative, and ASHHURST, J. and Lord KENYON, Ch. J. in the negative. LAWRENCE, J. If the plaintiffs recover, it muſt be either the money paid in diſcharge of the acceptances of the *Peters*, or of the bill drawn by them;

(1) See p. 260, 261, 264, infra, from whence it ſeems that this caſe has been ſince overruled.

and

and the counſel for the plaintiff, in the courſe of the firſt argument, contended, that the *Peters* having lent the defendants their acceptances, no debt accrued till they paid them, and on that account the certificate was no bar, conceiving the plaintiffs' claim to be founded on paying the acceptances they had made, to accommodate the defendants.—But they are not, in my opinion, entitled to recover the money paid in diſcharge of the acceptances of the *Peters'*, inaſmuch as in doing that, that was only paid which the *Peters* engaged to do in conſideration of the *Dunlops* having given them their acceptances. The contract between the parties was, not that the *Dunlops* ſhould repay the money which might be paid in diſcharge of the *Peters'* acceptances, but that they would make themſelves liable by a ſimilar inſtrument to diſcharge the money ſecured by ſuch inſtrument; and a ſecurity for money, giving a remedy in caſe of non-payment, may well be a conſideration of a ſimilar engagement. Had there been no conſideration, the law would have implied a promiſe to repay: but no implied promiſe to repay can be raiſed where there is an expreſs contract, to which the party may reſort, the conſideration of which does not wholly fail. In *Touſſaint* v. *Martinnant*, BULLER, J. ſaid (1), "In ancient times no action could be maintained at law, where a ſurety paid the debt of his principal; and the firſt caſe of the kind, in which the plaintiff ſucceeded, was, before *Gould*, Juſtice, at Dorcheſter, which was decided on equitable grounds; now, Why does the law raiſe ſuch a promiſe? becauſe there is no ſecurity given by the party: but if the party chooſe to take a ſecurity, there is no occaſion for the law to raiſe a promiſe; promiſes in law only exiſt where there is no expreſs ſtipulation between the parties." And though an implied aſſumpſit may be raiſed in caſes of expreſs contracts, where the original contract is reſcinded, either by ſome event provided for by the original terms of the contract, by the ſubſequent agreement of the parties, or by the conſideration wholly failing (in which laſt caſe, where a ſum of money has been paid, it may be recovered back in an action for money had and received), yet, if the contract be open, and the conſideration does not wholly fail, the expreſs contract of the parties muſt be reſorted to; and here, the conſideration does not wholly fail, for recourſe has been had to the acceptances of the defendants, upon which, the holders of the bills have received a dividend from their eſtate.—The fallacy of the argument, as applied to this queſtion, is the conſidering the *Peters'* as lending their acceptances without any conſideration, without recollecting that the acceptances of the *Dunlops* was the conſideration of the acceptances of the *Peters'*;

(1) *Ante*, vol. i. p. 321.

and that such is a good consideration is laid down in *Ralfe v. Caston*, 2 *H. Bl. Rep.* 570. in p. 242, *ante*. And this case is an answer to the proposition, that there was no legal debt until the acceptances were paid. For these reasons, the plaintiff is not intitled to recover the amount of the acceptances of the *Peters'*. Nor can the plaintiff recover the money paid in discharge of the bills drawn by the *Peters*, though the bills ought to have been paid by the *Dunlops*, inasmuch as this payment arose out of a transaction constituting a debt payable *in futuro* anterior to the bankruptcy of the *Dunlops*. The consideration of the *Dunlops'* bills, is the bills of the *Peters'*, and the question will be just the same as if the consideration, instead of bills, had been goods sold, or money lent to the *Dunlops*, and the ground on which the claim of the *Peters'* against them is founded, is that of the drawers of the bills of exchange of which the *Dunlops* were the acceptors. If the *Peters* had never negociated these bills, there can be no doubt but that they might have proved them under the commission against the *Dunlops*; and the circumstance of the *Peters'* having negociated the bills, will make no difference, for the situation of the *Peters'* is not worse than it would have been if they had not parted with the bills. For if the indorsees had returned the bills to the *Peters*, they would have stood just in the same situation as if they had never parted with them, and they might then have proved them under the *Dunlops'* commission; and that they would have been intitled so to do, though they had not the bills at the time of the bankruptcy of the *Dunlops*, appears by the determination of Lord *C. Thurlow*, in the case *ex parte Brymer*, reported in *Co. Bankr. L.* 164. 4th ed. There one *Forsyth*, having drawn bills on *Wilkins*, payable to the order of *Span*, who indorsed them over, *Wilkins* became a bankrupt, and afterwards *Span*, as indorser, was obliged to take them up, and having been admitted a creditor under *Wilkins's* commission; on a petition to expunge the proof of the debt, Lord *Thurlow* was of opinion, that the debt was proveable by *Span*, and he dismissed the petition, and continued of the same opinion on a re-hearing. And the same was holden in the case of *ex parte Seddon*, by Lord *Loughborough*, C. 20th of November, 1796. *Seddon* and others, the petitioners, having a bill of exchange accepted by one *Oldham*, indorsed it and delivered it to the bankrupts in consideration of their promissory-note for the same sum, which note they indorsed to *Down* and Co. bankers; *Paty* and Co. the bankrupts, negociated *Oldham's* bills, which he paid, and after the bankruptcy of *Paty* and Co. the petitioners, as indorsers of the bankrupts' note, were obliged to pay it to *Down* and Co.; and the Chancellor ordered, that the petitioners should be admitted creditors under the commission for this note. And

that

that it is not neceſſary that ſuch creditor ſhould be in poſſeſſion of the note at the time of the bankruptcy further appears from the caſe of *Bingley* and *Maddiſon*, *M.* 1783. *Co. Bankr. L.* 22. where it was holden, that the indorſee of a note after the bankruptcy was a good petitioning creditor.—Thus it would have been if the bills had been negociated and returned without the indorſees proving them. And the indorſees proving the bills under the commiſſion, will not make any difference, for having done that, they can only call on the *Peters* for the deficiency, beyond the dividend paid by the *Dunlops*, which is juſt what the *Peters* would loſe if they had kept the bills, and proved them themſelves, in which caſe the certificate would have barred them. Their negociation of the bills, ſubſtituted others in their place with reſpect to their claim on the *Dunlops*, but did not enlarge thoſe claims.—While the indorſees are holders of the bills, the *Peters* have no claims whatever on the *Dunlops*, they have transferred their right to others; and when the bills ſhall be returned upon their taking them up, it will be juſt as if they had never parted with them, for the right to recover on the bills is not done away by negociating them. If it were, much of the ſecurity, which a bill-holder has, would be loſt by negociation; for if *A.* ſhould indorſe to *B.*, and *B.* to *C.*, and *C.* to *D.*, and *D.* ſhould return the bill to *C.*, though he poſſibly might recover againſt *B.* on the original conſideration on which the bill was transferred to him, yet I do not ſee what action *C.* could have againſt *A.* or the drawer, but on the bill. That the right to ſue on the bill is not loſt by the indorſement, is ſettled in the caſe of *Death* v. *Serwonters*, 1 *Lutw.* 886. That was an action by the ſecond indorſee againſt the acceptor; and the declaration ſtated the cuſtom of merchants to draw bills of exchange and to indorſe them; and that if the acceptor fail paying the bill to an indorſee, then by the cuſtom, if the immediate previous indorſer pay the money, the acceptor is liable to pay the money to that indorſer, as he would have been if he had not made any indorſement; judgment was given for the plaintiff, and affirmed in error in the Exchequer-chamber, where it was objected, that by this means the acceptor would be liable to the payee and all the indorſers, and ſo be charged ſeveral times: but this was not allowed, for by the indorſement of the payee he was diſcharged from any payment to him, and by the indorſement of the plaintiff from any payment to him till he was again intitled to receive it by payment of the money to the indorſee. Now, as according to this caſe, the indorſer who pays is to be conſidered as having never made any indorſement, if he could likewiſe inſiſt on his having laid out money for the uſe of the acceptor, it would be in his power either to come in under the commiſſion or not as he pleaſed, and

his debt at the ſame time might be conſidered as ariſing both before and after the bankruptcy. If the indorſer who pays the whole cannot ſue for the whole after the acceptor's certificate, he cannot be in a better ſituation by paying a part only inſtead of taking up the bill. This is an anſwer to the argument of their not having the bills. But it has been contended, that after the negotiation of the bills it was a matter of contingency, whether the *Peters* would or would not be ever called on to pay, and that on payment a new debt aroſe, as in the caſe of principal and ſurety. But this caſe is diſtinguiſhable from that of a ſurety, who pays money for his principal after his bankruptcy; for the contract in ſuch a caſe, is from its nature conditional, and it is a matter of uncertainty and contingency, whether at any time any claim will ariſe on the principal. But that is not the caſe of the drawer of a bill, who may, after he has negociated it, and been obliged to pay it, maintain an action or ſue out a commiſſion on the bill itſelf, juſt as if he had never parted with it. When he takes up the bill, he is referred back to his original contract, according to the caſe of *Death* v. *Serwonter*; until the bill gets back to the drawer, the acceptor is diſcharged with reſpect to the drawer; when the drawer gets back the bill, his right revives, and the bill, which is the evidence of the contract of the acceptor, proves that his undertaking was to pay a certain ſum of money at a fixed time, and not on any contingency. In ſhort, the queſtion comes to this, *Whether the drawer of a bill of exchange, who is obliged to take it up after having negociated it, is not confined to his action on the bill to recover againſt the acceptor?* And it ſeems to me that he is, for I ſee no reaſon to raiſe an implied aſſumpſit as for money paid by the drawer for the acceptor, when the contract ariſing out of the bill and the cuſtom are fully ſufficient to enable him to recover what he may be obliged to pay on the acceptor's refuſal. In addition to theſe reaſons, it appears to me, that a contrary doctrine would militate againſt the deſign of the bankrupt laws, which is to ſet fair traders free from the engagements they may have made previous to their bankruptcies; and that it will be very miſchievous, if conſiderable dealers in trade, whoſe bills are in a ſtate of negociation at the time of their bankruptcies, ſhould be liable to the utmoſt amount of their bills, after having given up all their effects. Surely it cannot depend on the negociation or non-negociation of a bill by the payee, whether a debt created anterior to a bankruptcy ſhall or ſhall not be barred by it. The caſes, which preſs upon this opinion of mine, are thoſe of *Howis* v. *Wiggins* (1), and *Brooke* and *Rogers* (2). With reſpect to the laſt, Lord *Loughborough*,

(1) *Ante*, 255. (2) *Ante*, p. 255, 256.

borough, who was chief juſtice when that caſe was decided, on further conſideration of the caſes which had not been mentioned in the courſe of that argument, held differently in the caſe *ex parte Seddon*, which undoubtedly leſſens the force of it. I argued that caſe as being the caſe of principal and ſurety, and conſidered *Brooks* as lending his name to *Rogers*, to get money on the draft of *Rogers* of the *Olney* bank, and that in ſubſtance it was an advance of money to *Rogers*, on the credit of *Brooks*'s name as a ſurety to the bank: but I doubt if that argument is not fallacious, for on *Brooks*'s carrying the bill to the bank, the bank lent him the amount of it upon the ſecurity of the bill and of his name, and when *Rogers* received the money, it was a loan to him by *Brooks* on the ſecurity of the bill, on which *Brooks* was intitled to recover when returned to him for non-payment. As to the caſe of *Howis* and *Wiggins*, I ſenſibly feel the preſſure of it, and with the weight of ſuch an authority againſt me, I cannot but be apprehenſive that I have proceeded upon falſe grounds. I have endeavoured to diſcover wherein I may be miſtaken, but without ſucceſs, and according to the beſt judgment I have been able to form, after much conſideration, the certificates in this caſe are bars to the demand. And the anſwer I give to the queſtions propoſed is, that the plaintiff is not intitled to recover, and that a verdict muſt be entered for the defendants. GROSE, J. The right of the plaintiffs depends upon the queſtion, Whether the certificate of the defendants is a bar to the action? in other words, Whether the debt, on the bills accepted by the defendants, could be proved by the plaintiffs under the commiſſion againſt the defendants. [Here Mr. J. *Groſe* ſtated the caſe.] To make the caſe more intelligible, I will ſimplify it, and ſuppoſe it to be a caſe on two bills accepted and exchanged between *A.* and *B.*: it will then ſtand thus: *A.* exchanges his acceptance for 3000*l.* with *B.* for a like acceptance; *A.* pays his own acceptance; *B.* becomes a bankrupt and cannot pay his, in conſequence of which, the bill-holder calls on *A.* the drawer, and he pays that which *B.*'s eſtate could not pay. What then is the ſituation of the parties? *A.* in paying his own acceptance, has only performed his engagement, and paid what he was bound to pay: but upon *B.*'s acceptance, on which he was the drawer, he is a creditor on the eſtate of *B.*; *B.* the acceptor was bound to pay him upon the bill; his right of action ariſes upon the bill, and not upon any contract collateral to the bill. If there had been no bankruptcy, and *A.* had in default of *B.* paid *B.*'s acceptance, *A.* might have ſued *B.* as acceptor on the bill; and upon the eſtate of *B.* as acceptor of the bill, he had a right to prove the money he had paid as drawer. To this purpoſe is the caſe of *Rolfe* v.

Caſton (1). Apply the doctrine in that caſe to the preſent, and it will ſtand thus: the bills accepted by the *Dunlops* were a good conſideration for the bills accepted by the houſe of *Peters*; the *Dunlops* having become bankrupts, the bills accepted by them might have been proved under their commiſſion; and conſequently to an action brought on them, the certificate of the defendants may be pleaded in bar. The argument ſet up by the plaintiff is, that the right of the *Peters'* does not ariſe on the bills: but the fact is not ſo; the whole tranſaction is founded on the bills. The debt from the defendants to the houſe of *Peters'*, does not ariſe from the latter having paid their own acceptances, for thoſe they were bound to pay; but from the defendants having omitted to pay their acceptances, in conſequence of which, the houſe of *Peters'* were bound to pay as drawers, and are by law remitted to their right to recover againſt the *Dunlops* as acceptors. This is the true foundation on which the houſe of *Peters'* could have any right to recover againſt the *Dunlops*; and to this effect is the caſe of *Death* v. *Serwonters*, 1 *Lutw.* 885 to 888. *A.* draws a bill of exchange on *B.* payable to *C.*, which *B.* accepts; *C.* indorſes it to *D.*: now, by this indorſement, *B.* is diſcharged of the payment to *C.*, and if *D.* indorſe it to *E.*, then *B.* is diſcharged of any payment to *D.*; but if *D.* pay the money to *E.*, then *D.* becomes intitled to receive the money of *B.* So, if *C.* pay the money to *D.*, then *B.* is diſcharged as to *D.*; but *C.* becomes *newly* intitled, and *B.* is again liable to him, but diſcharged againſt *D.* and *E.* So here, the *Dunlops* not having paid their acceptances to the holders, the drawers were obliged to pay them; and when they have paid, they become again intitled, and the *Dunlops* are again liable. In other words, the houſe of *Peters'* are remitted to their right on the bills, which, when in the hands of other holders, were ſuſpended as to them. Theſe are caſes at law, and prove the right of the *Peters'* on the bills. And, conſiſtent with thoſe caſes is, I underſtand, the practice of the court of chancery; according to which (as I apprehend) the *Peters'* might have proved their claim upon the bills after they had paid what was due upon them, and had taken them up. *Ex parte Brymer, Co. Bankr. Laws*, 211; and *ex parte Seddon*, November, 1796, before Lord *Loughborough*, C. The petitioners there, were creditors before the bankruptcy, upon a promiſſory-note of the bankrupts' for 385*l.* 10*s.* 6*d.* payable to the petitioners, the conſideration of which was, a bill drawn by the petitioners, and accepted by one *Oldham* for the like ſum: at the time of the bankruptcy, the note was not in the hands of the petitioners, ſo that it could not be proved

(1) *Ante*, p. 242.

at that time under the commiſſion, but coming afterwards to their hands, the Lord Chancellor permitted it to be proved; for having given a valuable conſideration for it, there was, till it was paid, a debt due to them upon the note. So here, the *Peters* having given a valuable conſideration for the acceptances of the *Dunlops'*, there was, till they were paid, a debt due to them upon theſe acceptances. Theſe caſes therefore prove, that upon the acceptances of the *Dunlops'* being paid by the *Peters*, their right accrued on the bills; and that upon thoſe bills they might have proved their debts under the commiſſion of the *Dunlops'*. This is the plain way of conſidering the caſe, by which, I think, the material arguments for the plaintiff are anſwered. Not that the caſe is without its difficulties; and had I been compelled to have decided inſtantly on the former argument, thoſe of the plaintiff ſtruck me ſo forcibly, that my opinion inclined towards a deciſion in his favour. They were, 1ſt. That there was no cauſe of action till the bankruptcy. But there lies the fallacy and miſtake; for the inſtant the bills were exchanged, each was indebted to the other in the ſum which was the amount of their reſpective acceptances; for the counter-acceptances were a good conſideration to found a debt upon, on either ſide reſpectively. So is the caſe of *Rolfe* v. *Caſton*. 2dly, It was ſaid, that the *Peters* have paid more than they ought to pay. This will always happen upon the exchange of acceptances and an inſolvency of one of the parties, where one has paid and the other has not. The ſolvent man is bound to pay his own acceptances as acceptor, and the acceptances of the other as drawer: but the debt due to him from the other does not ariſe from the payment of his own acceptances, but upon his name ſtanding as drawer on bills of which the other is acceptor, and which always conſtitutes a debt to the drawer. 3dly, It was ſaid, that when the *Peters* paid the *Dunlops'* acceptances, a new conſideration aroſe, to which the certificate is no bar. To which, I anſwer in the negative: the right of the *Peters'* is not founded on a new conſideration, but they are remitted to their old right, which ariſes on the bills and not on a fact collateral to the bills; and the not attending ſufficiently to this diſtinction (I ſuſpect) led me at firſt into a contrary opinion, occaſioned by comparing this caſe to that claſs of caſes where a man, without conſideration, accepts a bill which another promiſes to take up. There, at the time of drawing the bill, there is no debt to the acceptor; the debt accrues only by payment of the money. The acceptor *quâ* acceptor can never be a creditor; his acceptance imports the admiſſion of a debt from him to another; and when he has paid as acceptor, if he paid for any other perſon in conſequence of any requeſt from that other, he becomes a creditor, not on the face of the bill, but

by a contract collateral to the bill. When two perſons exchange acceptances, each becomes the debtor of the other upon his accepted bills. But when a man accepts without conſideration, he is never a creditor of the perſon for whom he accepts, till he pays; from that payment ariſes the debt: but where the acceptances are exchanged, the debt ariſes from thoſe acceptances. The firſt caſes in which this claſs of men, who were refuſed the liberty of proving under the commiſſion, were permitted to ſue the bankrupt after his certificate, were caſes of indemnity. Upon that ground, were determined the caſes *ex parte Adney*, p. 272. *infra*. *Young* v. *Hockley*, *ante*, 254. *Chilton* v. *Whiffin*, *ante*, 252. *Vanderheyden* v. *De Paiba*, *ante*, 254. *Goddard* v. *Vanderheyden*, ib. *Heſkuyſon* v. *Woodbridge*, *ante*, 255. All which, were actions by acceptors againſt the drawers on promiſes of indemnity, i. e. to repay the acceptors if the drawers did not take up the bills when due; and *Taylor* v. *Mills* and another, p. 274, *infra*, which was an action on an indemnity bond. Here, in reſpect to the *Peters*, as drawers of the bills, the debt was certain and exiſted at the time of the bankruptcy, although the bills were in other hands. As to the caſes of *Brooks* v. *Rogers*, and *Howis* v. *Wiggins*, this caſe has been reſerved for the purpoſe of reconſidering them. The gentlemen in the court of chancery conceive that thoſe deciſions are directly in oppoſition to their daily practice. And of the caſe of *Brooks* v. *Rogers*, it is remarkable, that the Lord Chancellor, who, in 1791, determined that caſe as Chief Juſtice of C. B., ſo doubted of it, that upon re-conſidering it in the caſe *ex parte Seddon*, he overruled it, and permitted the debt to be proved. The caſe of *Howis* v. *Wiggins* came on before this Court, upon a motion for a new trial; and poſſibly under a miſapprehenſion of it, I conſidered it as a caſe of indemnity; and the ground on which the rule was refuſed was, on a ſuppoſition that *Vanderheyden* v. *De Paiba*, which was a caſe of indemnity, was in point. I then conſidered *Howis*, the plaintiff and payee of the two promiſſory notes, as having indorſed them as ſurety for the defendant, with a view to give credit to the notes, and without any conſideration given to him for ſo doing. In any other way of conſidering that caſe, I think it is not to be ſupported. It ſeems, therefore, in this way of conſidering the queſtion, that by the deciſions both at law and in the court of chancery the debt accruing upon the acceptances was a debt at the time of the bankruptcy, and as ſuch might have been proved under the commiſſion; and that, therefore, the certificate is a bar. And in ſo deciding, the Court is furthering the intention of the legiſlature in favour of bankrupts, whoſe plan it was to liberate that claſs of men from their debts before incurred, which would be very much obſtructed, if, in a caſe like the preſent, a bankrupt were, after giving up his all,

to

to be liable to demands for thouſands of pounds accrued due upon acceptances before his bankruptcy. ASHHURST, J. The queſtion is, Whether at the time of the bankruptcy of the *Dunlops*, the ſum for which this action is brought was or was not a debt proveable under their commiſſion? and, according as this is decided, the conſequence will follow of courſe, whether the debt is or is not barred by the bankruptcy and certificate. *It is a general rule of law, that where one man pays a debt for another which he was liable to pay, that is money paid for his uſe, and gives a new cauſe of action to the party ſo paying.* The queſtion is, Whether this caſe comes within that rule? Here there was no other conſideration than the mutual acceptances, and it was part of the original agreement that each was to pay his own. Then taking that to be the tranſaction, there could not be ſaid to be any debt exiſting by or from either party, provided they had kept to their ſeveral ſtipulations, and had each paid their own acceptances; conſequently no debt could ariſe but by future failure of the parties. And it is laid down in *Chilton* v. *Whiffin* (1) that no debt can be barred but what was contracted with certainty before the act of bankruptcy. This caſe ſeems to me to be the ſame in effect with that of *Young et al.* v. *Hockley* (2). There the defendant drew a bill of exchange on the plaintiffs, payable to his own order; the plaintiffs, at the defendant's requeſt, and on his promiſe to indemnify them, accepted the bill, which becoming due after the defendant's bankruptcy, the plaintiffs paid it to prevent being ſued; and it was holden that they could not prove this as a debt under the commiſſion, and therefore that the defendant could not plead his certificate in bar of the action on the promiſe to indemnify. The caſe alſo of *Taylor* v. *Mills et al.* (3) ſeems very appoſite to the preſent, where it was holden that a ſurety in a bond, who pays the debt after a commiſſion of bankrupt iſſued againſt his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. And Lord *Mansfield* ſaid, that at the time of the bankruptcy, the defendants *were not indebted to Taylor*; he clearly, therefore, could not come in as a creditor under the commiſſion; *he was not damnified at that time*; and till damnified, which he could not be till he had been called upon and had paid, he could not bring an action. He ſaid further, that the caſe did not ſeem to him to be different from any where the cauſe of action, though it ariſe after the bankruptcy, is founded on a pre-exiſting ground. And the other judges were of the ſame opinion. The caſes of *Chilton* v. *Whiffin* (4), and *Vanderheyden* v. *De Paiba* (5),

(1) *Ante*, 252. (2) *Ante*, 254. (3) p. 274, *infra*.
(4) *Ante*, 252. (5) *Ante*, 254.

which

which are not denied to be law, affirm the ſame principle; and ſo does the caſe of *Howis* v. *Wiggin* (1). Now here the debt could never ariſe but by the failure of one of the parties to fulfil this engagement; and that did not happen till after the bankruptcy of the *Dunlops*, till when, the debt was not aſcertained. This caſe, therefore, ſeems to fall exactly within the principle laid down by Lord *Mansfield* in *Taylor* v. *Mills*. It is the common caſe where the cauſe of action ariſes after the bankruptcy, though founded on a pre-exiſting ground; and, therefore, this demand could not legally be proved under the *Dunlops'* commiſſion. Indeed it is ſtated as a fact in the caſe, that the commiſſioners rejected the proof; and I think they did right, becauſe at the time of the bankruptcy of the *Dunlops'* the eſtate of the *Peters'* had not paid nor aſcertained the debt due from the *Dunlops*, which they were afterwards obliged to do in conſequence of the *Dunlops'* not paying their acceptances agreeably to their undertaking. And if, at the time of the bankruptcy of the *Dunlops*, there was not ſuch a debt aſcertained as was proveable under the commiſſion, but it only aroſe afterwards upon a contingency, it will conſequently not be barred by the certificate; and, therefore, I am of opinion, that the *poſtea* ſhould be delivered to the plaintiff. Lord Kenyon, Ch. J. This caſe has remained for judgment longer than we wiſhed. It is always expedient (if it can be effected) to decide on the intereſts of parties immediately, and particularly in caſes of bankruptcy, becauſe it lets in a more ſpeedy arrangement of the bankrupt's eſtate. The delay in this caſe has not ariſen from a want of our conſidering it again and again, but from a hope that we entertained of at length arriving at the ſame concluſion. It is not, however, in the nature of the mind of men always to ſee every part of an intricate argument in the ſame light; and, when we do not, it is a duty we owe to the public, to ſtate the grounds of our opinion. If the ſyſtem of the bankrupt laws had not been framed, it might, perhaps, appear reaſonable to enact, that a bankrupt, who has dealt fairly by his creditors, and has parted with all he has in the world, ſhould be delivered from every obligation he had made prior to his bankruptcy. But it is now too late to cancel, on ſuch a principle, all the deciſions at one ſtroke. It is clear that a bankrupt, who has acted moſt fairly, may, in a variety of inſtances, ſtill remain liable on contracts made before his bankruptcy. It is extremely clear, that where a bankrupt has taken a leaſe, and entered into covenants for payment of rent, and for repairing, &c. though the leaſe is taken from him and blended with the general maſs of his

(1) *Ante*, 255.

property, and divided among his creditors, yet his certificate will not deliver him from his liability to perform the covenants contained in that leaſe. The bankrupt's remaining ſtill liable, and the creditor not being able to prove his debt under the commiſſion, are convertible terms. Then could this debt have been proved under the *Dunlops'* commiſſion? if it could, their certificate delivers them from it; if not, the certificate does not deliver them. Without repeating the facts of this caſe, or noticing each particular caſe alluded to, I will aſſume this as a principle, which is ſettled by the caſe of *Goddard* v. *Vanderheyden*, and ſome of the other caſes already mentioned, that where a man enters into an obligation as ſurety (and there is no neceſſity for an abſolute promiſe, an implied promiſe has the ſame conſequence in law) for another, and is, after the bankruptcy of the other, called on to pay money in diſcharge of the obligation entered into by him for the bankrupt, a cauſe of action accrues to him which is not barred by the certificate. The way in which I have conſidered this queſtion leads me to draw the ſame concluſion that my brother *Aſhhurſh* has drawn, without encountering any deciſion. When theſe bills were drawn and accepted, they conſtituted an obligation on the acceptors, by which they were primarily liable to pay the perſon who ſhould have a title to the bills, and be in a condition to call for payment of the money: but they only conſtituted an obligation to the amount of the ſums contained in the bills; as ſoon as they had paid that money, they, the acceptors (the principal debtors), were diſcharged from every obligation. The holder of the bills tacitly engaged firſt to apply to the acceptors for payment, and on their failure only to reſort to the drawers or indorſers. I lay out of my conſideration the caſes *ex parte Brymer* and *ex parte Seddon*, becauſe they only ſhew that though the indorſer of a bill of exchange was not in poſſeſſion of the bill at the time of the bankruptcy, yet if he gets poſſeſſion under a perſon who had a legal title to it, he may come in and prove his debt under the commiſſion: he is then (as my brother *Groſe* obſerved) remitted to his former title: but I yield to that propoſition with this qualification, that he has a right to call on the acceptor for payment if the acceptor has not been called on by ſome perſon who had a better right to require payment, for if the acceptor has paid, he is delivered from all reſponſibility, and cannot be again called upon to pay the bill. Then let us conſider what the preſent caſe is; the holders of theſe bills have made uſe of them up to their extent, and proved them under the commiſſions againſt the *Dunlops'*, the acceptors. And after the eſtate of the *Dunlops* has been called upon to pay dividends up to the extent of theſe bills, ſhall it be permitted to another perſon, who gets poſſeſſion of the bills, to come upon the eſtate

eſtate of the *Dunlops* again? That would be charging the eſtate of the *Dunlops* twice for the ſame debt. Proving the debt under the commiſſions againſt the *Dunlops*, and receiving a dividend, was equivalent to payment. If that be ſo, there is an end of the queſtion beyond all doubt: for here the holders, having a legal right to the bills, obtained ſatisfaction from the eſtate of the *Dunlops*, not indeed in monies numbered, but ſuch a ſatisfaction as the law has pointed out in this caſe: the acceptors were then delivered from all liability under the bills. But then aroſe another liability, in conſequence of the *Peters* having become ſureties for the acceptors; when the drawers paid the bills, they had a right to call on the acceptors, for whoſe uſe they had paid that money, as for ſo much money paid, laid out, and expended for their uſe. I before ſtated, and on that I rely, that when the ſecurity of a bill is given, the acceptor is the principal debtor; to him the holder muſt firſt apply, and on his failure the holder may have recourſe to the drawer. But here, down to the time of the bankruptcy of the defendants, it was impoſſible for the houſe of *Peters* to call on the eſtate of the *Dunlops* for payment. If the bills, though once negociated, had come back again to the *Peters*, they would have been remitted to their better right, and might have proved their debt under the commiſſions againſt the *Dunlops*: but as the bills were not in the hands of the *Peters* at that time, and were put in force againſt the eſtate of the *Dunlops*, by the perſons who had the legal right to them, the *Peters* could not prove theſe bills again under the ſame commiſſion. Whether or not the *Peters* could have proved theſe bills under the *Dunlops'* commiſſion will be ſeen by conſidering whether or not they could have maintained an action at law againſt the *Dunlops* before the bankruptcy: had ſuch an action been brought, it would have been an anſwer to it to have ſhewn that the bills had been already paid by the *Dunlops*. The eſtate of the *Dunlops* having once paid theſe bills, I cannot conceive how the *Dunlops* could be again liable on the bills; and yet the affirmative of that propoſition muſt be eſtabliſhed before any fair oppoſition can be made to the preſent action. As it is clear that the *Peters* could not have brought any action againſt the *Dunlops* on theſe bills before the bankruptcy, it ſeems to follow that having been called upon after the bankruptcy of the *Dunlops* to pay this money, which the *Dunlops* were bound to pay, the right of action accrued to the *Peters* only on payment after the bankruptcy, on the ſame ground that a ſurety, who pays money for his principal after his bankruptcy, may ſue the principal, and the debt is not barred by the bankruptcy and certificate of the principal. I am, therefore, of opinion, that the plaintiff is intitled to judgment. BUT AS THE COURT ARE EQUAL-

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LY DIVIDED, NO JUDGMENT CAN BE GIVEN IN THIS CASE.

Where *A.* lent his acceptances to the defendant before his bankruptcy, but which were not paid till afterwards, it was held that *A.* might maintain an action againſt the defendant for money paid to his uſe, notwithſtanding his bankruptcy and certificate, and notwithſtanding the defendant before his bankruptcy gave his receipt to *A.* acknowledging the receipt of ſo much money as the acceptances amounted to.—On the trial of an action of aſſumpſit for money had and received, in which the defendant had pleaded his bankruptcy, a verdict was taken for the plaintiffs, who were the aſſignees of *Parke*, who had alſo become bankrupt, for the amount of two bills paid by him after the defendant *Gale*'s bankruptcy, with liberty to the defendant to move to ſet it aſide if the debt were proveable under the defendant *Gale*'s commiſſion in conſequence of a certain agreement between the parties. "It appeared that *Parke* and *Gale*, the defendants, were both mahogany merchants, and that the former had accepted bills drawn on him by the latter payable to his order, for his accommodation. The firſt of theſe bills was paid by *Parke* before *Gale*'s bankruptcy, and was therefore out of the queſtion. The ſecond was for 240*l.* dated the 4th of January, 1793, though in fact drawn on the 8th of February, payable four months after date, which conſequently became due on the 7th of May. The third was for 291*l.* 3*s.* dated the 4th of February, 1793, though in fact drawn the 2d of April, payable four months after date, and which became due the 7th of June. The firſt of theſe two laſt bills was taken up by *Parke* between the time of *Gale*'s bankruptcy and the iſſuing of the commiſſion againſt him; the laſt was taken up after the iſſuing of *Gale*'s commiſſion. *Gale* became a bankrupt on the 3d of May, 1793, previous to which and to the agreement hereafter mentioned he had negociated theſe bills. On the 8th of April, 1793, an agreement under ſeal was entered into between *Parke* and *Gale*, as a collateral ſecurity to the former for his acceptances, whereby, in conſideration of 833*l.* 1*s.* (namely, the ſums contained in the ſaid three bills and intereſt) paid by *Parke* to *Gale*, the receipt of which *Gale* thereby acknowledged, the latter ſold and aſſigned over to *Parke* certain cargoes of mahogany, then expected to arrive from the bay of Honduras, and conſigned to *Gale:* and *Gale* alſo covenanted in caſe of the loſs of the cargoes to aſſign to *Parke* the policies of inſurance on the ſame; and at the ſame time *Gale* ſigned the following receipt thereon: "Received the day "and year within written, of the within-named *T. Parke*, "833*l.* 1*s.* being the purchaſe-money within mentioned. "*J. Gale.*" The cargoes arrived the beginning of Auguſt; but

Snaith *et al.* Aſſignees of Parke *v.* Gale, Tr. Ter. 37 Geo. 3. B. R. 7. *Ter. Rep.* 364.

but bills of exchange came tacked to the bills of lading, ſo that *Parke* could not avail himſelf of the conſignments without accepting thoſe bills, which not being deemed prudent to do, he relinquiſhed the conſignment to *Gale* on his repreſentation that it would be no ſecurity. The queſtion was, Whether there was any legal ſecurity in the hands of *Parke* which he could prove under the commiſſion?—Per Cur. This differs from all the former caſes; for here was no debt due at law from the defendant to *Parke* at the time of the defendant's bankruptcy: but the debt altogether aroſe afterwards by the payment of the acceptances by *Parke*. No action could have been maintained at law on this acknowledgment: in other caſes legal ſecurities were taken, upon which the party might have been ſued.—Rule for new trial diſcharged.

The King *v.* Egginton, Tr. Ter. 26 Geo. 3. B.R. 2 *Ter. Rep.* 369.

The defendant had received, in his character as overſeer of the poor, 4*l.* previous to his bankruptcy, which was on the 5th of December, 1785: but his accounts were not made out till the Eaſter following; and he had afterwards been committed to Worceſter gaol, by two juſtices, for not paying over the 4*l.* as the balance of his accounts. It was moved for a rule to ſhew cauſe why a writ of *habeas corpus* ſhould not iſſue, directed to the gaoler at Worceſter, commanding him to bring up the defendant, in order that he might be diſcharged out of cuſtody, on the ground that *this ſum for which he had been committed to gaol was a debt exiſting previous to the bankruptcy, and might have been proved under the commiſſion*; and the defendant had ſince obtained his certificate. But the Court, on account of the ſituation of the defendant, who was not able to bear the expence of it, diſpenſed with the neceſſity of bringing him up by *habeas corpus*, and granted a rule to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody.—Per Cur. (after cauſe ſhewn), This money was depoſited in the defendant's hands for the uſe of the pariſh, which they had no right to call for till a fortnight after Eaſter, 1786; therefore, till that time he was able to retain it. But this debt only ariſes upon the defendant's converſion of it to his own uſe, which is not till after the bankruptcy: therefore the defendant is not intitled to be diſcharged. The motion can only be ſuſtained on the ground that the pariſhioners had a cauſe of action againſt the defendant before his bankruptcy: but at that time they could not have ſued him for this debt. And even if this ſum had been kept by itſelf, the bankrupt's aſſignees could not have touched it. The defendant was a mere truſtee for the pariſh; and his bankruptcy could not diſcharge him from his office of overſeer.—Rule diſcharged.

Hancock *et al.* *v.* Entwiſle *et al.* Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 435.

If a demand reſt in *contingency*, whether it will be paid or not, it cannot be proved, unleſs it be ſecured by a penalty which

which is forfeited at law.—This was an action on a bill of exchange; and the plaintiffs having proved their case, the only question was, Whether the defendants were intitled to a set-off, arising from an agreement, made in March, 1788, between the defendants of the one part, and the bankrupt of the other, by which (after reciting that a loss had been sustained by the defendants in consequence of the purchase of some cotton by the bankrupt as their broker, for reimbursing which they made a claim on him), in order to put an end to all controversy concerning it, it was *agreed that the loss*, though exceeding 1,900l. *should be fixed at that sum, and no more*; and that in payment or satisfaction of that sum, the bankrupt should, from time to time, within the space of four years, recommend parcels of cotton, not exceeding 130 bags at one time, to the defendants for their purchase, and that the defendants should purchase them, paying for them in notes at three months' date. *And the bankrupt undertook that the clear profits on such sales should, in the course of four years, be sufficient to discharge the* 1,900l.: *but if the same should not be paid within that time, then the bankrupt agreed immediately after the expiration of the four years, in case he should be then living, to pay them the difference.* And if the purchases should occasion a loss to the defendants, the bankrupt undertook to make good such loss. Lord Kenyon, before whom the cause was tried, being of opinion that the defendants were not intitled to set off, the plaintiffs obtained a verdict. A rule to shew cause why a new trial should not be granted, was obtained; but per Cur. (after cause shewn), If this deed had never been entered into, the claim which the defendants had on the bankrupt could not have been set off in this action, because it rested merely in damages; it arose from the misconduct of the bankrupt, and might have been settled in an action. But by this deed the damages are liquidated, and the parties agreed on certain things to be done in the course of four years, as the means of making a recompence to the defendants to the amount of that sum. If a certain sum of money had been payable at all events, by instalments, and one of the payments had become due before the bankruptcy, the whole might have been proved under the commission. But it is clear that the bankrupt was not discharged by his bankruptcy from the operation of this deed; for when he obtains his certificate, he may be enabled to perform the stipulations contained in it. Then if he were not discharged from his covenants by his certificate, this debt could not be proved under the commission, nor can it be set off: for it had no existence as a debt at the time of the bankruptcy. The distinction has been well settled in a variety of cases, as in those of *ex parte Groome*, 1 *Atk.* 115, and *ex parte Winchester*, 1 *Atk.* 116. that *if the demand be payable*

payable at all events, though at a future day, it may be proved under the commiſſion: BUT *where it depends on a contingency, whether it will be paid or not, it cannot be proved, unleſs it is ſecured by a penalty which is forfeited at law*; in which caſe the Court will take hold of the legal right to give the party a remedy under the commiſſion. But in this caſe there was no legal demand at the time of the bankruptcy.—Rule diſcharged.

Alſop *et al. v.* Price, Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 160.

In collateral undertakings, if the party engaging to ſecure the debt of another himſelf becomes bankrupt before that debt is payable to the principal, the principal cannot prove under his commiſſion—therefore, where a commiſſion of bankruptcy iſſued againſt the defendant on the 5th of September, 1776, who afterwards obtained his certificate, which was allowed by the Chancellor, on the 1ſt of May, 1777, and it appeared that the bankrupt had, on the 7th of June, 1772, entered into *a joint and ſeveral bond*, with a condition that the bond ſhould be void; if *J. S. I. L.* his executors, or adminiſtrators, ſhould pay the intereſt; and if the ſaid *J. S. I. L.* his executors, or adminiſtrators, ſhould, within twenty days after the expiration of five years, in caſe he ſhould ſo long live and enjoy the benefit of the loan, repay, or cauſe to be repaid, to the Chamberlain of the city of London for the time being, the principal ſum borrowed; with certain other conditions: and it was admitted, that the bond had not been forfeited by the breach of any of the ſtipulations in the condition, till after the defendant became bankrupt: viz. not till the 7th of July, 1777: on a ſpecial caſe reſerved at *niſi prius* for the opinion of this court, one queſtion that aroſe was, Whether this was ſuch a debt before the forfeiture, as might have been proved under the commiſſion.—AND LORD MANSFIELD, Ch. J. delivered the unanimous opinion of the Court, that this was not a debt to be paid by the bankrupt in all events, but depended on the acts of the principal: viz. whether he did or did not comply with the ſtipulations in the condition of the bond, and, therefore, that the certificate did not bar the action.

Ex parte Adney Tr. Ter. 16 Geo. 3. B.R. *Cowp.* 460.

So, in a caſe ſent out of Chancery for the opinion of the court of King's Bench, it appeared, that on the 10th day of June, 1773, *James Adney*, as broker, ſold to *George Henſhaw*, certain quantities of Ruſſian tallow, the property of *George Buckholme*; and there being a balance of 280*l.* 18*s.* 4*d.* due to *Buckholme*, *Adney* gave him *Henſhaw*'s note, dated the 10th day of June, 1773, for 306*l.* 13*s.* payable to *Buckholme* five months after date, being the price of the ſaid tallow: in July, 1773, *Henſhaw* wanting more tallow, *Adney*, as *broker*, applied to *Buckholme* to ſell it him; when *Buckholme* told him, that as *Henſhaw* was indebted to him at the time as above, and as he had no other ſecurity than the above note, he declined

clined giving him further credit; whereupon *Adney* anſwered, that *Henſhaw* was a ſafe man; that the note would be regularly paid, and he might ſafely give him credit for more goods; that he, *Adney*, in conſideration of 1*l.* 10*s.* 7*d.* paid him as a premium, would guarantee or ſecure the payment of the ſaid note; which propoſal *Buckholme* agreed to, and paid him the ſaid 1*l.* 10*s.* 7*d.* and afterwards delivered more goods to the uſe of *Henſhaw*: *Adney*, on the 12th of July, 1773, gave *Buckholme* the following undertaking, ſigned by him: viz. "In conſideration of the ſum of 1*l.* 10*s.* 7*d.* "received of Mr. *John Buckholme*, I hereby make myſelf "anſwerable for the due payment of *George Henſhaw*'s note "dated the 10th of June, order *J. Buckholme*, for 306*l.* 13*s.* "payable in five months, and due the 10th of November:" on the 8th day of September, 1773, a commiſſion of bankrupt iſſued againſt *Adney*, and he was declared a bankrupt: *Henſhaw* did not pay the note when it became due, but continued his trade till the 2d of December, 1773, when a commiſſion of bankrupt was iſſued againſt him, and he was declared a bankrupt; *Buckholme* having petitioned the Chancellor for liberty to prove the debt of 306*l.* 13*s.* under *Adney*'s commiſſion, his Lordſhip ordered that a caſe ſhould be made for the opinion of the judges of the court of B. R. upon the following queſtion: "WHETHER the ſaid engagement ſo "entered into by the ſaid *James Adney* is, or ſhall be, con"ſidered as a debt due from the ſaid *James Adney* before the "date and ſuing forth of the ſaid commiſſion againſt him, ſo "as to be proved by the ſaid *John Buckholme*, under the ſaid "commiſſion? Or, WHETHER the ſaid engagement is to "be conſidered as a collateral ſecurity from the ſaid *James* "*Adney*, the bankrupt, to the ſaid *John Buckholme*, for the "payment of the ſaid ſum of 306*l.* 13*s.* mentioned in the "ſaid note, in caſe the ſaid *George Henſhaw* did not pay the "ſame at the time the ſaid note became payable, and conſe"quently a debt only accruing due from the ſaid *James* "*Adney* to the ſaid *John Buckholme*, from the time de"fault was made by the ſaid *George Henſhaw* in payment of "the ſaid note." After argument and full conſideration, THE COURT certified, in theſe words: "Having heard "counſel on both ſides, and conſidered this caſe, we are "of opinion, that from the occaſion of giving *Adney*'s note, "and the terms in which it is conceived, the parties intended "it to be a collateral engagement only, in caſe *Henſhaw* "ſhould not pay his note at the time it became due; and "therefore it reſted in contingency (at the time the com"miſſion iſſued againſt *Adney*) whether this engagement ever "would become a debt or not, and conſequently it could not "be proved as ſuch under *Adney*'s commiſſion."

Taylor v. Mills and Magnall, Hil Ter. 17 Geo. 3. B. R. Cowp. 525.

A ſurety in a bond, who pays the debt after a commiſſion bankruptcy iſſued againſt his principal, is not barred by the certificate, though the penalty of the bond was forfeited before.—*Mills* and *Magnall* were partners with one *Bailey*, and, in order to raiſe money, the partnerſhip had entered into bonds. In the year 1765, *Bailey* withdrew from the partnerſhip, and wiſhing to be diſcharged from theſe bonds, application was made to *Taylor* to become ſurety inſtead of *Bailey*, to which he conſented; the bonds became due; and, afterwards *Mills* and *Magnall* became bankrupts; when the obligees had got as much as they could from the partnerſhip eſtate, and which amounted to no more than 6*s.* in the pound, they came upon the plaintiff for the reſidue: he accordingly paid it, and brought this action for money paid, laid out, and expended.—LORD MANSFIELD, and THE COURT, held, that the action would lie: he ſaid, this caſe was not harder than any other caſe of a debt ariſing after bankruptcy, upon a pre-exiſting ground: at the time of the bankruptcy the defendants were not indebted to *Taylor*: he clearly, therefore, could not come in as a creditor under the commiſſion: he was not damnified at that time, and till damnified (which he could not be till he had been called upon, and had paid) he could not bring an action: he did not pay till after the commiſſion iſſued, conſequently his whole damage, and cauſe of action, aroſe after the bankruptcy, and, therefore, could not be diſcharged by the certificate: with reſpect to the money received by the original creditors under the commiſſion, it is a diſcharge of ſo much of the debt, and the ſurety is only liable for the remainder, conſequently he can recover no more againſt the defendants: but as to that, he is a new creditor, and is not barred by the certificate. It is an extremely clear caſe, and not different from any where the cauſe of action, though it ariſes after the bankruptcy, is founded on a pre-exiſting ground.

Paul v. Jones, Hil. Ter. 27 Geo. 3. B.R. 1 Ter. Rep. 599.

So, where the defendant being indebted to *Hemming* and *Smith* in 90*l.* prevailed on the plaintiff and two others to join with him, in January, 1785, in giving a warrant of attorney to confeſs judgment for that ſum, with a defeazance thereon, in caſe the debt was paid by three inſtalments of 30*l.* each, in two, four, and ſix months. Default was made in payment. In November, 1785, the defendant became a bankrupt; and, in December, 1786, obtained his certificate. Before the bankruptcy, the plaintiff was applied to for payment by *Hemming* and *Smith*, but did not pay any part till afterwards, when he paid 44*l.* The defendant, having been held to bail for this ſum, obtained a rule to ſhew cauſe why he ſhould not be diſcharged out of cuſtody on filing common bail, on the ground that this debt might have been proved under

under his commiſſion—SED PER CUR. (after cauſe ſhewn), The rule of law is, that though a party make himſelf liable for the debt of another, by a contract prior to the bankruptcy of ſuch other perſon, and he does not actually pay that debt till after the commiſſion of bankrupt, he cannot prove his debt under the commiſſion. The two leading caſes are *Goddard* v. *Vanderheyden*, *ante*, *p.* 254, and *Young & al* v. *Hockley*, *ante*, *p.* 254; where the court held, that, inaſmuch as the money was not actually paid before the bankruptcy, the debt ſhould not be barred by the bankrupt's certificate. Thoſe two caſes have been followed and recognized by many ſubſequent determinations. Here the money was not paid by the plaintiff, who was only a ſurety, till after the bankruptcy; and as the debt only accrued by actual payment, there was no debt to which he could ſwear at the time of the bankruptcy.—Rule diſcharged.

Goodtitle *v.* North, Hil. Ter. 21 Geo. 3. K. B. 2 *Doug.* 583.

Bankruptcy is no plea in bar to an action of treſpaſs for meſne profits, for where the damages are uncertain, they cannot be proved under a commiſſion of bankruptcy.—This was an action of *treſpaſs for meſne profits*, againſt ſeveral defendants: PLEA, by two of them (huſband and wife), that the huſband became a bankrupt after the cauſe of action accrued. GENERAL DEMURRER. LORD MANSFIELD, Ch. J. The form of the action is deciſive; the plaintiff goes for the whole damages occaſioned by the tort, and, where damages are uncertain, they cannot be proved under a commiſſion of bankruptcy. WILLES, J. of the ſame opinion. ASHHURST, J. The plaintiff goes for a compenſation in damages, the amount of which is uncertain, and cannot be ſworn to before the commiſſioners, but muſt be aſcertained by a jury, upon all the circumſtances. BULLER, J. The damages are as uncertain as in an action of aſſault.—Judgment for the plaintiff (1).

Parker v. Norton, Tr. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 695.

So, bankruptcy is no bar to an action of trover, though the converſion happened before the bankruptcy.—This was AN ACTION OF TROVER for a bill of exchange drawn the 28th of February, 1795, by the plaintiff, on, and accepted by, *J. B. Fowler*, for 24*l.* 19*s.* payable two months after date to the plaintiff or order; to which THE DEFENDANT PLEADED, 1ſt, the general iſſue; 2dly, his bankruptcy before the cauſe of action aroſe; and, 3dly, that before the time of the ſuppoſed converſion, the plaintiff ſent and delivered to the defendant, and the defendant received from the plaintiff, the ſaid bill of exchange, to the intent that the defendant might preſent the ſame, when due, to *Fowler*, for payment, and might receive, from *Fowler*, the money therein

(1) See alſo *Gulliver* v. *Drinkwater*, *ante*, p. 209.

mentioned, to and for the uſe and on the account of the plaintiff, and might remit the ſaid money to the plaintiff when he ſhould have ſo received the ſame; that before the bill became due, to wit, on the 1ſt of March, 1795, the defendant diſcounted the bill, and gave away and exchanged the ſame for money, and received the value thereof in money, and kept and applied the money ſo by him received to his own uſe, which is the ſame ſuppoſed converſion and cauſe of action, &c. The defendant then ſet forth in this plea, all the circumſtances neceſſary to ſhew that he had become a bankrupt on the 19th of March, 1795. It alſo ſtated, that the defendant had ſince obtained his certificate, though it did not ſet forth that that certificate had been allowed by the Lord Chancellor. And it concluded with an averment that the ſuppoſed converſion, and the cauſe of action mentioned in the declaration, accrued before the defendant became a bankrupt. ISSUE was taken on the firſt plea; and THE PLAINTIFF DEMURRED generally to the two laſt.—LORD KENYON, Ch. J. If ever a caſe was brought before a court of juſtice that was intitled to leſs favour than others, this, as it is diſcloſed on the part of the defendant, is that caſe.—The plaintiff, being the owner of a bill of exchange, entruſted it to the care of the defendant, in order that, when it became payable, he ſhould obtain payment: the latter, without waiting for the day of payment, and in violation of his truſt, diſcounted the bill, received leſs than its value, and applied the money to his own uſe. This is, certainly, a diſhonourable tranſaction: but ſtill *if the rules of law protected him in this diſhoneſty, we could not deprive him of this protection.* However, I am glad that the law will not protect him in this caſe. When the caſe of *Goodtitle* v. *North* was argued here, Lord *Mansfield* put an end to it by one obſervation, "The form of the action is deciſive." The action of trover is founded on a tort. *The defendant's caſe is reſted on the dictum of a very reſpectable judge in the caſe of* Johnſon v. Spiller, *ante*, p. 240. But I underſtand *Mr. J.* Buller, *in uſing the words attributed to him, to have meant only this, that if a perſon has his election of two remedies, and may either bring trover or any other action, the poſſibility of his electing to bring trover ſhall not prevent his proving his debt under the commiſſion of bankrupt if he will waive the tort*; and I aſſent to the propoſition ſo qualified. In the preſent caſe the defendant did not receive all the money which was due on the note, the diſcount was deducted. *If the plaintiff, after conſidering what remedy he ſhould take, had brought an action for money had and received, he would have affirmed the act of the defendant, and the bankruptcy and certificate would have been an anſwer to that action.* It cannot be ſaid, that the plaintiff was bound to reſort to ſuch an

action,

action, and to abandon the reſt of his demand: if he were, the ſame rule muſt prevail in other caſes. When this bill was depoſited with the defendant, it was his duty to wait until the day of payment before he received the money, and then to carry the money to the plaintiff; inſtead of which he has, for his own convenience, received a part inſtead of the whole value of the bill, and converted the money to his own uſe. In this caſe, therefore, the remedy by an action for money had and received, would not have done the plaintiff complete juſtice; and *though he might have waived aſſerting his right to the full extent, the law will not compel him to do ſo.* Ashhurst, J. In the firſt place, the form of the action precludes the plaintiff proving his demand under the commiſſion; and, in the next place, the juſtice of the caſe requires that the plaintiff ſhould be able to recover in this mode of action. This is not an action for a debt, and therefore the plaintiff could not have proved it before the commiſſioners. Grose, J. The queſtion here is not whether or not the plaintiff *might* have proved his debt under the defendant's commiſſion, but whether *he was bound* to do ſo; and if he were not, the certificate is no bar to this action. In order to effect the juſtice of the caſe where trover would have lain, we have held for the ſake of the plaintiff himſelf, that he might waive the tort and ſue as on a contract. But the plaintiff is not bound to ſay that the defendant was his agent in diſcounting this bill: the defendant himſelf ſays that he was not his agent, for that he committed a fraud, a breach of truſt, in receiving the money contrary to the plaintiff's directions; then he ought not to be permitted to ſay in a court of juſtice, that the plaintiff is bound to conſider this as money received by him as the plaintiff's agent. What Lord *Mansfield* ſaid, in the caſe of *Goodtitle* v. *North*, is decifive of the preſent caſe. And, even without that authority, I would not conſent that the whole ſyſtem of the bankrupt laws ſhould be converted into a ſyſtem of fraud by the bankrupt himſelf. This is not a debt ariſing out of any contract of the parties, but if it be a debt at all, it ariſes out of the miſconduct of the defendant. Lawrence, J. It has been ſaid, that the object of the bankrupt laws was to make the bankrupt free from all claims in future, after he has given up his property to his creditors: that may be true, when ſpeaking of his creditors; but here the plaintiff is not to be conſidered as one of the bankrupt's creditors. The bankrupt laws were intended to protect the bankrupt from all ſuits on contracts entered into previous to his bankruptcy, on his giving up all his property for the benefit of his creditors: but it was not the object of thoſe laws to protect the bankrupt from the conſequences of groſs frauds like the preſent. The caſe of *Johnſon* v. *Spiller*, *ante*, p. 240, was an action for money

had and received, where the plaintiff agreed to waive the tort; and what was there ſaid by Mr. J. *Buller* has been carried in the argument of this caſe beyond the meaning of that judge. His opinion was not that in a caſe ſo circumſtanced the plaintiff was bound to prove his debt under the commiſſion: but that he had his election, and might, if he choſe, waive the tort, and conſider it as a contract; in which caſe, the certificate would be a bar. And that Mr. J. *Buller*'s opinion in that caſe was not what it has been repreſented to day, ſeems clear from the caſe of *Goodtitle* v. *North*, where he agreed that the bankruptcy of the defendant was no bar to the action of treſpaſs for meſne profits.—Judgment for the plaintiff.

Sir A. S. Hammond, Bart. *et. al. v.* Toulmin & Kendrick. Ea. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 612.

So, where the cauſe of action ariſes *ex delicto* before the bankruptcy, the certificate is no bar.—In an action of covenant, brought by the plaintiffs, who were commiſſioners of the navy. *The firſt count* in THE DECLARATION ſtated, that on the 26th of October, 1795, the defendants, agents to the captors of the Dutch frigate, the *Alliance*, in conſideration of 6,741*l.* 3*s.* 4*d.* by deed, conveyed the ſaid frigate to the plaintiffs, and thereby covenanted that they had full power and lawful authority to ſell the ſame to the plaintiffs, free and clear of, and from, all former charges and incumbrances, &c.; that the plaintiffs accordingly took poſſeſſion of the ſhip, &c.; but that the defendants had not full power and authority to ſell the ſame, for that the ſhip and ſtores, at the time of making the ſaid deed, belonged to the king, who by warrant, dated the 30th of May, 1797 (after reciting that the *Alliance* had been taken as prize on the 22d of Auguſt, 1795, by the king's ſhip the *Stag*, commanded by Captain *J. Yorke*, in company with three other ſhips, and had been ſold to the lords commiſſioners of the treaſury, for the public ſervice, and that the commiſſioners of the treaſury had recommended it to the king to grant the proceeds of the ſale of the ſhip and cargo to the captors), authoriſed the commiſſioners of the treaſury to pay the proceeds of the ſale to the officers and crew of the four ſhips; that thereupon *F. Edgecombe*, as attorney for and on behalf of the officers and crew of the ſhip *Stag*, claimed the ſhare of the ſaid ſhip, which amounted to 200*l.* belonging to the ſhip (the *Stag*), which ſum the plaintiffs became liable to pay and did pay to the ſaid *Edgecombe*, but that the defendants had refuſed to pay the ſame to the plaintiffs, contrary to their covenant, &c. *The ſecond count* was ſimilar to the firſt, except that it alleged, that the prize-money was demanded by and paid to the officers and crew of the *Stag*, inſtead of their attorney. *The third count*, after ſetting forth the ſale of the ſhip by the defendants to the plaintiffs, for 6,741*l.* 3*s.* 4*d.*, with the covenant, &c. ſtated, that the defendants had not full power and authority

thority to ſell the ſame, &c. for that the ſame belonged to and was the property of the king, and that the defendants had not paid to the plaintiffs the ſaid purchaſe-money, &c. The defendant *Toulmin* pleaded (*inter alia*) that after the ſeveral cauſes of action in the declaration mentioned accrued againſt him, and before the exhibiting of the bill, to wit, on the 27th of February, 1796, he became a bankrupt, and that the ſaid ſeveral cauſes of action accrued againſt him before he became a bankrupt. To this plea, there was a ſpecial demurrer, becauſe this action founded in damages only, and was not a liquidated certain demand, &c. Lord KENYON, Ch. J. It is extraordinary that no caſe preciſely ſimilar to the preſent, ſhould ever have been brought before the Court until now. I am clearly of opinion, that the defendant's certificate has not delivered him from this demand. There are caſes without number to ſhew that a certificate does not deliver the bankrupt from every contract entered into before his bankruptcy: it is eſtabliſhed beyond all doubt, that if he take a leaſe and covenant to pay rent, and is then ſtripped of all his property by his bankruptcy, ſo that he has no fund to which he can reſort, yet he is liable for the rent, in an action on his covenant, made before his bankruptcy. So, *when the action ariſes* ex delicto *before the bankruptcy, the plaintiff need not go before the commiſſioners of the bankrupt (defendant) to receive a ſatisfaction, but he may bring his action, to which the defendant's certificate will be no bar.* The legiſlature only meant that thoſe demands that were incurred before the bankruptcy, and which were liquidated debts, ſhould be proved under the commiſſion. But here was no debt that could be proved under the defendant's commiſſion; the whole reſted in damages, and the plaintiffs have a right to appeal to a jury to aſcertain what is due to them for damages for the breach of this covenant. On ſuch an appeal, the jury will have an opportunity of enquiring into all the circumſtances of the caſe; they may ſee reaſon not to give damages to the full extent of the price paid for the ſhip, but apportion the damages according to the injury really ſuſtained. Therefore I think the plaintiffs are intitled to judgment on this demurrer. ASHHURST, J. Where the plaintiff's demand reſts in damages, and cannot be aſcertained without the intervention of a jury, it cannot be proved under the defendant's commiſſion: now here was no preciſe ſum due to the plaintiffs at the time of the defendant's bankruptcy. The defendant had indeed been guilty of a breach of covenant at that time: but the jury were to aſcertain the amount of the damages ſuſtained; it was a mere choſe in action. GROSE, J. The ground of the demurrer is, that the plaintiff's cauſe of action is not barred by the defendant's certificate under the ſtat. 5 *Geo.* 2. c. 30. The word in that act is, "debt:" but

this is not the demand of a debt, but of uncertain unliquidated damages. The plaintiffs' council has very properly argued by analogy to cases arising on the statutes of set-off, where the same word "debt" is used; and such a demand as the present, clearly could not have been set off in an action brought by the defendant. LAWRENCE, J. The defendant's argument is this, that it is admitted on the record, that the cause of action arose previous to the defendant's bankruptcy, and therefore the defendant's certificate is a bar to this action: but if so, it would equally be an answer to any action that might be brought for any special damage arising after the bankruptcy, because the cause of action accrued from the defendant's sale of the ship without having a title. But we must consider the nature of the contract, and see whether a breach of it creates a *debt* within the meaning of the statute that could have been proved under the defendant's commission. In the case of goods sold, but not delivered, the consideration fails, and then the vender has received money to the use of the vendee. But here is a contract under seal; the plaintiffs must proceed on that contract, and can only recover damages for the breach of it. Judgment for the plaintiffs.

Lewis *v.* Piercy, Tr. Ter. 28 Geo. 3. C. B. 1 *Hen. Black.* 29.

What will render the Certificate void.] Insuring in the lottery is not gaming within the stat. 5 *Geo.* 2. c. 30. s. 12. so as to avoid a bankrupts' certificate.—This was a rule to shew cause why the defendant should not be discharged out of custody, on the following affidavit: "That the debt arose "before he became a bankrupt, but that the verdict was ob- "tained, and the costs taxed, after the bankruptcy, though "before his certificate was allowed." On shewing cause, it was not urged, that the costs were not to be considered as part of the original debt; BUT an affidavit was produced stating, that "within twelve months before the bankruptcy, the de- "fendant had lost 500*l.* by insurance in the English and "Irish lottery," which it was said was within the stat. 5 *Geo.* 2. c. 30. s. 12. and therefore deprived the defendant of any benefit of a certificate. BUT the Court were clearly of opinion, that insuring in the lottery was not gaming within the statute.—Rule absolute.

Robson *v.* Calze, Tr. Ter. 19 Geo. 3. B R. 1 *Doug* 227.

On a rule to shew cause why there should not be a new trial in this cause (a verdict having been found for the plaintiff), it appeared, that it was *a feigned issue, to try whether the certificate was obtained unfairly and by fraud?*—The proof at the trial was, that notes for money had been given by a confidential friend of the defendant, who had managed all his affairs to two of the creditors, who were thereby induced to sign the certificate, that *the defendant did not know of this* at the time when he made the affidavit directed by stat. 5 *Geo.* 2. c. 30.

c. 30. ſ. 10. by which he ſwore that "the certificate and "conſent of his creditors thereunto was obtained fairly "and without fraud:" that the affidavit was made on the 4th of September, but was not laid before the Chancellor, with the certificate for his allowance, till November; and that *before that time*, the defendant had been informed of the notes having been given, and for what purpoſe. Lord MANSFIELD, Ch. J. If there were creditors enough who would ſign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to ſign for the mere purpoſe of preventing the bankrupt from receiving any benefit from the certificate, this would be a fraud on the bankrupt, and ſhould not hurt him. But although a third perſon ſhall not be puniſhed for the fraud of another, he ſhall not avail himſelf of it. There is no caſe in the law where that can be done. In the caſe of *ſimony* the preſentation is void, though the money has been given without the privity of the preſentee: in like manner, all ſecurities obtained by fraud are void.—There is no way of compelling the creditors to ſign the certificate: they are all left at liberty, and ought to be upon a *par*; and if ſome are induced to ſign it becauſe others have, whom they ſuppoſed to be on a par with themſelves, but who in fact have been paid, this is a groſs fraud upon them. So the matter would ſtand if there had been no privity in the bankrupt; but there is ſtrong evidence that he knew of the notes being given before the allowance of the certificate, which in my opinion is not complete till it is allowed. If the fact had come to the knowledge of any of the creditors, and had been ſtated by them to the Chancellor, before the allowance of the certificate, he could not have allowed it. However, I put the caſe upon the broad ground, that a certificate is void if obtained by fraud, though without the knowledge of the bankrupt. WILLES, J. Inclined to think that the certificate would have been void, even if the defendant had not known of the notes having been given, but he declared that it was certainly a fraud in the bankrupt to permit his affidavit to be read at a time when the certificate was allowed; for though it might be true when ſworn, it certainly was not true then, and therefore he was clear that the certificate was void. ASHHURST, J. It ſeems to me that the interference of a friend, though without the knowledge of the bankrupt, is ſufficient to invalidate the certificate, becauſe the teſt which the legiſlature requires, is the unbiaſſed approbation of the creditors. I ſhould be clear on this ground alone, but there is another in this caſe. BULLER, J. The act of 5 *Geo.* 2. c. 30. ſ. 11. makes it unlawful for third perſons, as well as for the bankrupt, to give money to induce creditors to ſign the certificate. If money is given, in order to deprive the bankrupt of the effect of his certificate, where

there

there are creditors ſufficient in number and value, without thoſe who are paid to ſign it, the bankrupt ſhall not be hurt by this fraud upon him; but if the neceſſary number and value is completed by perſons who are induced to ſign by money, *that*, though without the privity of the bankrupt, is a fraud on the creditors at large, and ſhall not have the intended effect. A certificate is a bar againſt all creditors, whether they have ſigned or not, but they ſhall not be deprived of their remedy againſt the bankrupt, unleſs it is obtained agreeably to the directions of the ſtatute. This is no hardſhip on the bankrupt: the certificate would not have exiſted, if it had not been obtained by means which the legiſlature has reprobated. The bankrupt ſhall not derive a benefit from the acts of others, which the law has declared to be illegal and void.—Rule diſcharged (1).

Holland v. Palmer, Mic. Ter. 38 Geo. 3. C. B. 3 *Pull* et *Boſan.* 65.

So, in this caſe, on a motion for a new trial, where a verdict had been taken for the plaintiff, it appeared, that it was an action for goods ſold and delivered: Plea, that after the cauſe of action accrued, and before the commencement of the ſuit, the defendant became a bankrupt and obtained his certificate. At the trial, it was proved, that *Richard Pope*, one of the creditors who had ſigned the certificate, had received ten guineas for ſo doing from one *Griffiths*, the defendant's brother-in-law, *but without the privity of the defendant.* BULLER, J. It is no matter whether the bankrupt knew of the money being paid or not; it was a fraud on the reſt of the creditors. One of the creditors has obtained money which ought to have been divided among all of them. By ſo doing, he has obtained an advantage. Beſides, the others may have been induced to ſign by his example. EYRE, Ch. J. This has always been the impreſſion on my mind, and I ſhould have had no difficulty upon it at *niſi prius*. I do not feel the weight of the diſtinction between the party coming to the knowledge of the money paid juſt before the allowance of his certificate, and at any time before. The certificate is as improperly obtained, whether the bankrupt knows of the circumſtance or not. My brother *Buller*'s obſervation is extremely ſtriking. If a conſiderable creditor be induced by money to put himſelf at the head of the liſt, the majority in number and value may be obtained by that means; ſince others may be unwilling to refuſe ſigning, when one of the moſt conſiderable has conſented. The bankrupt is to have the benefit of the certificate, provided the genuine ſenſe of the body of creditors appears in his favour; but if it is not the genuine ſenſe that appears, the certificate is no longer

(1) See vol. i. p. 243, and the caſes of *Smith* v. *Bromley*, vol. i. p 244, *Jones* v. *Barkley*, vol. i. p. 245.

that

that fair act which ought to have any effect. *I ſhould not, therefore, agree to the caſe which has been put, of money paid maliciouſly.* I ſhould think that a certificate ſo obtained would be bad; but the bankrupt would be at liberty to procure another. HEATH, J. and ROOKE, J. of the ſame opinion. —Rule refuſed.

So, a bond given to a creditor of a bankrupt, in order to *induce him to withdraw a petition* which he has preferred to the Chancellor againſt the allowance of the certificate, is *void* by ſtat. 5 *Geo.* 2. c. 30. ſ. 11.—Debt on bond for 400*l.* Plea of the defendant *Brady, non eſt factum*, on which, iſſue was joined. 2dly. That he ought not to be charged with the ſaid debt, ſtating in ſubſtance that he became a bankrupt, and that the plaintiff, who was a creditor, preferred a petition to the Chancellor againſt the allowance of his certificate, which had been ſigned; and that whilſt the defendant was detained in priſon and in execution at the ſuit of the plaintiff, and before the allowance and confirmation of the ſaid certificate, it was *unlawfully conſented to and agreed* by and between the defendant and the plaintiff, that the bond mentioned in the declaration ſhould be ſealed and executed, and together with certain other ſecurities, ſhould be delivered to the plaintiff, and that the plaintiff, in conſideration thereof, ſhould thereupon diſcharge the defendant from his ſaid impriſonment, *and alſo withdraw the petition ſo preferred by him againſt the certificate as aforeſaid, to the intent that the allowance and confirmation thereof by the Lord Chancellor might be obtained:* that the ſaid bond was ſealed, executed, and delivered, to the plaintiff, and by him accepted, &c. whereby the ſaid bond was *wholly void and of no effect*, and this the ſaid defendant is ready to verify, &c. &c. 3dly. That the ſaid bond was executed, &c. for ſecuring the payment of a debt due from the defendant at the time of his becoming bankrupt, with intent to perſuade the plaintiff to conſent to the allowance and confirmation of a certificate, and to *withdraw a certain petition, &c.* The plea of the defendants, *Cartwright* and *Fenton*, were to the ſame effect. REPLICATION to the defendant *Brady*'s pleas. To the ſecond, That the ſaid bond was ſealed and delivered for a good and valuable conſideration, traverſing that it was unlawfully conſented, &c. To the third, That it was executed for a good and valuable conſideration, and not for a debt due at the time of the bankruptcy—The replication to the defendants, *Cartwright* and *Fenton*'s, plea was, that the ſaid bond was executed and delivered for a good and lawful conſideration, &c. whereupon iſſue was joined. REJOINDER by *Brady* to the replication to his ſecond plea, that it was unlawfully conſented and agreed, &c. concluding to the country, whereupon iſſue was joined. On the trial, a verdict was found for the plaintiff on the firſt iſſue, for the defendant

Sumner v. Brady, Cartwright, and Fenton, Tr. Ter. 31 Geo. 3. C. B. 1 *Hen. Black.* 647.

defendant on the ſecond; and with reſpect to the other iſſues, the verdict was to be entered as the Court ſhould direct.—After ſhewing cauſe againſt a rule granted to ſhew cauſe, why judgment ſhould not be entered generally for the plaintiff; on which the queſtion was: Whether, under the circumſtances ſtated in the firſt ſpecial plea, the bond given by the defendants to the plaintiff was void, as being within the 5 *Geo.* 2. c. 30. ſ. 11? the judgment of the Court was pronounced as follows: Lord LOUGHBOROUGH, Ch. J. There could not be a more unfavourable caſe than the preſent come before a court. But whether the caſe be favourable or unfavourable is quite out of the queſtion; the Court is bound to declare what is the true conſtruction of the law. The argument, on the part of the plaintiff, reſts on the caſe of *Lewis* v. *Chaſe*, 1 *Pere Wms.* 620. (from which caſe it has been urged, that the withdrawing an oppoſition to a certificate is not ſuch an act as is neceſſary for the bankrupt's diſcharge); but the impreſſion on my mind is, that this caſe has been long exploded; and upon conſidering it with reference to the ſtatute, it ſeems to me to be a caſe totally unprincipled, and directly contrary to the true conſtruction of the act. *That caſe cannot ſtand, unleſs ſome words be eraſed from the ſtatute, or a meaning aſſigned to them entirely repugnant to the whole principle of the act.* A diſtinction is attempted to be made from that caſe, between the act of giving money for the conſent of the creditor to ſign the certificate, and that of giving him money to withdraw his oppoſition to it; as if the former act were only to be condemned. But ſee how the act of withdrawing an oppoſition ſtands, compared with the actual ſigning of the certificate. The argument urged is, That as it is a voluntary act, the creditor may do as he pleaſes. But the law feels it a miſchief, and a ſubverſion of the bankrupt laws, to traffick with them and the power given by thoſe laws. See the conſequences. A bankrupt labours to get a ſufficient number of creditors to procure a certificate: a principal creditor, knowing what will prevent the certificate, ſtands by and petitions: now, if the argument were allowed, it would fetch more at the market, it would be a more valuable traffic to withdraw an oppoſition to the certificate, than to ſign a conſent to it, as one out of four-fifths of the creditors in number and value. See too how the act ſ. 10. expreſſes itſelf. No perſon becoming bankrupt ſhall be intitled to the benefit of the act, unleſs the certificate be allowed by the great-ſeal, and unleſs four parts in five in number and value of the creditors "*ſhall ſign ſuch certificate, and teſtify* "*their conſent to ſuch allowance and certificate.*" And after a power given to any creditor to oppoſe the certificate, comes the clauſe in queſtion; that every bond, bill, &c. given as a conſideration, or to the intent to perſuade him, her, or them,

"*to*

" *to conſent to or ſign any ſuch allowance or certificate*, ſhall be " wholly void and of no effect." Now, according to the argument, the act ought to have left out the words " *conſent* " *to*," as being idle words at beſt, and retained only the word "*ſign.*" But being in the ſtatute, Do they mean any thing? I think they clearly mark the caſes of ſigning the certificate, and of an oppoſition made to it, as diſtinct caſes in the contemplation of the legiſlature. Where words may have an operation, they ought not to be rejected. Lord *Macclesfield*, in *Lewis* v. *Chaſe*, ſeems to me to have taken a liberty with the ſtatute which was totally unfounded, for he argues as if it were to be applied to no caſe but that of ſigning the certificate. But I have no ſcruple in ſaying that any caſe is not law, which I think is contrary both to the words and the true ſpirit and policy of an act of parliament.—When a caſe is merely cited in argument, perhaps a court may not directly decide it not to be law, unleſs the very point of it is in diſcuſſion; but the oftener the caſe of *Lewis* v. *Chaſe* has been cited, the more it has been doubted, and I think it intirely inconſiſtent with *Cockſhott* v. *Bennet* (1), which I hold to be a right determination. The reaſoning alſo in *Robſon* v. *Calze* (2) is applicable to the preſent caſe. I do not enter more at large into the general argument, becauſe I think the caſe is directly within the act of parliament. GOULD, J. of the ſame opinion. HEATH, J. of the ſame opinion. If this tranſaction, which is admitted to be fraudulent, affected only the parties, it would be a different queſtion. But this is a fraud affecting the other creditors, and againſt the policy of the law. It is a matter of choice whether a creditor will prefer a petition, but having preferred it, he ought not to withdraw it ſo as to injure the other creditors. So it is competent to any man, unleſs bound in a recognizance, to prefer an indictment for felony, or not, at his option; but when he has preferred it, he cannot ſtipulate for his own private advantage, and compound. The reaſoning upon which the caſes go is, that the money either comes out of the bankrupt's own fund, and then there is a fraud on the other creditors, or it is raiſed by his relations, and then an undue advantage is taken of the ſituation of the bankrupt to extort money from them. This cuts up by the roots the caſe of *Lewis* v. *Chaſe*. WILSON, J. of the ſame opinion. I think this clauſe, by a fair conſtruction of the words, includes the preſent caſe: the ſtatute ſays, " conſent " to *or* ſign," and I conſtrue the withdrawing the petition to be a conſent.—Judgment for the defendant.

Plea of Certificate.] On a general plea of bankruptcy under 5 *Geo.* 2. c. 30. the plaintiff may give the condition of a bond,

Alſop *v.* Price, Ea. Ter. 19 Geo. 3. B. R. 1 *Doug.* 160, 165.

(1) 2 *Term Rep.* B. R. 763. and *ante* vol. i. p. 247. (2) *Ante*, p. 280.

bond, on which an action is brought, in evidence, to ſhew that he is not barred by the certificate, for the plea given by the ſtatute opens the whole merits of the queſtion in evidence on both ſides.

Paris v. Salkeld, Ea. Ter. 2 Geo. 3. C. B. 2. *Wils.* 139.

The defendant pleaded *puis darrein continuance* (1): viz. that on ſuch a day he became a bankrupt, and concluded with an averment in bar: the plaintiff demurred; and now it was objected, that the plea was bad, becauſe it was not alleged by the defendant that he had conformed himſelf to the ſtatutes of bankrupts, nor obtained his certificate. (After argument, and time taken to conſider), THE COURT were clearly of opinion that the plea was bad, becauſe the defendant had not averred that he had conformed, &c. according to the ſeveral ſtatutes concerning bankrupts.

Willan v. Geordini, Tr. Ter. 1782, B. R. *Cooke's* B. L. 532.

But, in a more modern caſe, where, in an action on a promiſſory-note, the defendant pleaded his certificate, and that the cauſe of action aroſe before he became a bankrupt; there being a ſpecial demurrer to this plea, ſhewing, for cauſe, that the defendant ought to have ſhewn in his plea, that he had conformed according to the ſtatutes. THE COURT ſaid, that it was not neceſſary, becauſe the ſtatute has directed this general pleading, and if the defendant has not conformed, it is matter of evidence; and they denied the caſe of *Paris* v. *Salkeld*, to be law.

Charlton v. King, Hil. Ter. 31 Geo. 3. B. R. 5 *Ter. Rep.* 156.

But a plea of bankruptcy muſt ſtate that the *cauſe of action* accrued before the bankruptcy.—This was an action of covenant, and the declaration was for a ſum of money payable under a covenant, in an indenture of co-partnerſhip between the plaintiff and the defendant, on certain days after the diſſolution of the co-partnerſhip, averring, that the partnerſhip was diſſolved in March, 1787: the defendant pleaded ſeveral pleas, among which was the following: that the defendant, before the exhibiting of the bill of the plaintiff, to wit, &c. became bankrupt; *and that the ſaid indenture in the ſaid declaration was made before ſuch time as the ſaid defendant ſo became a bankrupt*; concluding to the country. To this there was a ſpecial demurrer, becauſe it was not alleged that *the cauſe of action* accrued before the bankruptcy of the defendant, and joinder in demurrer. In ſupport of the demurrer it was urged, that the plea was bad, becauſe it did not purſue the form preſcribed by the ſtat. 5 *Geo.* 2. c. 30. ſ. 7.; which enables a bankrupt who is ſued, to plead, that *the cauſe of action* aroſe before the bankruptcy. On the other ſide, it was contended, that the defendant could not, in ſtrictneſs, plead that *the cauſe of action* accrued before the bankruptcy, though the *indenture were executed* before; be-

(1) See vol. i. p. 19.

cauſe

cauſe it was the bankruptcy which put an end to the partnerſhip. SED PER CUR. This plea cannot be ſupported. In the firſt place, it is bad as a plea at common law: and in the next, it is not warranted by the ſtatute, which has preſcribed a particular form of plea. But as this was a certain ſum of money payable at all events on a future day, the plaintiff might have proved it under the commiſſion with a rebate of intereſt; and as the ſtatute has given the defendant a right to plead generally that the cauſe of action aroſe before the bankruptcy, he is intitled to prove this defence on a plea that the cauſe of action aroſe before the bankruptcy.—Judgment for the plaintiff on this plea.

A plea of bankruptcy need not be ſigned by counſel.—In this caſe the defendant having pleaded his bankruptcy, and the plea not being ſigned by counſel, judgment was ſigned by the plaintiff: this being moved to be ſet aſide, on the ground of irregularity, it was oppoſed, on the ground, that it was always conſidered as a ſpecial plea, and, as ſuch, was filed with the clerk of the papers. BUT the Court ſaid, that this plea did not require the ſignature of counſel.—Rule abſolute. Leigh q. t. v. Monteiro, Mic. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 456.

If an executor or adminiſtrator ſue a defendant who pleads the general plea of bankruptcy, which, at the trial, is found for him, the executor or adminiſtrator is not liable to coſts under the ſtat. 5 *Geo.* 2. c. 30. ſ. 7.—To an action of aſſumpſit on promiſes made to the plaintiff's teſtator, the defendant pleaded the general plea of bankruptcy, and obtained a verdict: and now it was moved, that the prothonotary might be directed to tax the defendant his coſts, on the ground that, by the ſtat. 5 *Geo.* 2. c. 30. ſ. 7. if a bankrupt be ſued for a debt due before the bankruptcy, "and if a verdict paſs for the defendant, or the plaintiff ſhall become non-ſuited, or judgment be given againſt the plaintiff, *the defendant ſhall recover his full coſts.*" BUT THE COURT held the plaintiffs not liable to coſts, being clearly of opinion, that the ſtat. 5 *Geo.* 2. c. 30. ought to be conſtrued in the ſame manner as the ſtatutes 23 *Hen.* 8. c. 15. and 4 *Jac.* 1. c. 3. which firſt gave coſts to defendants, where they gained a verdict: which ſtatutes, although they are general in their expreſſions, and make no exception of the caſe of executors and adminiſtrators, have been uniformly holden (1) not to extend to executors and adminiſtrators.—Rule refuſed. Martin *et al.* v. Norfolk, Mic. Ter. 31 Geo. 3. C. B. 1 *Hen. Black.* 528.

But if an executor, who becomes bankrupt, plead a falſe plea, after the commiſſion iſſued, he is liable to execution for the coſts.—On a motion for ſetting aſide a *fieri facias*, and Howard *et al.* v. Jemmett, Hil. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1368. 1 *Black.* 400.

(1) *Cro. Eliz.* 69. 503. *Cro. Jac.* 229.

reſtoring

reſtoring the monies levied, it appeared, that the defendant was a bankrupt, and had obtained his certificate, but between the time of the iſſuing the commiſſion and the time of obtaining the certificate, he had pleaded *a falſe plea*, viz. *that he had no aſſets*; when, in fact, he had ſome aſſets which was found againſt him, and thereupon the plaintiffs had judgment *de bonis teſtatoris, ſi, &c.* and againſt the defendant himſelf *de propriis for the coſts*.—PER CUR. The pleading a falſe plea was the bankrupt's own act, and his own fault; and the judgment and execution *de bonis propriis*, for coſts, was ſingly owing to this his falſe plea; which was ſubſequent to the iſſuing of the commiſſion, conſequently it could not be a debt proveable under the commiſſion: it is therefore not diſcharged by the certificate.

Barbers' Company.

Sharpe q. t. v. Law, Mic. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2133.

The Court held, that the ſtatute of 32 *Hen.* 8. c. 42. by which the barbers and ſurgeons of London were made one company, and incorporated, continued in force as to the barbers, notwithſtanding that of 18 *Geo.* 2. c. 15. which ſeparates them from the ſurgeons: and that the latter ſtatute only means to diſſolve the union between the two companies.

Baron and Feme.

Power of the Huſband over the Perſon of his Wife.

Rex v. Mackenzie, Tr. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1622.

The huſband may uſe neceſſary coercion, where the wife is inſane.—This gentleman's wife having ſworn articles of the peace againſt him and others, and it having appeared fully to the Court, as well upon ſome collateral motions, as upon his own affidavit now produced, "that he had never "uſed any force againſt her, any otherwiſe than what "was neceſſary to the care and cure of her, as a perſon "diſordered in her mind, and this too in purſuance of the "advice of an eminent phyſician; and that he had never, "in any other reſpect, treated her with any ſort of ill-uſage, "but quite the contrary." THE COURT ordered his recognizance to be diſcharged, and that all proceedings againſt him be ſtayed.

Rex v. Anne Brooke and Thomas Fludgate, or Anne Gregory's caſe, Mic. Ter. 7 Geo. 3. B. R. 4 *Burr.* 1991.

But, the Court will not deliver a wife out of the hands of her friends, into the cuſtody of the huſband, where it is clear that he has uſed her ill, and ſhe actually ſwears the peace againſt him.—*Anne Gregory*, the wife of *Abraham Gregory*, was

was brought up, upon the return of an *habeas corpus* directed to her mother and uncle, which had iſſued at the application of her huſband; ſhe appeared to have been very ill-uſed by her huſband, and to have, thereupon, fled from him, and come to the defendants for ſecurity and protection; and ſhe was ready to ſwear, and actually did ſwear, the peace againſt him. THE COURT would not order her to be delivered to her huſband, as his counſel demanded: but, on the contrary, told her, "ſhe was at liberty to go where ſhe thought proper;" and offered her, and (at her requeſt) gave her a tipſtaff to ſecure her from any inſult in her return to her friends.

What Intereſt the Huſband ſhall have in Right of his Wife.

A man poſſeſſed of a term of years, in right of his wife, as executrix of her former huſband, has power to grant and convey the ſame.—In ejectment, the caſe was as follows, a man being poſſeſſed of a beneficial leaſe of a term for years of the premiſes in queſtion, in right of his wife, as executrix to her former huſband, grants and releaſes all his right, title, and intereſt, of and in the ſame premiſes, to the leſſor of the plaintiff. THE QUESTION was, Whether the huſband, by the marriage, had ſuch a title to the leaſe veſted in him, that he could transfer and convey the ſame to the leſſor of the plaintiff, ſo that he could recover in this action: the caſe was argued, and the Court took time to conſider: And now DE GREY, Ch. J. delivered the opinion of the Court, that the leſſor of the plaintiffs was intitled to recover; and this principally, becauſe the huſband may adminiſter in the right of his wife, without her conſent, though ſhe cannot adminiſter without the conſent of her huſband: ſo held by *Brian*, 2 *Hen.* 7. 15. See alſo *Dier.* 166. *b.* *Salk.* 306. *Bro. Exec.* 46. 96. 118. 151. 1 *And.* 117. *Fitz. Exec.* 23. 5 *Co.* 27. *Swinb.* 342. *Dier.* 183. *Cro. Eliz.* 28. *Arnold* v. *Bedgood*, directly in point. *Cro. Jac.* 318. *Moor*, 54. And if the huſband can adminiſter *jure uxoris*, without her conſent, it is incident to the power of adminiſtration to ſell or diſpoſe of a term of years: And, therefore, Per TOT. CUR. *Poſtea* to the plaintiff (1). Thruſtout v. Coppin, Hil. Ter. 12 Geo. 3. C. B. 3 *Wilſ.* 277. 2 *Black.* 801.

If a *feme ſole*, intitled to the profits of an eſtate veſted in truſtees for her ſeparate uſe, conveys them to a married woman, for her ſeparate uſe, without the interpoſition of a truſtee; and afterwards marries, and the truſtees, without Daviſon v. Atkinſon, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 434.

(1) See the caſes of *Ankerſtein* v. *Clarke*, in vol. i. 346.

notice of the conveyance pay the profits to the grantor, the husband of the grantee cannot maintain an action against the grantor's husband for the money, as money had and received to his use.—At the trial of an action of assumpsit for 40*l.* had and received to the plaintiff's use, the case appeared to be this: "*L. Stoddart* devised some lands, under which collieries have "since been discovered, to three trustees, in trust, to sell for "the benefit of certain persons, of whom the defendant's "wife, one of his daughters, was one; and until sale to "receive the rents and profits, and pay a certain portion to "the defendant's wife, for her sole and separate use, exclu- "sive of the control of any husband she might marry. The "land was not sold, but the trustees let the collieries. *The "defendant's wife, before her marriage, conveyed one-eighth "part of the profits of these collieries, not to a trustee, but to "the plaintiff's wife, to her sole use, exclusive of her husband's "control, she being then married.* The trustees under *Stod- "dart*'s will having received the rent, and paid over to the "defendant's wife her share, without notice that she had "conveyed any part of her interest to the plaintiff's wife: "this action was brought by the plaintiff alone against the "defendant, to recover one-eighth part of the rent. It was "objected, on the part of the defendant, that the trustees "under *Stoddart*'s will must be considered as trustees for the "plaintiff's wife, there being no trustees appointed in the "conveyance to her to protect her separate interest, and "that the plaintiff, her husband, was not intitled to any "part of this money; or, that if he could sue at all, the "wife ought to have been joined with him." A verdict was taken for the plaintiff, reserving the point; and, accordingly, a rule having been obtained to shew cause why a nonsuit should not be entered. Cause was shewn.—Per Cur. A Court of equity will, in some cases, consider the husband as a trustee for his wife, where her interest cannot otherwise be so effectually protected. But here are other and better protectors of her interest, namely, the trustees under the will, in whom the legal estate is vested, and who may be considered as trustees for her. In this case the interests of the husband and wife are directly in opposition to each other: and if we were to permit the husband to recover this money, which was intended for the separate use of the wife, we should destroy that separate right. The plaintiff or his wife should have given notice to the trustees not to pay over this money to the defendant; and, for their default, they ought to be answerable.—Rule for a nonsuit absolute.

How

How far the Huſband ſhall be anſwerable in reſpect of his Wife.

A huſband is not bound to maintain his wife's child by a former huſband.—This was an action on a covenant, in which the defendants, who were father and ſon, after reciting that differences had ariſen between the ſon and his wife, and that they had agreed to live ſeparate, covenanted to the plaintiffs to pay the wife an annuity of 50*l.* a year, and to pay all the debts contracted by her, *which her huſband was by law liable to pay.* The breaches aſſigned were (amongſt others), that the wife had then contracted a debt of 50*l.* 16*s.* 9*d.* to *J. Brighton*, for neceſſary board and lodging, and other neceſſaries, and for money paid and laid out for neceſſaries for *Mrs.* Harriſon, *and one* John Perrin, *her infant ſon by a former huſband, at her requeſt.* On the trial it was agreed, that a verdict ſhould be taken for the plaintiffs, but that an account of the particulars of the ſeveral demands ſhould be ſtated by an arbitrator: in order that the opinion and direction of the Court might be taken on the conſtruction of the above covenant: and upon the taking of ſuch account, ſeveral of the items appeared to be for the maintenance of her infant ſon by a former huſband. PER CUR. In the caſe of *Rex* v. *Munday*, 1 *Stra.* 190. it was held, that a huſband is not bound to maintain his wife's mother. And the Court, in that caſe, reverſed the order of maintenance, on the ground that the ſtatute of *Elizabeth*, c. 2. ſ. 7. only extends to natural relations. Therefore, on the authority of that caſe, we are of opinion, that the huſband is not liable for the expences of maintaining the wife's child by the former huſband; and, conſequently, that thoſe articles in the account muſt be diſallowed.

Tubb *et al. v.* Harriſon *et al.* Mic. Ter. 31 Geo 3. B. R. 4 *Ter. Rep.* 118.

The huſband is not liable to anſwer for the contract of the wife, where ſhe has committed adultery.—In this caſe, the defendant, having committed adultery with a woman of the name of *Bazeley*, whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors: then the wife committed adultery, after which ſhe offered to return home, but her huſband would not receive her. On the trial of an action of aſſumpſit, brought by the plaintiff, for her board and lodging ſubſequent to that time, Mr. Juſtice BULLER was of opinion, that the huſband was not bound to receive the wife after ſhe had committed adultery, and conſequently was not bound to ſupport her, and he directed a verdict for the defendant, with liberty for the plaintiff to move to enter a verdict for him, if the Court ſhould be of opinion, that the defendant was liable. A rule to ſhew cauſe being moved for, THE COURT ſaid, that though this preciſe caſe did not appear to have been controverted before, it was

Govier *v.* Hancock. Eaſt. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 603.

probably becauſe the point had not been doubted; and that it muſt be governed by the ſame principle on which it had been determined, that the huſband is not liable in caſes where the wife goes away with an adulterer: that this was not a modern rule, but was mentioned in *Co. Lit.* 32. *a.* that if a wife go away with an adulterer, ſhe loſes her dower: that the queſtion depended upon this, Whether the neceſſaries were provided before or after the wife had committed adultery? if after, the action could not be maintained; and that in this caſe, if the wife had inſtituted a ſuit in the eccleſiaſtical court againſt the huſband for reſtitution of conjugal rights, they would not have aſſiſted her.—Rule refuſed.

Norton v. Fazan, Ea. Ter. 38 Geo. 3. C. B. 1 *Pull. et Boſan.* 226

But if the huſband permits the wife to remain in his houſe, he will be liable to anſwer for her contracts, though ſhe may have committed adultery, unleſs the plaintiff knew, or ought to have known, the circumſtances under which ſhe was living. —This was aſſumpſit, for neceſſaries ſold to the defendant's wife and children.—Some time previous to the delivery of the goods, the defendant having diſcovered that his wife kept up an adulterous intercourſe with another man, ſeparated himſelf from her, *leaving her in poſſeſſion of the houſe which he had inhabited*, together with two children bearing his name: in this houſe ſhe was living in a ſtate of adultery, at the period when the goods in queſtion were delivered: the defendant had made no regular proviſion for his wife. At the trial, EYRE, Ch. J. was of opinion, that if the plaintiff knew, or ought to have known, that the ſeparation proceeded from the adultery of the wife, the jury ſhould find for the defendant; if not, that the plaintiff was intitled to recover.—There was a verdict for the plaintiff. And it now being moved for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, and a nonſuit entered, PER CUR. Every caſe on the facts is peculiar to itſelf, and this is ſo different from every other caſe which has been decided, that it muſt be conſidered as anomalous. The verdict is clearly and ſtrictly right: the wife committed adultery for a conſiderable time while ſhe was living with her huſband; he voluntarily yielded his bed to the adulterer, and made no proviſion for her: the woman was living in a houſe in which ſhe was placed by the defendant himſelf, with two children bearing the huſband's name, both of whom were born in wedlock: her adulterous intercourſe was not proved to be known by this tradeſman: if the defendant can bring it home to any other tradeſman who ſhall be in the ſame ſituation as the preſent plaintiff, that he did know, or ought to have known, the circumſtances under which the wife was living, the defendant may, perhaps, be able to prevent another verdict paſſing againſt him.—Rule refuſed.

A voluntary

A voluntary penſion granted to the wife by the crown during pleaſure, ſhall not exempt the huſband from being liable to be ſued by his wife's creditors, for neceſſaries.—On a motion for a new trial, in an action againſt the defendant, for neceſſaries furniſhed to his wife at Briſtol, where there had been a verdict for the plaintiff: it appeared, from the evidence given at the trial, that the wife had a penſion during pleaſure from the crown, determinable at the will of the crown, of 300*l.* a year, granted to her in her own name, *but not by any agreement, or otherwiſe, appropriated at all to her own uſe:* that at her return from Briſtol, the defendant, her huſband, ſhut his doors againſt her; that he had never made, or agreed to make, any ſeparate allowance to her, or had contributed any thing towards her ſupport ſince he had ſo ſhut his doors againſt her; nor had ſhe any uſe of his table, ſervants, or equipage, and there was evidence of his being reputed to have an income of about 1,800*l.* per annum.—THE COURT were extremely clear, that the huſband was liable to this action, and that the verdict obtained againſt him ought not to be ſet aſide. There was no agreement for a ſeparation: but he has ſent her adrift by ſhutting his doors againſt her: as ſhe had no admittance into his houſe, ſhe was obliged to procure lodging and maintenance ſome where elſe: every man is obliged to maintain his wife.—The penſion is only a voluntary grace and bounty of the crown; not what every creditor of her's, even for her neceſſary ſubſiſtence ſuitable to her degree and rank of life, can be ſuppoſed to give her credit upon.—Rule diſcharged.

Thompſon *v.* Hervey, Hil. Ter. 8 Geo. 3. B. R. 4 *Burr.* 2177.

The huſband cannot be ſued alone for the debt of his wife, contracted before marriage.—In aſſumpſit, the firſt count ſtated, that the defendant was indebted to the plaintiff in 50*l.* for work and labour before the defendant's intermarriage with *Ann* his wife, and while the ſaid *Ann* was a widow, done and performed, and for divers medicines found and provided, by the plaintiff, for her, and for her three ſons, by her former huſband, at her ſpecial inſtance and requeſt, and being ſo indebted, the defendant promiſed to pay, &c. There was another count, for work and labour, &c. for the defendant's wife, before her marriage with the defendant. The defendant pleaded the general iſſue; and the plaintiff obtained a verdict for 10*l.* 18*s.*—It was moved in arreſt of judgment, becauſe the wife ought to have been joined with the huſband in the action, the cauſe of action being a debt of the wife's before the marriage. For which, was cited *Robinſon* v. *Hardy, Keb.* 281. 440. and *Drue* v. *Thorn, All.* 72. alſo *Rann* v. *Hughes* (1), to ſhew that the promiſe muſt be coextenſive with

Mitchinſon *v.* Hewſon, Ts. Ter. 27 Geo. 3. B. R. 7 *Ter. Rep.* 348.

(1) In this caſe, the declaration ſtated, that an arbitrator awarded that the defendant's inteſtate ſhould pay to the plaintiff's teſtator 98*l.* That the defendant's inteſtate

with the consideration. And here, the husband is only liable to pay this debt in right of his wife, in certain events; but this is an attempt to make him liable in his own right, and at all events. THE COURT, after argument, thought, that according to the best authorities on this subject, *the action against the husband alone could not be supported*; observing, that the case cited from *Alleyn*, was a direct authority in point. And, therefore, they made the rule for arresting the judgment absolute.

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intestate afterwards died possessed of effects sufficient to pay: that administration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death, the said sum of 983*l.* was unpaid, "*by reason of which premises, the defendant, as administratrix, became liable to pay to the plaintiffs as executors the said sum, and being so liable she, in consideration thereof, undertook and promised to pay, &c.*" The defendant pleaded non assumpsit; *plene administravit*; and *plenè administravit*, except as to certain goods, &c. which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth, &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and *on the first, a general judgment was entered in B. R. against the defendant* de bonis propriis. This judgment was reversed in the Exchequer-chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor. "WHETHER sufficient matter appeared upon the declaration to warrant, after verdict, the judgment against the defendant in error in her personal capacity?" Upon which, the Lord Chief Baron *Skynner* delivered the opinion of the judges *inter alia* thus: The declaration states, that the defendant being indebted *as administratrix* promised to pay when requested, and *the judgment is against the defendant generally*. The being indebted, is of itself a sufficient consideration to ground a promise, but *the promise must be coextensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity*. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right: but *here no sufficient consideration occurs to support this demand against her in her personal capacity*; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said, that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise, that it should be in writing, it will, after verdict, be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. But it is said, that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. The words are merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be, at all events, liable. He said, that all his brothers concurred with him that, in this case, *there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference.* Judgment in the Exchequer-chamber affirmed.—*Rann* and another, executors of *Mary Hughes*, *v. Isabella Hughes*, administratrix of *J. Hughes* in error; Dom. Proc. 7 *Ter. Rep.* 350.

If a *feme covert*, without any authority from her huſband, contract with a ſervant by deed, the ſervant having performed the ſervice ſtipulated, may maintain aſſumpſit againſt the huſband.—By articles of agreement under ſeal, between Mrs. *Cuyler*, the defendant's wife, and a Mr. *Low* of the one part, and the plaintiff of the other part, Mrs. *Cuyler* agreed to take the plaintiff with her to Barbadoes, in the capacity of a waiting-maid, to pay her 21*l. per annum*, as long as ſhe continued in her ſervice, and to pay for her paſſage to Barbadoes, and other incidental expences that might ariſe in the courſe of the voyage, as alſo her paſſage home to England, in caſe Mrs. *Cuyler* ſhould diſmiſs her from the ſervice, &c. Mrs. *Cuyler* not having paid the plaintiff's paſſage home from Barbadoes, the plaintiff brought an action of aſſumpſit againſt the defendant. On the trial, it appeared in evidence that when Mrs. *Cuyler* entered into the engagement ſhe was about to ſail to Barbadoes from this country to join her huſband, General *Cuyler*, but it did not appear that ſhe was acting under any written authority from the general. It was objected that the action was miſ-conceived, for that the plaintiff ſhould have ſued upon the deed: but the judge over-ruled the objection, and there was a verdict for the defendant, with leave to move to enter a nonſuit, if this Court ſhould be of opinion that the action could not be ſupported; which motion having been made—PER LORD KENYON, Ch. J. (after cauſe ſhewn), As to the form of the action, I am of opinion that aſſumpſit will lie. The covenant by Mrs. *Cuyler* cannot bind her huſband, ſhe having no authority to bind him by a deed. Beſides, in executing a deed for the principal, under a power of attorney, the proper way is to ſign in the name of the principal. And with regard to *Low*, the contract of a guarantee, or ſurety, under ſeal, does not, by operation of law, extinguiſh the debt of the principal.—PER CURIAM, Rule diſcharged.

White v. Cuyler, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 176.

How far a Feme Covert *is perſonally anſwerable.*

A *feme covert* is liable to anſwer perſonally for a criminal offence; and though it may have been committed by her previous to her marriage, ſhe is ſtill the object of the law, as to criminal juriſdiction.—The defendant was brought up by *habeas corpus* from Lancaſhire, having been committed to the houſe of correction for diſobeying an order of two juſtices, "adjudging her child to be a baſtard, and ordering her to "maintain it, by paying 8*d*, a week, for ſo long a time as "the child ſhould be chargeable to the pariſh;" there to remain without bail or mainprize, except ſhe ſhall put in ſufficient ſurety "to perform the ſaid order, or elſe, &c. or

Rex v Ellen Taylor, late Bent, Ea. Ter. 5 Geo. 3 B.R. 3 *Burr.* 1679.

be otherwiſe diſcharged by due courſe of law." She was unmarried when the child was born; but was now married to *Taylor:* two objections were taken; 1ſt, that the juſtices had no power under the ſtat. 18 *Eliz.* c. 3. to make this order of maintenance, ſhe being then a married woman, and incapable of having any property; beſides the huſband ought to have been ſummoned: 2dly, that by the 18 *Eliz.* the juſtices are obliged to commit to the *common gaol*, and here it was to the *houſe of correction.*—LORD MANSFIELD, Ch. J. A *feme covert* is liable to be proſecuted for crimes committed by her: this woman has diſobeyed the order of the juſtices; and the 18 *Eliz.* c. 3. preſcribes the puniſhment here inflicted upon her: there is no need to ſummon the huſband in a criminal proſecution againſt the wife: 2dly, 'tis within the 6 *Geo.* 1. c. 19. ſ. 2. which authorizes the juſtices to commit vagrants and *other* criminal perſons, charged with ſmall offences, EITHER to the common gaol, OR houſe of correction; for ſhe is committed for an offence, and for want of ſureties; 'tis therefore within the proviſion of that act, and a legal commitment: and it is better for her than a commitment to the common gaol. WILMOT, J. The 18 *Eliz.* expreſsly conſiders the producing baſtards as an offence: not only the getting or bearing the child, but the leaving it to be a burthen on the pariſh, and defrauding the relief of the true poor of it: therefore, the juſtices may order a proper puniſhment, and alſo take order for the maintaining the child, in relief of the pariſh, they may do either or both: matrimony does not purge the crime: ſhe is ſtill the object of the law, as to criminal juriſdiction: ſo was the caſe of the woman ſelling gin, 2 *Strange*, 1120. there was no need to ſummon the huſband: the huſband is not liable for the criminal conduct of his wife: 2dly, and if it be a crime, ſhe is a criminal offender within the 6 *Geo.* 1. and may be committed to either priſon, as the juſtices think proper; and it is for the eaſe, benefit, and advantage of the party committed, to ſend her to the houſe of correction rather than to the common gaol. YATES, J. All offences are perſonal, and no change of the offender's circumſtances can diſcharge her: the huſband was no object of the law; therefore there was no need to ſummon him. ASTON, J. concurred.—PER CUR. Unanimouſly remanded.

Corbett *v.* Poelnitz and Ann, his wife, Mic. Ter. 26 Geo. 3. B. R. 1 *Ter. Rep.* 5.

A *feme covert* living apart from her huſband, and having a ſeparate maintenance, may contract, and be ſued as a *feme ſole.*—The declaration ſtated, that the defendant *Ann*, before her intermarriage with Baron *Poelnitz*, was the wife of Lord *Percy*; that afterwards they agreed to live ſeparate; that accordingly ſuch ſeparation took place; and that, the defendant *Ann* had a competent maintenance of 1600*l.* *per annum* ſettled on her by deed. That afterwards, the ſaid *Ann*, *before her*

her intermarriage with the defendant, Baron Poelnitz, *and whilſt ſhe was ſo* covert *with the ſaid Lord* Percy, *and alſo whilſt ſhe ſo lived ſeparate and apart from the ſaid Lord* Percy, *and alſo whilſt her ſaid maintenance from the ſaid Lord* Percy *was duly ſecured and paid to her*, to wit, on the 29th of November, in the year 1776, at London aforeſaid, &c. in conſideration that the plaintiff, at the ſpecial inſtance and requeſt of the ſaid defendant *Ann*, and for and in conſideration of the ſum of 900*l.* paid by one *Abraham Chambers* to the ſaid *Ann*, had then and there become held and firmly bound, together with the ſaid *Ann*, to the ſaid *Abraham Chambers*, by their joint and ſeveral bond, in 1800*l.* conditioned for the payment of an annuity of 150*l.* during the natural life of the ſaid *Ann*, and had alſo at the like ſpecial inſtance and requeſt of the ſaid *Ann*, together with the ſaid *Ann*, executed a warrant of attorney for confeſſing judgment on the ſaid writing obligatory for 1800*l.* and coſts of ſuit, at the ſuit of the ſaid *Abraham Chambers*, undertook, and to the ſaid plaintiff then and there promiſed faithfully, to indemnify him againſt the ſaid bond and warrant of attorney: that afterwards, and after the ſaid promiſe, *the marriage between the ſaid Lord* Percy *and the ſaid defendant* Ann *was diſſolved by act of parliament*, by which the ſame proviſion of 1600*l. per annum* was continued and ſecured to her for her life: that *afterwards, in* March, 1780, *the ſaid* Ann *was married to the defendant, Baron* Poelnitz: that afterwards, and after the marriage of the ſaid *Ann* with the ſaid Baron *Poelnitz*, to wit, on the 29th of Auguſt, 1789, 262*l.* 10*s.* became payable to the ſaid *Abraham Chambers*, by virtue of the condition of the ſaid bond, for one year and three quarters, ending on the ſaid 29th of Auguſt, 1780: that afterwards, the ſaid *Abraham* cauſed to be entered of record, upon and by virtue of the ſaid warrant of attorney, a judgment in his majeſty's court of King's Bench, at Weſtminſter, as of Trinity Term, in the twentieth year of the preſent king, at the ſuit of the ſaid *Abraham*, againſt the ſaid *Ann* and the ſaid plaintiff, upon the ſaid writing obligatory for the ſaid ſum of 1800*l.* and 63*s.* for coſts; whereupon the plaintiff, to prevent his being taken in execution upon the ſaid judgment, afterwards, on the 6th of November, 1780, was obliged to pay, and did pay, to the ſaid *Abraham Chambers* the ſaid ſum of 262*l.* 10*s.* together with 5*l.* 19*s.* for coſts; yet that the ſaid Baron *Poelnitz*, and *Ann*, had not paid him, the ſaid plaintiff, the ſaid ſums of 262*l.* 10*s.* and 5*l.* 19*s.* or indemnified him againſt the payment thereof, &c. Plea, the general iſſue. And verdict for the plaintiff. Motion in arreſt of judgment.—Lord Mansfield, Ch. J. The facts lie in a narrow compaſs, and admit of no doubt. Lord and Lady *Percy*, by a deed, mutually agreed to live ſeparate; neither

neither can break this agreement (1); and a large maintenance is ſettled on her for her own private ſeparate uſe as a *feme ſole* to all purpoſes, the ſame as if ſhe were unmarried. The claim upon which this action is founded, is of a moſt meritorious nature. Lady *Percy* applied to the plaintiff: he conſidered her as a *feme ſole*, and became ſurety for her: ſhe promiſed to indemnify him, and the contract was concluded under a firm belief on both ſides, that it was perfectly valid and binding. In juſtice, then, ſhe ought to pay this debt. But then, to encounter this, there is a rule of poſitive law, which is to be adhered to and preferred, though in ſome particular caſes it may ſeem productive of hardſhip and oppreſſion. By this general rule, *a married woman can have no property real or perſonal. Her contracts are entirely and univerſally void; for her contracts even for neceſſaries are the contracts of her huſband: ſhe cannot be ſued or be taken in execution.* This is the general rule. But then it has been properly ſaid, that *as the times alter, new cuſtoms and new manners ariſe:* theſe occaſion exceptions, and juſtice and convenience require different applications of theſe exceptions within the principle of the general rule. The queſtion then is, Whether it is ſo here? *Whether under the circumſtances of the preſent caſe a married woman ſhould or ſhould not be ſued ſolely?* Exceptions have been made in this very caſe. *Where a huſband is in exile, or has abjured the realm, and credit has been given to the wife alone, juſtice ſays ſhe muſt pay; for the huſband cannot be ſued. So it is in the caſe of tranſportation*; though the caſe is not exactly the ſame; for there the abſence is only temporary, becauſe the huſband may come over and be ſued afterwards. Why then is it ſo eſtabliſhed? becauſe the wife acts as a ſingle woman, gains credit as ſuch, receives the benefit, and ſhall be liable to the loſs: and *where ſhe has an eſtate to her ſeparate uſe, in juſtice ſhe ought to be liable to the extent of it.* In modern days, a new mode of proceeding has been introduced, and deeds have been allowed under which a married woman aſſumes the appearance of a *feme ſole*, and is, to all intents and purpoſes, capacitated to act as ſuch. *In the ancient law there was no idea of a ſeparate maintenance; but when it was eſtabliſhed, what ſaid the courts? that the huſband ſhall not be liable even for neceſſaries*; and they ſaid ſo, becauſe convenience and juſtice require it. In the preſent caſe no diſtinction has been taken at the bar, whether, ſuppoſing Lady *Percy* to be liable, her ſecond huſband is ſo? And they have done right; for ſo he muſt certainly be. The only queſtion then is, *Whether a woman married, but living ſeparate from her huſband by agreement, having a large ſeparate*

(1) 2 *Burr.* 542.

maintenance

maintenance ſettled on her, continuing notoriouſly to live as a ſingle woman, contracting and getting credit as ſuch, and the huſband not being liable, ſhall be ſued as a feme ſole? I think ſhe ſhould; it is juſt that it ſhould be ſo. I am of opinion that the preſent caſe is quite determined by two late ones, *Ringſtead* v. *Lady Laneſborough*, Hil. Ter. 23 Geo. 3. and *Barwell* v. *Brooks*, Hil. Ter. 24 Geo. 3. B. R. (1), which do not reſt upon one or two circumſtances, but upon the great principle which the Court then laid down, "THAT "WHERE A WOMAN HAS A SEPARATE ESTATE, AND "ACTS AND RECEIVES CREDIT AS A *feme ſole*, SHE "SHALL BE LIABLE AS SUCH." There is the ſame juſtice in this caſe, nor can I ſee any difference between them. WILLES, J. concurred, ASHHURST, J. It ſeems to me, that to decide the preſent queſtion we need only conſider the reaſons on which the incapacities of a *feme covert* are founded; not on the ſame ground as thoſe of an infant, whoſe diſabilities ariſe from a want of diſcretion; but firſt, becauſe ſhe has no property; and ſecondly, becauſe it would be unreaſonable to permit the wife to affect the property of her huſband, except where he will not allow her neceſſaries, in which caſe her contracts are the contracts of her huſband. Now, where a woman has a ſeparate maintenance, and the huſband cannot be charged, it follows naturally that ſhe muſt; and if ſo, we cannot draw a preciſe line, and ſay, ſhe ſhall be liable for this, and not for that; for her incapacity, ariſing from want of property, being once removed, ſhe is, in my opinion, ſuable for all. But if, as was ſuppoſed, ſhe were only liable in reſpect of her ſeparate maintenance, ſhe could not be liable generally, but only ſo long as the maintenance continued, after the manner of an executor, as long as aſſets remain in his hands. That however cannot be: if ſhe exhauſt her whole fund, it is her own folly, but does not render her leſs liable. As to her being only liable in reſpect of her firſt ſettlement, ſuch a doctrine was never before contended. If ſhe be liable at all, ſhe is liable generally; and that not only for neceſſaries, but for all contracts. I think the other two caſes govern this, and that the rule for arreſting the judgment muſt be diſcharged; for ſhe gained a general capacity to contract debts, and conſequently her ſecond huſband takes them; for he takes her *cum onere*. BULLER, J. The only conſiderable diſtinction to be found between this caſe and that of *Ringstead* and Lady *Laneſborough* is the non-reſidence of Lord *Laneſborough:* but that is intirely done away by what the Court ſaid in *Barwell* and *Brooks*, that *it made no ſort of difference whether the huſ-*

(1) See theſe caſes reported in Cooke's B. L. 32, 36.

band

land was in England or not, for he was not liable; which was the great principle that influenced the deciſion, and not his local ſituation. Hence then we have only to conſider, whether it is poſſible to draw the line that the wife ſhall only be liable for *neceſſaries*. And a queſtion has been made as to the fund that is liable; and it has been aſked, *what if ſhe alien the whole?* The argument however ſtops ſhort; for it ought to have ſhewn that the huſband would again become liable in that caſe: but *there is no colour to ſay, that, if the wife ſpends the whole of her ſettlement, her huſband ſhall be liable even for neceſſaries.* As to the prudence of the meaſure, that is no ground on which the Court can found their deciſion. In Lady *Laneſborough*'s caſe, the only queſtion was, Whether ſhe could acquire a capacity to contract? It was determined that ſhe could; and, therefore, as I think that caſe muſt govern the preſent, I am of opinion that the plaintiff may recover.—Rule for arreſting the judgment diſcharged.

Hatchett *v.* Baddeley, Ea. Ter. 16 Geo. 3. C.B. 2 *Black.* 1079.

But in an action againſt a *feme covert* under ſuch circumſtances, the huſband muſt be joined for conformity ſake.—This was aſſumpſit againſt the defendant, *Sophia Baddeley*. PLEA, non-aſſumpſit; and alſo at the time when, &c. ſhe was married to one *Robert Baddeley*, &c. REPLICATION, *proteſtando* as to the marriage, that the defendant, before the cauſe of action accrued, *eloped* from the ſaid *R. B.* and hath ever ſince lived ſeparate and apart from him; and that the work was done on her credit only. The defendant did not rejoin in due time, and judgment was ſigned for want of a rejoinder. It was intended to have demurred to the replication, but the time being ſlipped by accident, it was moved, in arreſt of final judgment, on the following grounds; 1ſt, ſuppoſing the facts to be true, that it did not therefore follow, that ſhe was liable to be ſued alone; 2dly, that it ſhould not have been alleged that ſhe *eloped*, but that ſhe lived in *adultery*; 3dly, that it ſhould have ſtated the cauſe of action to have been for neceſſaries.—DE GREY, Ch. J. The word elopement is not a legal term, nor has any expreſs meaning in the law; but it is quite indifferent in this caſe, in what ſenſe the word is to be taken: the preſent caſe is not that of *a woman having a ſeparate maintenance, and living apart from her huſband, by his expreſs permiſſion*; but of a wife, departing from her huſband's houſe, without his conſent: ſhe is, in every view, even in reſpect of dower (unleſs adultery be proved), a *feme covert*; and, as ſuch, can neither ſue nor be ſued alone: this is the general law: the exceptions to this are:—1. local cuſtoms, as in the city of London, where a *feme covert*, being a ſole trader, may be ſued: *but there the huſband muſt be joined in the action at the outſet, for conformity*:—2dly, the wife of an exile; one abjuring the realm; or, perhaps, one profeſſed; who are looked upon as dead, in law:

—3dly,

—3dly, the ſame law has been extended to caſes ſomewhat like the former, as the Ducheſs of *Mazarine*'s caſe, whoſe huſband lived in France:—all theſe are by the acts of the huſband; but no act of the wife can ever make her liable to be ſued alone; if ſhe can be ſued, ſhe can ſue, acquire property, releaſe actions, execute deeds, &c. which would overturn firſt principles; on the whole, therefore, I am clearly of opinion, *the defendant is not in a capacity to be ſued alone.* GOULD, J. The replication is ill pleaded: *elopement* is a word of too vague and uncertain a meaning: if adultery is intended by it, it ſhould not be thus inſinuated, but plainly expreſſed. BLACKSTONE, J. It ſeems to be ſuppoſed, by the argument, that if the huſband is not bound to pay this debt, it follows that the wife may be compelled alone, but this is no legal conſequence: I think, in this caſe, that it cannot be recovered of either; but be that as it may, I am clearly of opinion, that *in no caſe can any* feme covert *be ſued alone*, except in the known caſes of abjuration, exile, and the like; where the huſband is conſidered as dead, and the woman as a widow; or elſe as divorced *à vinculo:* the contrary doctrine militates againſt the firſt principles of the Engliſh law, which conſiders the woman's powers, nay, almoſt her very being, as ſuſpended, during the coverture: ſhe and her huſband may plead *non eſt factum* to her bond, *Salk.* 7. 6 *Mod.* 311. 2 *Pere Wms.* 144. If judgment be had againſt her, or ſhe be outlawed, her huſband and ſhe may reverſe it by writ of error. *Bro. Abr.* Er. 173. "The very forms of the action demonſtrate the ſame thing." If ſued alone ſhe can have no addition (as in the caſe at bar), which is in the teeth of the ſtatute 1 *Hen.* 5. c. 5. If ſued by her maiden name, it is miſnomer, 6 *Mod.* 311.: if by her huſband's name, and as widow, it is the like: ſhe cannot put in bail without her huſband, *Cro. Jac.* 445. And, as the previous ſteps are thus embarraſſed, ſo, after judgment, the remedy muſt prove defective. No *elegit* can go againſt her lands, elſe this would be a mode of alienation by a *feme covert* without a fine: it would be endleſs to purſue this idea through all its legal abſurdities, and, therefore, I am clearly of opinion for arreſting the judgment. NARES, J. concurred in opinion that *no action would lie againſt a* feme covert *without her huſband.*—Judgment arreſted.

So alſo, in aſſumpſit, by *Alexander Lean* againſt *Sarah Schutz*; there was a PLEA in abatement, that at the time of the writ iſſued, the defendant was covert with one *Charles Schutz*, her huſband, yet living. REPLICATION (proteſting againſt the fact of coverture), that before the making of the promiſes, the ſaid *Sarah* and *Charles*, on the 14th of June, 1774, were parted and ſeparated from each other, and have ever ſince lived apart; and that during all the time aforeſaid,

Lean *v.* Schutz, Ea. Ter. 18 Geo. 3. C. B. 2 *Black.* 1195.

aforeſaid, the ſaid *Sarah* hath had, and ſtill has, a large ſeparate maintenance paid to her: and that the goods ſo ſold were neceſſary and ſuitable to her degree. The defendant DEMURS to the replication; becauſe, 1ſt, It is not an anſwer to the plea. 2dly, It contains double matter, by endeavouring to bring in iſſue ſeveral facts, viz. the parting of the huſband and wife; their living ſeparate ever ſince; the eſtabliſhment of a ſeparate maintenance; its being duly paid to the wife, and that the goods were neceſſary for her, and ſuited to her ſtate and degree. 3dly, It refers to certain promiſes mentioned in the declaration, whereas the plea goes to the writ, and the replication ſhould not go beyond it. The plaintiff joins in demurrer—the caſe was fully argued, and the Court took time to conſider. After which, DE GREY, Ch. J. delivered the opinion of the Court to the following effect:—There are two queſtions which ariſe in this caſe, 1ſt, Whether the wife, having a ſeparate maintenance, is liable to anſwer for her debts as a *feme ſole?* 2dly. If ſo, *Whether the huſband ought not at leaſt to be joined by way of conformity?* The general queſtion was intended by the parties to be decided; but it is not neceſſary to decide it upon this record; for *the whole is totally vitious, as the huſband* is not privy to the record. There is no inſtance in the books of an action being ſuſtained againſt the wife, the huſband being living, at home, and under no civil diſability: even by the cuſtom of London, though the wife and her effects are alone liable to execution if ſhe be a ſole trader, yet the huſband muſt be a co-defendant. And though a wife may acquire a ſeparate character by the civil death of her huſband, as by exile, profeſſion, or abjuration, yet, by a voluntary ſeparation, ſhe does not acquire what may be called a civil widowhood, nor is taken notice of by the law as ſuch.—Judgment for the defendant.

Gilchriſt *v.* Brown, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 766.

So in aſſumpſit for goods ſold; work and labour, &c. Plea, that the defendant, who is ſued by the name of *Brown*, at the time of the promiſes, was, and yet is, covert of, and married to, one *J. Timmiſs*, who is now living. Replication, that the defendant, before the making the ſaid promiſes, and whilſt ſhe was married to *Timmiſs*, committed the crime of adultery; that afterwards, and before the making of the promiſes, &c. *Timmiſs* was ſeparated from bed, board, and cohabitation with the defendant; that the defendant hath ever ſince lived, and ſtill doth live, ſeparate and apart from *Timmiſs*, in adultery; and that whilſt ſhe ſo lived ſeparate, ſhe made the promiſes on her own ſeparate credit and account, in manner of a *feme ſole*, and not on the credit or account of her huſband. To this there was a ſpecial demurrer, aſſigning for cauſe that the plaintiff in his replication endeavoured to put in iſſue matter wholly immaterial and inconcluſive; that the

the plaintiff alledged, that the defendant was ſeparated from her huſband, &c. and introduced matter foreign to the plea, immaterial to the queſtion, and matter on which the defendant could not take iſſue, &c. The Court ſaid, that this replication could not be ſupported, for that it was deſtitute of the principle upon which all the late deciſions have proceeded, in which it has been held that a *feme covert* may be ſued as a *feme ſole*, namely, ſeparate maintenance; and therefore they gave judgment for the defendant.

Ellah v. Leigh, Tr. Ter. 35 Geo. 3 B.R. 5 *Ter. Rep.* 679.

To an action for uſe and occupation, the defendant pleaded coverture, averring, that *C. Leigh*, her huſband, was ſtill living. The plaintiff replied, that before the promiſes mentioned in the declaration, to wit, on the 1ſt of July, 1779, the defendant and *C. Leigh* were parted and ſeparated; and that afterwards, on the 2d of July, 1779, in the Conſiſtory and Epiſcopal Court of London, in a certain ſuit depending in the ſaid court between the ſaid *Charles* and the defendant, &c. the judge allotted the ſum of 200*l.* a year to be paid to the defendant as alimony during the ſuit, to commence from the return of the citation, and to be paid quarterly; that that ſuit is ſtill pending and undetermined; that that alimony was and ſtill is a ſufficient maintenance from the defendant's huſband, and was and is duly paid; that ſhe obtained credit as in the declaration mentioned from the plaintiff, on her own account, and not on the account of her huſband; and that being ſeparate and apart, and having ſuch alimony, the defendant made the promiſes, &c. on her own account and credit ſolely, in the manner of a *feme ſole*, and not on the credit of her huſband; averring, that before the promiſes were made, the plaintiff had no notice of the coverture of the defendant. To this replication the defendant demurred, and aſſigned for cauſe of demurrer, that the plea is double, and attempts to put ſeveral diſtinct matters in iſſue. Lord KENYON, Ch. J. I confeſs I do not think that the courts ought to change the law ſo as to adapt it to the faſhion of the times: if an alteration in the law be neceſſary, recourſe muſt be had to the legiſlature for it. The caſe of *Corbett* v. *Poelnitz* was indeed decided by great authority; and when a ſimilar queſtion ariſes, perhaps it may influence my judgment: but until ſuch a caſe does ariſe, I ſhall ſuſpend my opinion upon it. I remember a caſe, many years ago, in chancery, when Lord *Bathurſt* preſided in that court, where a bill was filed againſt a woman, who was ſeparated from her huſband, and had ſeparate property, to have part of this property given up in ſatisfaction of a debt contracted by her; but the Lord Chancellor thought that this property could not be touched without having her truſtees, in whom the legal eſtate was veſted, before the Court; and the caſe ſtood over to make the truſtees parties to the ſuit. In *Corbett* v. *Poelnitz*, Lady *Percy*'s property

perty was veſted in truſtees: but as thoſe truſtees were not before the Court, I do not know how that property could be got at. But without touching that authority, it is ſufficient to ſay, that this caſe is very different from that; for here, the defendant had no permanent fund; and as this is an attempt to extend the doctrine of that caſe, I am clearly of opinion, that the preſent action cannot be maintained.—Ashhurst, J. In order to make a *feme covert* anſwerable for her debts as a *feme ſole*, ſhe ought to have a permanent fund, out of which ſhe can ſatisfy her creditors: but this defendant has no ſuch permanent maintenance. Grose, J. Without interfering with the caſes that have been cited, it is enough for the deciſion of the preſent caſe to ſay, that it does not come within the principle upon which thoſe were determined; becauſe the defendant has no fixed and permanent income. It is impoſſible to ſupport this replication, whether it be conſidered as affecting the defendant or her huſband. Conſider the defendant's ſituation: before the alimony, now growing due, is paid, the ſuit in the Commons may perhaps be determined either by the huſband himſelf or by the Court, and the defendant may be taken in execution in the ſuit, if judgment be againſt her, for want of that very fund, which (it is contended,) ſubjects her to the payment of her debts. The huſband's right will alſo be invaded, if after the determination of the ſuit in the eccleſiaſtical court, unleſs there be a ſentence of divorce, he finds that his wife has been taken in execution in this action. Lawrence, J. In the caſe of *Corbet* v. *Poelnitz*, the Court ſo far conſidered the wife as a *feme ſole* for the remainder of her life, that the huſband had no property in, or controul over, that maintenance which was ſecured to the wife, and that he had no right to the perſon of the wife afterwards: whereas, here the defendant has only alimony during the pendency of the ſuit in the eccleſiaſtical court.—Judgment for the defendant.

Clayton *v.* Adams, Executor, Ea. Ter. 36 Geo 3. B. R & *Ter. Rep.* 604.

Aſſumpſit againſt the defendant, as executor of *Mary Byrne*, for goods ſold and delivered to her. Plea, that *Mary Byrne*, at the time of making the ſuppoſed promiſes, was covert of one *Arthur Byrne*. Replication, that *Mary Byrne*, at the time of making the ſaid promiſes, and from thence until her death, lived *ſeparate and apart from the ſaid* Arthur, *and carried on the trade and buſineſs of an haberdaſher as a feme ſole*, and that the plaintiff never knew of or truſted the ſaid *Arthur*, but dealt with the ſaid *Mary* as a *feme ſole*, and on her credit; and in the courſe of ſuch dealings for goods ſold by him (the plaintiff) to her, as ſuch *feme ſole* ſhe made the ſaid promiſes, &c.; that after the death of the ſaid *Mary*, the defendant, as her executor, took and poſſeſſed divers goods and chattels which were of and in poſſeſſion of the ſaid *Mary* as ſuch *feme ſole*, to the amount of more than the damages ſuſtained by the plaintiff by reaſon of the non-performance of

of the ſaid promiſes, &c. and whereout as ſuch executor he ought to have ſatisfied the ſame, &c. To this replication the defendant demurred. PER CUR. To the equity caſes that have been cited of *Norton* v. *Turvill* (1), where it was held, that the ſeparate eſtate of a *feme covert* was liable for the diſcharge of her bond debt. And *Hulme* v. *Tenant* (2), where Lord Chancellor *Thurlow* ſaid, that the engagements of the wife ſhould operate on her perſonal property. I fully ſubſcribe: but they cannot govern us in a court of law. A court of equity can mould intereſts differently from a court of law; and can give relief in caſes where a court of law cannot. *In order to enable the plaintiff to recover in this action, he ſhould have ſhewn, that the* feme covert, *when alive, might have been ſued, and that the defendant was poſſeſſed of that property in reſpect of which ſhe was liable:* but it does not appear that this could have been the ſeparate property of the wife. And the probate of the will of the wife was abſolutely void. We cannot determine that an action might have been maintained againſt this *feme covert*, without alſo ſaying, that ſhe might have been taken in execution: but that would operate as a divorce between the huſband and wife. In a late caſe, reported in 2 *Vez. Jun.* 145, the Lord Chancellor ſaid, that if the huſband and wife be ſeparated by deed or ſentence, an action may be brought againſt the wife alone. I take it for granted, that the doctrine there laid down was correct as far as it applied to that particular caſe; but I doubt extremely the generality of that rule: according to that, a wife might be taken from her huſband, though the ſeparation by deed was only temporary. We muſt not, by any whimſical conceits ſuppoſed to be adapted to the altering faſhions of the times, overturn the eſtabliſhed law of the land: it deſcended to us as a ſacred charge, and it is our duty to preſerve it. And if any one propoſition in the law can be more clear than another, it is this, that an action cannot be brought againſt a *feme covert*, except by the cuſtom of London. A court of law cannot get at the property of the wife, if ſhe have any. But courts of equity make their decrees ſo as to arrive at the juſtice of the caſe without violating the rules of law; to effect which, they follow the property of a *feme covert* in the hands of her truſtees. And I particularly remember when one caſe firſt came before Lord *Bathurſt*, he inſiſted that the truſtees ſhould be made parties to the bill before he would give any relief. LAWRENCE, J. It does not appear that the wife could acquire any property.—Judgment for the defendant.

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(1) 2 *P. Wms.* 144. (2) 1 *Bro. Ch. Caſ.* 16.

Roberts *v.* Andrews, *et ux.* Tr. Ter. 10 Geo 3. C. B. 3 *Wils.* 124. 2 *Black.* 720.

If husband and wife be rendered after judgment in discharge of bail, the wife may be discharged out of custody upon motion.—This was an action against husband and wife, for a debt contracted by her *dum sola*. After judgment against them, they were both rendered to prison in discharge of their bail; *and not being now charged in execution*, it was moved, that the wife might be discharged out of custody on common bail.—PER CURIAM, The rule and practice is, that where there is judgment and execution against both the husband and wife, she shall not be discharged; but if they be both in custody upon mesne process, the wife shall be discharged upon common bail. In the present case, they are rendered to prison in discharge of their bail, and are now in the same situation as if bail had never been put in for them; so are really in prison for want of bail to the first process; and not being charged in execution, the wife must be discharged out of prison, see 2 *Strange* 1167, 1237, 1272. 1 *Wils.* 149. in *Jan.* 1750. *Coffin*, executor, v. *Filleux*, B. R. Husband and wife were rendered in discharge of their bail; before execution, it was moved, that she might be discharged on common bail, which was ruled accordingly. In *Trin.* 1754. *Wilmot* v. *Butler et ux.* B. R. Husband and wife were both in execution. *Pratt* obtained a rule to shew cause why the wife should not be discharged out of custody, BUT PER CURIAM, Where judgment and execution are against husband and wife, she shall not be discharged, but only when she is in custody upon mesne process.

Waters *v.* Smith, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 451.

On shewing cause against a rule to discharge the defendant out of custody on filing common bail, on the ground that she was a *feme covert*, it was contended, that the ground of the application, if true, was a defence to the action; and that this was not the time for making such an objection.—PER CUR. Though when a married woman imposes on a trader, and contracts on her own credit, we will not relieve her in a summary way, yet, according to the latest authority on the subject, with which the master has furnished us, where it has clearly appeared that the defendant was a *feme covert*, and there has been no contrariety of evidence about the fact, the court has discharged her out of custody on filing common bail. Here that fact is positively sworn to on one side, and not contradicted by the other. Therefore, let the rule be made absolute.

Edwards *v.* Rourke & Wife, Mic. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 486.

Non est inventus having been returned, to a writ sued out against both the defendants, as to the husband, the defendant's wife was arrested; and she afterwards obtained a rule to shew cause why she should not be discharged. PER CUR. (after cause shewn), There are many authorities in favour of this application, and none against it; and the cases go with the

the reaſon of the thing, for a *feme covert* has no property of her own, and if it were permitted to arreſt her, ſhe might be impriſoned for her life.—Rule abſolute.

So, where the defendant had been arreſted and holden to bail, for penalties to the amount of 200*l.* incurred by inſuring tickets in the lottery, a rule was granted to ſhew cauſe why ſhe ſhould not be diſcharged on entering a common appearance, and the bail-bond given up to be cancelled, on the ground, that ſhe was a married woman, which appeared from her own affidavit: but it was alſo ſtated, that her huſband reſided at Birmingham and ſhe in London. GOULD, J. ſeemed to diſapprove of the ſummary proceeding by motion, and of taking the fact of coverture from the defendant's affidavit. He mentioned the caſe of Mrs. *Baddeley*, 2 *Black.* 1079. in p. 300, *ante*, where the Court were not ſatisfied with an affidavit, but put her to plead her coverture; and he ſaid, he had always underſtood, that ſuch was the courſe both in the King's Bench and in this court. BUT THE COURT made the rule abſolute, being of opinion, that the coverture of the defendant was a good reaſon to diſcharge her. Pritchett *v.* Rachel Croſs, Hil. Ter. 32 Geo. 3. C. B. 2 *Hen. Black.* 17.

But the Court will not diſcharge a *feme covert* on common appearance, unleſs the coverture be open and notorious.— It was moved to diſcharge the defendant, *Margaret Meadon*, arreſted by the name of *Mary Meadon*, on a common appearance, as being a *feme covert*; upon her affidavit that ſhe was married the 30th of October, 1764, at Saint Margaret's, Weſtminſter, to *George Frederick Meadon*, with whom ſhe has ever ſince cohabited, and he is generally known to be her huſband; but that ſhe was arreſted by the defendant, though the cauſe of action, if any, aroſe ſince the coverture, and that the plaintiff then knew her to be the wife of *George Frederick Meadon*. By the copy of the regiſter produced it appeared, that on the 30th of October, 1764, *Frederick Meadon* was married to *Margaret Hughes*; and a bill of exchange alſo drawn by *George Meadon*, was produced, which the defendant offered to the plaintiff to be changed for her on the 10th of February, 1772, the day when their dealings commenced. PER CUR. Where a tradeſman gives credit to a woman of genteel appearance, for articles of dreſs, not much beyond her level (as was the preſent caſe, the plaintiff keeping a houſe in Taviſtock-ſtreet), and he does not know her to be a married woman, nor does ſhe inform him ſo, nor is her coverture of ſuch ſufficient notoriety, as upon reaſonable enquiry he might find it out; if, in ſuch a caſe, he brings his action and arreſts her as a *feme ſole*, the Court will not interfere in this ſummary way to deliver a woman in ſuch circumſtances as contributed to impoſe upon him, but will leave her to plead coverture: though they certainly would diſcharge a *feme covert* who lived openly Pearſon *v.* Mary Meadon, Ea. Ter. 13 Geo. 3. C. B. 2 *Black.* 903.

with her huſband, however the plaintiff might pretend ignorance of it; for then it is his duty to inform himſelf. But in the preſent caſe, from the confuſion of the chriſtian names of the ſuppoſed huſband, it is by no means clear to the Court that the defendant is really a *feme covert*; and if ſhe was, there was not a ſufficient notoriety of it to the world, ſo as to entitle her to her diſcharge in a ſummary way; for which reaſons, the Court does not think it neceſſary to interpoſe, but will leave her to her regular remedy.—Rule diſcharged.

De Gaillon v. Victorie Harel L'Aigle, Ea. Ter. 37 Geo. 3. C. B. 3 *Pul.* et *Boſan.* 8.

So, on a rule to ſhew cauſe why, on the defendant in this action entering a common appearance, the bail-bond ſhould not be ſet aſide, and all further proceedings againſt the ſheriff of Middleſex be ſtayed, it appeared, that in November, 1792, the plaintiff M. *De Gaillon*, a M. *L'Aigle*, and the defendant Madame *L'Aigle* his wife, came over together as emigrants from France to England. In July, 1795, M. *L'Aigle* left England for Hamburgh, and then gave a power of attorney to the defendant to manage his affairs. In purſuance of which ſhe drew and accepted bills for him. Since the huſband's reſidence in Hamburgh, he had carried on buſineſs with the houſe of *Dubois* and ſon in London, and the defendant had cohabited *with another perſon* of the name of *Montelun*, who called himſelf *Piccardi*, by whom ſhe had a child, and with whom ſhe had been carrying on trade. In June 1796, the plaintiff wrote the following letter to the defendant: "Will you, or can you procure me merchandize "for 700*l.* as ſoon as poſſible? I will ſend you immediately "300*l.* on account, and I will ſend your huſband goods to "the amount of 600*l.* to Hamburgh; and in return he will "ſend me French goods to that amount, ſuch as brandy, "hollands, or what he may think moſt advantageous to "me." Soon after this, the plaintiff depoſited 300*l.* in the hands of the defendant, for which ſhe gave him a receipt *in her own name*. The plaintiff having obtained no goods, preſſed the defendant to repay the 300*l.* which he had advanced, upon which, the following arrangement took place. The defendant gave the plaintiff 100*l.* in goods, and four bills on her huſband, for 50*l.* each; the bills were in form as follows: "One month after date, pleaſe to pay to the order "of M. *De Gaillon*, 50*l.* ſterling, value received. (Signed.) "Wife *Harel De L'Aigle*, by virtue of power of attorney." M. *L'Aigle* accepted the bills, but on their becoming due refuſed to pay; on which, they were returned to England proteſted, and the defendant was arreſted for the ſum of 180*l.* being the balance due to the plaintiff on the whole tranſaction. The defendant ſtated, in an affidavit, the plaintiff's knowledge of her coverture at the time of her coming over to England: the plaintiff, on the contrary, denied in his affidavit any intimate acquaintance with M. *L'Aigle*, and declared

clared that he had reaſon to ſuppoſe from the defendant's conduct in England, that in fact ſhe was not married to him. EYRE, Ch. J. Theſe parties came from France, where it is not unuſual for the wife to deal ſeparately from the huſband. In this caſe, the huſband reſided at Hamburgh, ſhe lived with another man, and he made no objection. She muſt therefore be reſponſible for her own trading, and ſhould not be allowed to ſhelter herſelf under the name of her huſband, who is in a foreign country. BULLER, J. We are not called upon to decide whether the defendant be married or not. It may happen that her coverture may be a good defence. Theſe caſes afford no general rule. They turn on nice circumſtances. If the 300*l.* had been advanced on the huſband's account, I ſhould have wiſhed the Court to interpoſe; but ſhe took it for her own uſe. The huſband had no connection with her trading. The obſervation of my Lord, that theſe parties are French, is very material. In France, married women have many rights, which are allowed to none but ſingle women in this country. If ſhe received the 300*l.* on her own account, ſhe is intitled to no favour. A diſcharge is a favour; and the queſtion now is, Whether we are to grant a favour or not? If ſhe can prove a marriage at the trial, it may be a defence at law. Let her put her coverture on the record. HEATH, J. The plaintiff took the bills from the defendant, drawn by procuration, as the only ſecurity which he could obtain for the debt. But the money was originally advanced to her as a *feme ſole*. ROOKE, J. On the opening of this queſtion, I wiſhed for further diſcuſſion; but on diſcuſſion, am entirely ſatisfied. Let her plead her coverture.—Rule diſcharged.

Neither will the Court diſcharge a woman under arreſt on common bail, as being married, if ſhe obtained credit pretending ſhe was ſingle.—On a motion to diſcharge the defendant out of cuſtody on common bail, in this action of *aſſumpſit* for 50*l.* on her affidavit, ſtating that ſhe was a married woman, and annexing thereto a copy of the regiſter of her marriage. An affidavit was produced by the plaintiff, ſtating, that when the defendant applied to him to borrow the money, he had objected to her the rumour of her being a married woman, which ſhe had poſitively denied. PER CUR. The defendant, after having been guilty of this fraud, ought not to be diſcharged upon this ſummary motion, but ought to be left to her plea of coverture in the ordinary courſe of proceeding. For the Court have always held, that if the fact itſelf of the marriage were in doubt, or there had been any fraud committed by the defendant to procure the credit, they will not interfere in a ſummary way to give relief.

Partridge *v.* Clarke, Ea. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 194.

Power of the Wife as to her ſeparate Eſtate.

Goodright *ex. dim.* Carter *v.* Straphan *et al.* Mic. Ter. 15 Geo. 3. B.R. *Cowp.* 201.

A redelivery by a *feme*, after death of *baron*, of a deed delivered by her whilſt covert, is a ſufficient confirmation of ſuch deed ſo as to bind her, without its being re-executed or re-atteſted.—Upon ſhewing cauſe why a new trial ſhould not be granted, the caſe appeared to be as follows:—In ejectment for a houſe in Thames-ſtreet, the leſſor of the plaintiff ſhewed a right, under the will of one *James Roberts*, dated July 14th, 1710, the defendants claimed as or under the repreſentatives of one *Greening*, who had been in poſſeſſion from the year 1737; but it was ſhewn, that he had accounted for the rents and profits to the leſſor of the plaintiff and her huſband, and therefore there was no pretence for a bar by the ſtatute of limitations. BUT THE OBJECTION WAS, That by indenture, bearing date the 19th of July, 1737, and made between *Charles Carter* and *Elizabeth* his wife on the one part, and *William Greening* on the other part (reciting, that *Elizabeth Carter*, the leſſor of the plaintiff, after the deceaſe of *Mary Trimmer*, by virtue of the will of *James Roberts*, was or would be well intitled to the inheritance of the ſaid houſe in Thames-ſtreet, and alſo to three other houſes in Reading, and reciting, that the ſaid *Charles Carter* was then indebted to *Greening* in 102*l.* and at the ſpecial inſtance and requeſt of *Charles Carter* and *Elizabeth* his wife, had agreed to furniſh them with a further ſum of 144*l.* for the maintenance and ſubſiſtence of them and their family, ſo long as the ſaid *Mary Trimmer* ſhould live; by way of mortgagee, they demiſed to him, as well the ſaid houſe in Thames-ſtreet, as the three houſes in Reading, for the term of ninety-nine years, at a pepper-corn rent, from the death of the ſaid *Mary Trimmer*, with a proviſo of redemption on payment of the ſaid ſum with intereſt, at the end of ſix months after the deceaſe of *Mary Trimmer*, and the huſband covenants to pay, &c.) and the deed was executed by both.—Three exhibits were produced, all ſubſequent to the death of *Charles Carter* the huſband. THE FIRST was an account ſtated, conſiſting, amongſt other articles, of a receipt for rent of the houſe in Thames-ſtreet, from 1755 to 1760, out of which was deducted *an article for intereſt due*; a balance ſtruck; and the account ſigned by *Elizabeth Carter*. THE SECOND as follows: 23d of May, 1763. I do hereby ſurrender the poſſeſſion of a houſe belonging to me at Reading, late in the occupation of Mr. *Collins*, but now empty, to Mr. *Thomas Saunders* and *William Smith*, executors of Mr. *William Greening*, the mortgagee thereof; ſigned *Elizabeth Carter*; witneſs *John Lewis*. THE THIRD: Mr. *Miles*, I do hereby direct you to attorn

attorn tenant of your houſe and ſhop at Reading, from Lady-day laſt, to Mr. *Thomas Saunders* and Mr. *William Smith*, executors of Mr. *William Greening*, the mortgagee of the ſaid premiſes, and to pay them all rent that ſhall become due for the ſame from that time. And I deſire you will pay the rent that was due at Lady-day laſt, to the ſame perſon as you formerly paid your rent to, for my uſe. *Elizabeth Carter.* Witneſs, *John Lewis.*—Lord MANSFIELD, Ch. J. delivered the opinion of the Court. It is inſiſted by the defendants, that the ſeveral exhibits, proved in the cauſe, amount to a ratification of the mortgage by the leſſor of the plaintiff; in ſtrictneſs, *a fine is the proper method for a married woman to part with her right:* ſo that a formality of law only is wanting: but in conſcience, ſhe has confirmed this ſecurity: after ſo many ſolemn acts on her part, to contend that the mortgage is void is a proceeding againſt every principle of natural juſtice and equity. The counſel, at the trial, put it upon the footing of leaſes by huſband and wife, reſerving rent or no rent, which the authorities ſay are not void, but only voidable by the wife after the huſband's death; and if ſhe ratifies them, ſhe is bound. It was anſwered, that theſe authorities were by way of exception to the general rule of law, which ſays, the deed of a married woman is void; and they were allowed for the ſake of agriculture and tillage: that this, it is true, is a leaſe for ninety-nine years, and a century ago the Court would not have ſeen further: but now it is ſaid, the Court muſt look further and ſee the real intent of the deed; namely, that it was a mortgage.—WE are all of opinion, that the anſwer is a good one, and that the exception to the general rule was allowed of for the advancement of agriculture and tillage. WE are alſo of opinion, that the Court ought to look into the ſubſtance of the deed, and to ſee with the ſame eye as the reſt of the world: it is in ſubſtance a mortgage, though in form a leaſe for ninety-nine years: but we think we have good authority to ſay, that *the wife is nevertheleſs bound by it, and that her ſubſequent acts ſet up this mortgage againſt her.* *Perkins*, which is a very good authority in point of law, in ſec. 154. ſays, "It is to be known, that a deed cannot have and take effect at every delivery as a deed; for if the firſt delivery take effect, the ſecond delivery is void: as in caſe an infant, or a man in priſon, makes a deed, and deliver the ſame as his deed; and afterwards the infant when he cometh to his full age, or the man impriſoned when he is at large, deliver again the ſame deed, as the deed which he delivered before as his deed, this ſecond delivery is void: but if a married woman deliver a bond unto me, or other writing as her deed, this delivery is merely void; and therefore, if after the death of her huſband, ſhe being *ſole*, deliver the ſame deed again unto me as her deed, the ſecond delivery is

good and effectual." The Year Books, *Mic. Ter.* 3 *H.* 6. 4. and *Hil. Ter.* 8. *H.* 6. 8. confirm the propoſition laid down by *Perkins*, namely, that the deed is not to be re-executed or re-atteſted; but delivered only: now, delivery is an act in *paris* only. THE QUESTION then is, WHETHER the law has laid down any preciſe form, in which delivery muſt be made, or whether circumſtances may not be equivalent to it, without actual delivery? Lord *Coke*, in his Commentary on *Lit.* 36. ſays, "as a deed may be delivered to a party without words, ſo a deed may be delivered by words, without any act of delivery; as if the writing, ſealed, lies upon the table, and the feoffor or obligor ſays to the feoffee or obligee, 'take up the ſaid writing, it is ſufficient for you, as it will ſerve your turn,' it is a ſufficient delivery," 2 *Roll. Abr.* 26. *pl.* 2.—This brings it to the ſingle queſtion, Whether theſe facts amount to a delivery? Now, the mortgage deed was in the hands of the mortgagee: the wife after the death of her huſband, the mortgagor, ſurrenders poſſeſſion, under her own hand, to *Sanders* and *Smith*, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee, in terms: this is a clear acknowledgment that the deed was her's; and that ſhe was content the defendants ſhould enjoy, according to the terms of the deed: therefore, we are all of opinion for the defendants, and that theſe facts were a confirmation of the mortgage, upon the ground of their being equivalent to a redelivery of the deed.

Compton v. Collinſon, Hil. Ter. 30 Geo. 3. C. B. 2 *Hen. Black.* 334.

A caſe which was ſent out of Chancery for the opinion of this Court, ſtated, in ſubſtance, that *Jane Collinſon*, a married woman, lived apart from her huſband under articles of ſeparation; by which he covenanted, that ſhe ſhould enjoy to her own uſe, all ſuch eſtates both real and perſonal, as ſhould come to her during the coverture, and that he would join in the neceſſary conveyances to limit them to ſuch uſes as ſhe ſhould appoint; that copyhold lands having afterwards deſcended to her, the huſband again covenanted in the ſame manner as before, and that he would *join in ſurrendering* ſuch eſtates to ſuch uſes as ſhe ſhould appoint; that on May 16, 1771, the ſaid *Jane Collinſon was admitted to the copyholds held* of the manor of Banſtead, and on the ſame day *ſhe ſurrendered them to the uſe of her will:* June 3, 1771, the ſaid *Jane* was admitted to the copyholds, held of the manor of Ryegate, and on the ſame day ſhe ſurrendered them to the uſe of her will: July 5, 1772, by a certain paper writing, of that date, purporting to be the will of the ſaid *Jane Collinſon*, ſhe *deviſed the copyholds held of both manors*, ſubject to debts, legacies, and funeral expences, to *John Willis and his heirs*, and appointed him executor: July 15, 1772, the ſaid *Jane Collinſon* made *an abſolute ſur-*

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render of the copyholds held of the manor of Banſtead, to the ſaid *John Willis and his heirs*; and the ſame day the ſaid *John Willis* was admitted thereto, and at the ſame court the ſaid *John Willis* ſurrendered the ſaid copyholds, to the uſe of his will: July 15, 1772, the ſaid *Jane Collinſon* made an abſolute ſurrender of the copyholds held of the manor of Ryegate, to the ſaid *John Willis and his heirs*, and the ſame day, the ſaid *John Willis* was admitted thereto, and at the ſame court the ſaid *John Willis* ſurrendered the ſaid copyholds to the uſe of his will: *Michael Collinſon, the huſband of* Jane, *did not join or concur in any of the aforeſaid ſurrenders made by* Jane, *his wife*: July 26, 1772, the ſaid *Jane Collinſon*, by another writing of that date, purporting to be a codicil to her will, after reciting the ſaid ſurrenders, and that the ſame were made in truſt, for ſecuring the payment to the ſaid *John Willis*, of ſuch ſums as he ſhould, during her life, advance for her uſe; declared, in caſe the copyholds ſhould not be ſold at her death, for the purpoſe of paying her debts, then that the ſaid *John Willis* ſhould ſtand ſeiſed thereof, charged with all ſums, which ſhould be due from her at her death, or which he ſhould pay by her order, and the fines and fees of admiſſion; in truſt for himſelf, his heirs, &c.; September 1, 1772, the ſaid *Jane Collinſon* died, leaving the ſaid *Michael Collinſon*, her huſband, ſurviving her, and *Charles Steynſham Collinſon*, her heir at law, and heir according to the cuſtoms of the ſaid manors of Banſtead and Ryegate. THE QUESTION was, Whether *John Willis* took any, and what, eſtate, under the ſurrenders, will, and codicil, of the ſaid *Jane Collinſon*, or under either, and which of them?—And now, after argument, the judgment of the Court was thus given by LORD LOUGHBOROUGH: The ſubject of diſpute being copyhold lands, it is evident, that unleſs the ſurrenders be valid, no eſtate can paſs at law. No ſpecial cuſtom is ſtated, and, therefore, the ſurrenders muſt be judged of by the general law of copyhold eſtates. The ſeveral ſurrenders, on the face of them, are the ſurrenders of *Jane Collinſon*, as a *feme ſole*: for it is not ſtated that ſhe was privately examined, nor is any notice taken of her being a *feme covert*, nor is there any aſſent, or evidence of aſſent, on the part of the huſband accompanying the ſurrenders. She is ſtated by the caſe, to have been in truth the wife of *Michael Collinſon*, ſeparated from him, firſt by articles renouncing all his right to whatever eſtates, real or perſonal, might come to her during the coverture; and, ſecondly, by deed after the copyhold eſtates had deſcended to her, covenanting that ſhe ſhould enjoy the ſame to her own uſe; and that he would join in making a ſurrender of ſuch eſtates, and in limiting them to ſuch uſes as ſhe ſhould appoint. *By force of theſe articles, and of this deed, all the right of the huſband is barred.* The queſtion,

queſtion, therefore, is, whether the ſurrenders of *Jane Collinſon*, her huſband not having joined, ſhall bar her heir? There are two diſtinct ſurrenders of each copyhold: the firſt made May the 26th and June the 3d, 1771, to the uſe of her will; the ſecond July the 14th and 15th, 1772, abſolute ſurrenders to *John Willis*, on which he was admitted, and which he on the ſame day ſurrendered to the uſe of *his* will. If *Jane Collinſon* had a full power to make a valid ſurrender, the laſt ſurrenders have paſſed all her eſtate at law to her ſurrenderee. Theſe ſurrenders took effect immediately; ſhe could not herſelf have avoided them, nor could the huſband againſt his own covenant. If ſhe had ſued jointly with her huſband to avoid them, it would have been incongruous to have alleged as a defect in the ſurrender, the omiſſion of that which the huſband had covenanted to do, and which it was in her power to procure; and if ſhe had ſued as a *feme ſole* againſt her own ſurrender, it would have been ſtill more prepoſterous. If, therefore, *Jane Collinſon* could not have avoided theſe ſurrenders, it is difficult to conceive how her heir ſhould be in a better condition with reſpect to an abſolute ſurrender binding upon her, whatever claim he might have againſt a ſurrender to the uſe of her will. It cannot be more neceſſary that the huſband ſhould join with his wife in the ſurrender of her copyhold, than in levying a fine of her freehold eſtates. But it has been ſettled ever ſince the caſe in the 17 *Ed.* 3. (1), that *if a fine be levied by a* feme covert *without her huſband, it ſhall bind her and her heirs, if it be not avoided by the huſband*; and both (2) *Rolle* and *Comyns* ſeem to intimate, that the law would be the ſame as to a recovery. Had the preſent caſe been of a freehold eſtate conveyed by the wife, by fine, without her huſband, it would clearly have bound her heirs, and the huſband being eſtopped by his deed, the eſtate of the conuſee would have been indefeaſible at law. The modes of conveying freehold and copyhold eſtates are different, but there is ſurely a fair argument from analogy, that a copyhold eſtate tranſmiſſible under the ſame circumſtances as a freehold, ſhould be governed by the ſame rules. Both are public conveyances, and from the nature of copyholds, there is more reaſon to ſupport the ſurrender of a *feme covert*, where the intereſt of the huſband is not affected by it, than there is to make a fine effectual without his joining. Of a freehold eſtate the huſband is *ſeiſed* in right of his wife; of a copyhold he has a mere *poſſeſſion*. He is not admitted in her right;

(1) *Year Book*, 17 *Ed.* 3. 52 *and* 78. Aſſi. pl. 17. *Bro. Abr.* tit. *Fines*, pl. 75.

(2) 1 *Roll. Abr.* 346. *l.* 50. *Com. Dig.* tit. *Bar. and Feme* (P. 1.)

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ſhe is the actual tenant; and, when a copyhold deſcends to a married woman, the new grant of the lord is to her, and not to the huſband. In oppoſition to this reaſoning, two caſes were cited at the bar, which were ſuppoſed to have denied the application of any argument drawn from the caſe of a fine, to the validity of a ſurrender; and to have aſſerted the abſolute nullity of a ſurrender by a *feme covert*, without the concurrence of her huſband. The firſt of theſe caſes is *Taylor* v. *Philips*, 1 *Vez.* 229. Now all that can be inferred from that report of Lord *Hardwicke*'s opinion is, that if the fact had been fully before him, he would have made a caſe for the opinion of a court of law upon this very queſtion, whether a ſurrender by a *feme covert* without her huſband's joining, but with his aſſent, was an effectual ſurrender? But as there was ſome reaſon to ſuppoſe there might be a ſpecial cuſtom to warrant that ſurrender, he directed a trial. It is evident then, that Lord *Hardwicke* was of opinion, that a cuſtom for a *feme covert* to ſurrender without her huſband joining, might be a good cuſtom, for otherwiſe the trial would have been idle, and he would have directed at once a caſe for the opinion of the judges. This obſervation will alſo materially apply to the next caſe, which is *Stephens* v. *Tyrrell*, 2 *Wilſ.* 1. where, according to the report, the court of Common Pleas held, that a cuſtom for a *feme covert* to ſurrender without her huſband's joining, is contrary to law, and bad. In this caſe it is ſaid, that the chief juſtice obſerved, that it was not ſtated whether the huſband was to conſent, though he did not join, and therefore it muſt be taken to be without his conſent. Now the natural inference from thence is, that the conſent of the huſband, though he did not join, would have made the ſurrender effectual. The chief juſtice there cenſures an inaccuracy in 2 *Danvers' Abridgement*, 430. *pl.* 10. cited in ſupport of the cuſtom, and the remark is juſt. But when one looks into the caſes referred to in *Danvers*, it is evident that they furniſh an authority in ſupport of a ſurrender without the huſband's joining in the act of the ſurrender. The firſt is an anonymous caſe in *Moore*, 123. where a cuſtom for a married woman to deviſe her copyhold lands, with the aſſent of her huſband, was holden to be good. The next are 3 *Leon.* 81. *Godb.* 14 *and* 143. and 2 *Brownl.* 218. which all treat of the ſame caſe, *viz. Skipwith*'s caſe. There were two parts of the cuſtom alleged in that caſe, the one, that a married woman might deviſe; the other, that ſhe might ſurrender in the preſence of the ſteward and ſix of the tenants. The ſtate of the caſe in *Leonard* ſhews that the will was made in favour of the huſband, in the preſence of the ſteward and ſix of the tenants; and, at the next court, the ſurrender to the uſe of the will was alſo in the preſence of the ſteward and

and ſix of the tenants. The cuſtom ſeems to have been holden good in ſubſtance, and it is probable that it was ſo, from the citation in (1) 2 *Brownl.* 218. This is, therefore, an authority, that a ſurrender without the huſband's joining, though certainly in a caſe where his aſſent might be preſumed, is good. The reaſoning of the chief juſtice, according to *Wilſon*'s report, proceeds upon a ſuppoſition, that the cuſtom ſtated excludes the huſband intirely, becauſe it does not expreſsly require his conſent, and that it would therefore enable the *feme covert* to diſpoſe of her eſtate againſt his conſent. But this is by no means a neceſſary concluſion. A ſurrender without the huſband, may be a good diſpoſition againſt all but him, and his right to avoid it is not inconſiſtent with ſuch a cuſtom. The reaſons, therefore, on which the cuſtom in *Wilſon* is condemned, do not appear quite ſatisfactory; and it has always appeared to me ſomewhat arbitrary, to condemn a cuſtom, becauſe it is not conformable to the general law and policy of the nation. That eſtates ſhould be holden, in ſome manors, by an heireſs, independent of her huſband, is not more ſingular, than in others that the eſtate ſhould veſt abſolutely in the huſband, by the intermarriage, which is the caſe in ſome manors in Weſtmoreland. This caſe, then, goes no farther than an opinion, that a ſurrender, in which the huſband neither joins nor aſſents, cannot be good; but if that opinion were well founded, it would not affect the preſent caſe. In both *Vezey* and *Wilſon*, the obſervation made on the analogy of a fine is, that it works by eſtoppel. In the caſe in *Vezey*, Lord *Hardwicke* is ſpeaking of the fine of a tenant in tail, where no intereſt paſſes, which, he ſays, will be good againſt the heir by eſtoppel, and the phraſe is very correctly uſed. But as to a *feme covert* levying a fine, where it conveys an intereſt, it ſhall bind her and her heirs, if the huſband does not enter and avoid it, becauſe, ſays Lord *Coke*, ſhe was *examined and has power over the land.* 10 *Rep.* 43. *a.* The fine there paſſes the eſtate, and when it is ſaid that ſhe is eſtopped by it, the expreſſion is uſed in the ſame looſe manner as when it is applied to any other perſon contending in oppoſition to his own deed, by which he has paſſed away the intereſt and eſtate which he would claim. It was objected in the argument, that no cuſtom is ſtated in the caſe, and that a ſurrender by a *feme covert*, even with the huſband's joining, can in no caſe be good, but by the particular cuſtom of a manor. No authority was cited for this poſition, but it was argued, that from the ſeveral caſes, viz. *Dyer*, 363. *b.* *Cro. Eliz.* 717. and *Litt. Rep.* 274. (in

(1) It is there cited *arguendo*, by the name of *Skegg*'s caſe.

which

which the validity of a cuſtom for a *feme covert* being ſeparately examined, and her huſband joining, to make a ſurrender, is affirmed), it was ſtrongly implied, that ſuch a ſurrender would not be good by the general law of copyholds. This objection reſts on a ſuppoſed defect in the ſtatement of the caſe. But the court will intend that the ſurrender by the wife ſeparately examined with the huſband joining, would have been good. The caſe could not otherwiſe have been made; and even if the argument had been upon a ſpecial verdict, the objection would not prevail. For it would be contrary both to law and reaſon, that the copyhold of a woman ſhould become unalienable by her marriage, and it is againſt the nature of copyhold eſtates, that they ſhould not be ſurrendered back to the lord, by the act of all the perſons having any intereſt in them, and having a diſpoſing power. Lord *Coke* ſays, "This is the general cuſtom of the realm, that every copyholder may ſurrender in court, and need not to allege any cuſtom therefore," *Co. Litt.* 59. *a.* and in *Combe*'s caſe, 9 *Rep.* 75. it is holden to be a neceſſary conſequence of this, that every copyholder may ſurrender by attorney, as a thing incident by the common law; and in the pleadings of that very caſe, a ſurrender by a *feme covert* and her huſband is pleaded, without any cuſtom being alleged, *Co. Entries*, 576. The caſes which are ſaid to afford a negative implication, that without a cuſtom, the ſurrender, by a huſband and wife, of the copyhold of the wife, would not be good, cannot be ſo conſtrued. The caſe in *Dyer*, 363. *b.* aroſe upon a queſtion whether a cuſtom in the vill of Denbigh, that a *feme covert* with her huſband, by ſurrender and examination in court, might alien her land, was taken away by the ſtatute of Wales, 27 *Hen.* 8. c. 26.; and the opinion of *Dyer* and *Wray* was, that ſuch cuſtom was not abrogated, becauſe it was reaſonable and agreeable to the cuſtom of England, for the aſſurance of purchaſers. The caſe in *Cro. Eliz.* 717. ſtates a queſtion, whether the examination of a *feme covert* out of court, by two tenants, be good, without a ſpecial cuſtom; and it is holden that it is not, becauſe it is a judicial act more proper to be done in court; admitting, at the ſame time, that a ſurrender on a ſole examination in court would bind her by the *cuſtom*, *i. e.* by the *general* cuſtom; for though the ſtate of the facts does not appear by the report, it is fairly to be collected, that no ſpecial cuſtom for a *feme covert* to ſurrender in court, was given in evidence. The ſhort note in *Litt. Rep.* 274. ſeems more to favour the argument, than the two preceding caſes, which, attentively conſidered, rather make againſt it. But it may eaſily be diſcovered, why in the caſe of *Littleton*, the defendant choſe to allege a cuſtom, rather than to rely on the general law.

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He makes uſe of terms much more extenſive than the general law: he pleads a cuſtom that *quælibet fæmina viro coperta (including infants)* may ſurrender; the plaintiff replies that every woman of full age may ſurrender without traverſing the cuſtom that *quælibet fæmina*, &c. and the court holds the replication bad, for he ought to have traverſed the cuſtom alleged by the defendant. It might be a queſtion, whether by ſpecial cuſtom, a *feme covert* infant could not ſurrender, though it is contrary to the general law, and therefore it is pleaded, that *every feme covert* may ſurrender: but ſuch a caſe affords no inference that it was neceſſary to alledge a cuſtom for the general poſition, that a *feme covert* with her huſband, might ſurrender. For theſe reaſons, this objection ought not to prevail even ſo far as to induce the court to deſire a fuller ſtate of the caſe; which would be the only effect it could have; for the cuſtoms of moſt manors being conſonant to this general law, there is little doubt but ſuch a cuſtom might be truly ſtated in any caſe, where it were neceſſary that it ſhould be particularly alleged. The general objection to the validity of the ſurrenders, *viz.* that by the common law, a *feme covert* is incapable of diſpoſing of her lands without the concurrence of her huſband, has been in part already conſidered; but it may be fit to examine this poſition more particularly. It certainly is, generally ſpeaking, a true one, though perhaps not quite correctly expreſſed; for *a* feme covert *has no power to convey with her huſband, except by fine or recovery.* It would be more accurate to ſtate the law to be, that a married woman can make no conveyance of her lands except by fine or recovery, and that a fine levied by her alone is avoidable only by her huſband. It is equally a general rule of law, that a *feme covert* cannot ſue or be ſued without her huſband, and that ſhe can make no contract to bind herſelf. Theſe rules are eſtabliſhed on the principle (partly religious, and partly political), that ſhe has entered into an indiſſoluble engagement, by which ſhe is placed under the power and protection of her huſband, and has given up to him all perſonal property in her actual poſſeſſion, and the right to receive all ſuch as may be reduced into poſſeſſion. To theſe general rules, there have been, in the proceſs of the law, various exceptions allowed, where the principle of the rules could not be applied to the circumſtances of the caſe. In the caſe mentioned in *Co. Litt.* 132. *b.* and ſtated at large in *Ryley Plac. Parliam.* 19 *Ed.* 1. *p.* 66. the huſband having abjured the realm for felony, the wife was permitted to ſue, and had judgment to recover ſeiſin of an eſtate, of which ſhe was jointly enfeoffed with her huſband for life, againſt the lord, who, after ſatisfaction made to the king for the year, day, and waſte, claimed to have the land by eſcheat. In the 31 *Ed.* 1. it was holden,

that

that the wife of one who had abjured the realm could make a feoffment by deed with warrantry of her land, and ſhould be bound by it. *Fitz. Abr. cui in vitâ, pl.* 31. In the (1) 10 *Ed.* 3. a *quare impedit* was brought for the *King* v. the Lady *Maltravers*; ſhe pleaded coverture, and upon the replication for the King, that her huſband was exiled for a certain cauſe, ſhe was ruled to anſwer. In the (2) 1 *Hen.* 4. the ſame point was determined in the caſe of the Lady *Bellknap*, whoſe plea of coverture was over-ruled on a replication, that her huſband was exiled: and, in the following year 2d of *Hen.* 4. the ſame lady ſued in her own name, and her ſuit was allowed. Lord *Coke* does not take notice of a circumſtance mentioned in the Year Book (3) and in (4) *Brooks' Abridgment*, that ſome of the juſtices ſaid, ſhe ſued as farmer of the king; which ſeems to ſtrengthen the authority, for it ſhews, that during the exile of the huſband, ſhe acted as a *feme ſole*, holding an intereſt under a grant from the king, by which ſhe might both ſue and be ſued alone. A *feme covert* may convey in execution of a power, Sir *W. Jones*, 137. and *Latch*, 39. and 134. and though in that caſe, there is much debate in the court, and a difference in opinion, whether the wife had any eſtate, and whether ſhe could convey in execution of a truſt, without her huſband, yet all agreed that her feoffment without her huſband, was a valid act. A *feme* may execute a power to ſell lands without her huſband, and may ſell them to him. *Co. Litt.* 112. *a.* A *feme covert* may act in *auter droit* as an executrix, without her huſband; and, it is ſaid, that ſhe may adminiſter, or prove the will notwithſtanding his refuſal. *Com. Dig. Adminiſtration* (D). In the three inſtances laſt mentioned, the law ſupports the act of the wife alone, becauſe the huſband has no intereſt in the execution of it; and, in all the former inſtances, ſhe is enabled to act by herſelf, becauſe ſhe cannot have the authority of her huſband, whoſe exile or abjuration, though it does not diſſolve the marriage, ſuſpends the marital power. Caſes of ſeparation, and in conſequence of the relinquiſhment of the marital rights, by the agreement of the huſband, were not likely to have often occurred in the ſimplicity of ancient times. But there is a caſe in the Year Book, 47th of *Ed.* 3. c. 18 (5), which ſhews that they were not then totally unknown in the law. " An action of account was brought againſt one as bailiff of the plaintiff's land, to which the

(1) *Co. Litt.* 132. *b.*
(2) *Co. Litt.* 133. *b.* caſe of *Sibel*, B. Year Book, 1 *Hen.* 4. 1. *pl.* 2.
(3) 2 *Hen.* 4. 7. *pl.* 26.
(4) Tit. *Baron and Feme*, *pl.* 66.
(5) *Pl.* 43.

defendant

defendant pleaded, that there was a debate between the plaintiff and his wife, on which, by the accord of their friends, the plaintiff aſſigned to his wife for her maintenance, the lands of which the account was demanded, and that the wife leaſed theſe lands to him for a term of years. The plaintiff inſiſts, this is no plea, and amounts merely to a denial of the defendant being bailiff; but the court held, that he muſt anſwer the plea. And then the plaintiff traverſes the leaſe alleged to be made by his wife." This caſe ſeems to prove, that a *feme covert* might diſpoſe of the profits of lands allotted for her maintenance, and make a leaſe of them without her huſband joining in the leaſe. In *Cro. Car.* there are two caſes, on bonds given to ſecure the diſpoſal of a ſum of money by a married woman. The firſt of them was in the 5 *Car.* 1. *Cro. Car.* 219. (1). It was an action upon a bond given by a man after marriage, conditioned to permit his wife to make a will, and diſpoſe of a ſum not exceeding 50*l.* in legacies: the defendant pleaded that the wife did not make any will; and on that plea iſſue was joined. It was found ſpecially that ſhe did make a will, and diſpoſed of divers legacies not exceeding 50*l.* but that ſhe was *covert* at the time of making the will. Judgment was given for the plaintiff; for, though by law, a *feme covert* could not make a will without her huſband's aſſent, yet it was a will within the meaning of the condition. The other caſe was in the 10 *Car.* 1. *Cro. Car.* 376. It was an action on a bond conditioned to pay 300*l.* after the death of the wife by the huſband, in caſe he ſurvived, for ſuch uſes as ſhe ſhould appoint by any writing under hand and ſeal, in the preſence of two witneſſes. The defendant pleaded that ſhe did not appoint. The plaintiff replied, that ſhe by her will in writing, ſealed and publiſhed, in the preſence of two witneſſes, did will and appoint ſuch ſums to be paid; to which the defendant demurred, and judgment was given for the plaintiff. The argument ſeems to have been upon the pleading this writing as a will, and not as an appointment. But the Court held it to be ſufficient, for though it was not properly a will, being made by a *feme covert*, yet it was a writing in the nature of a will. Courts of law then had, at this period, recognized the power of a married woman, authoriſed by her huſband, to make, in effect, a teſtamentary diſpoſition of perſonal property. The caſe of (2) *Manby* v. *Scott*, decided ſoon after the Reſtoration, on an action which had been commenced during the Uſurpation of *Cromwell*, gave riſe to a very large diſcuſſion of the rights of huſbands and wives. It ſeemed then to be the opinion of the majority

(1) *Marriott* v *Kinſman.* (2) 1 *Lev.* 5.

of

of the judges, that the husband could not be sued for any debt contracted by the wife without evidence of his assent; consequently for no debt contracted by her when wilfully separated from him. *Hale* held the rule so strict, that in a case reported (1), 2 *Levinz*, 16. some years after the judgment in *Manby* v. *Scott*, he non-suited the plaintiff, in an action brought by a gaoler against a husband for the diet and lodging of his wife. It appeared in the case, that the husband had left his wife in the country, and come up to London, where he married another woman. The former wife caused him to be indicted, and coming to London to prosecute, was, by his contrivance, arrested and sent to gaol. The husband was convicted on the prosecution: yet *Hale* would not allow this peculiar case of the husband's procuring the arrest, to be an exception to the rule, which required his assent to the debt. Subsequent cases, however, relaxed the extreme rigour of this rule; as, where the husband turns the wife out of doors, he gives her credit wherever she goes, according to *Holt*'s opinion (2), *Salk.* 118. But still in the case of a wilful separation by the wife, the law was understood to be, that the husband was not liable to be sued for her debts. It seems very certain, that the judges who argued the case of *Manby* v. *Scott*, did not conceive that an action could be brought against the wife. It was equally the supposition of those who maintained that the husband was not chargeable; as, of those who held the contrary, that the wife was incapable of having any property, could acquire no credit on her own account, and must either subsist on charity, or starve, unless she could obtain an alimony from chancery, or the ecclesiastical court. On the one side, this situation of the wife separated from her husband, is urged as a strong argument to support the conclusion, that the husband is liable to an action for necessaries; while they who argue on the other side contend, that the distress in which the wife is placed, is a just and expedient consequence of her separation from her husband, from which the law ought not to relieve her. It does not seem to have occurred to any of the judges at that time, that a wife separated from her husband may, in fact, possess property; that she will obtain credit by means of her apparent property, and that the consequence of her debts not being recoverable either against her or her husband, would only be prejudicial to the unwary, but honest, tradesman. The first case which appears, after this determination of *Manby* v. *Scott*, of an action brought against a married woman, is that of the Duchess of *Mazarine*. 1 *Salk.* 116. Lord *Raym.* 147.

(1) *Calverly* v. *Plummer*. (2) *Etherington* v. *Parrot*.

Comb. 402. in which the court avoid the queſtion, though ſhe was holden liable to the action. The reports ſay, it may be intended ſhe was divorced, or her huſband an alien enemy; and, perhaps, it may be like the Lady *Belknap's* caſe, whoſe huſband was exiled. The only notes of the caſe are very ſhort, and the point appears to have been made upon a motion for a new trial, in which the court felt what the juſtice of the caſe required, and were not preſſed to explain the grounds of their opinion. It would, however, have been a ſtrange ſituation, if the Ducheſs of *Mazarine*, a woman enjoying a conſiderable fortune of her own, and for many years a large penſion from the crown of England, had been protected from every legal demand, by a rule of the law of England, that no action could be brought againſt her, becauſe ſhe had a huſband whoſe perſon and fortune were utterly unknown, and could not be attached by any one with whom ſhe dealt. The only two grounds hinted at for the deciſion, could not have ſtood examination. She neither was nor could be divorced, the law of France not permitting a divorce; and, though in the term when the motion for a new trial was denied, the treaty of peace had not been ſigned, and a Frenchman was then an alien enemy, yet that argument would not have been applicable in the next term. The queſtion, whether a married woman ſeparated from her huſband, and enjoying, by his agreement, a ſeparate proviſion, ſhall be liable for her debts, has come before the courts in ſeveral caſes. In that of (1) *Ringſtead* v. Lady *Laneſborough*, *Hil. Ter.* 23 *Geo.* 3. the point was directly brought before the court of King's Bench upon the record, and judgment given that ſhe was liable. In that caſe, the huſband was ſtated to be out of England. But in (2) *Hil. Ter.* 24 *Geo.* 3. the ſame queſtion was brought before the court, the huſband being in England, and the ſame judgment given. In *Mic. Ter.* 26 *Geo.* 3. the ſame queſtion was again ſtated upon the record, in the caſe of (3) *Corbet* v. *Poelnitz*, with this difference only, that in that caſe the contract was for money, in the others, for goods: and the judgment was the ſame. About the ſame period, *Eaſt. Ter.* 16 *Geo.* 3. the queſtion was agitated in this court; firſt, in the caſe of (4) *Hatchett* v. *Baddeley*, where the Chief Juſtice and my brother *Gould* took a diſtinction on the pleadings, which neither ſtated a ſeparation, nor a ſeparate maintenance, but that the wife had eloped and lived ſeparately from her huſband; which diſtinction has, certainly, great

(1) *Cooke's Bankrupt Law*, 2d Ed. 32.
(2) *Barwell* v. *Brookes*, *Cooke's Bankrupt Law*, 2d Ed. 36.
(3) 1 *Term Rep. B. R.* 5. *ante*, 296.
(4) 2 *Black.* 1079. *ante*, 380.

weight

weight. But the two other judges held, that the action would not lie, merely on the ground of the defendant being a married woman. In *Eaſt. Ter.* 18 *Geo.* 3. the queſtion was again ſubmitted to this court, the caſe of (1) *Lean* v. *Schultz*, on pleadings which diſtinctly ſtated a ſeparation, and ſeparate maintenance; but the queſtion itſelf then received no determination, the court having given judgment merely on a point of form, namely, that the huſband ought to have been joined for conformity. From this ſtate of the deciſions, it cannot be concluded, that it is a ſettled point, that an action may be maintained againſt a married woman ſeparated from her huſband by conſent, and enjoying a ſeparate maintenance. But ſuppoſing the law to be according to the three laſt determinations of the court of King's Bench, it ſeems to be a neceſſary concluſion, that a married woman, whoſe ſeparate property conſiſts of a copyhold eſtate, ſhould have a power to ſurrender it; for, otherwiſe, the law would compel her to pay, without allowing her to uſe the means of paying, and enable the creditor to recover a demand, without the power of making that demand effectual. This is certainly an argument from inconvenience alone, and therefore not altogether concluſive; but it has great weight when no poſſible inconvenience can be oppoſed on the other ſide. The intereſt of the huſband is intirely out of the queſtion; the intereſt of the lord is not hurt by the ſurrender; the expectancy of the heir is not an intereſt, and ſlight as it is, cannot be ſet up as a claim in juſtice, to take the eſtate without paying the debts. But the main and ſubſtantial ground of the caſe is, that the wife is the tenant of the copyhold and not the huſband; that the eſtate can be forfeited or ſurrendered only by her acts, not by his; that the authority which he acquires by his marital rights, to direct and controul her acts, is by his covenant in the preſent inſtance annulled, or at leaſt ſuſpended; and there is then no impediment to the validity of an act, paſſed in the court of the manor between her and the lord. The certificate ſent to the court of Chancery was, "that *John Willis* took an "eſtate to him and his heirs, according to the ſeveral "cuſtoms of the manors of Banſtead and Ryegate, under "the ſurrenders and admittances of the 14th and 15th of "July, 1772."

On the trial of an action of trover for eight cows and one heifer, the jury found a verdict for the plaintiffs, ſubject to the opinion of this Court, on the following caſe:—By indenture *tripartite*, dated the 11th of October, 1779, between *John Rhodes* of the one part; *Anne Peach*, widow, of the

Haſelinton *et al. v.* Gill and another, Tr. Ter. 24 Geo. 3. B. R. 3 *Ter. Rep.* 620.

(1) 2 *Black.* 1195. *ante*, 301.

ſecond part; and the plaintiffs of the third part; made previous to the marriage between *Rhodes* and *Anne Peach*. The ſaid *Anne Peach*, in purſuance of the marriage agreement, and with the conſent of *Rhodes*, aſſigned to the plaintiffs all the perſonal eſtate of her the ſaid *Anne Peach*, conſiſting of *thirty-two cows, and the increaſe and produce to ariſe therefrom*, and two of her beſt horſes, and one bull (and other goods therein mentioned), upon truſt, that the plaintiffs ſhould permit *Anne Peach*, or ſuch perſon as ſhe ſhould by her laſt will in writing appoint, and in default of ſuch appointment, the adminiſtrators of the ſaid *Anne Peach*, to keep and enjoy, and at her or their will *to ſell and diſpoſe of the ſaid cows and premiſes, and of all the increaſe and produce to ariſe and be produced from the ſame, for her and their own proper uſe*; and that *Rhodes* ſhould not intermeddle therewith, &c. The defendants, as ſheriff of Middleſex, in July, 1782, levied an execution at the ſuit of *Henry M'Cleſo*, againſt the goods of *John Rhodes*, the huſband, *and ſeized, and (after having notice given to them of the ſettlement) ſold eight cows and one heifer, four of which were part of the cattle belonging to* Anne Peach *before her marriage, and mentioned in the deed of ſettlement, and the reſt of them bought with the money produced by the ſale of milk of the cows mentioned in the ſettlement.* Lord MANSFIELD, Ch. J. By the common law, the wife can have no property during the coverture, but all her eſtate is veſted in the huſband. But courts of equity have for ages paſt thought the rules of the common law too hard, and have thought it right to protect the property of the wife from the extravagance of the huſband, in caſes clear of fraud. This is done by the intervention of truſtees; and thus far, the wife is, to all intents and purpoſes, a ſingle woman. And wherever the truſt can be ſupported in equity, this Court will conſider the truſtee intitled at law. Fraud infects every tranſaction, but more eſpecially between ſuch near relations as man and wife. Therefore it is, that a conveyance after marriage is totally void as againſt creditors, for then there is no conſideration. But in the preſent caſe, there is no fraud: the conſideration of the ſettlement is valuable, becauſe it was made before marriage; and the more ſo, becauſe it was a ſettlement of the wife's own property before marriage. If the ſettlement had been made *after* marriage, or the huſband had carried on the trade in his own name, and contracted debts in it, that would have varied the caſe. But here there is nothing but the general queſtion, Whether by any means a man may, before marriage, put his intended wife in a ſituation to carry on a ſeparate trade; there is no authority that he may not. In this caſe, the cows would have been of no uſe to the wife, unleſs ſhe had the produce of them. Therefore I am of opinion, that this is a truſt which might be

ſupported

ſupported in equity, and that the legal property in the truſtees is good. WILLES, J. of the ſame opinion. ASHHURST, J. The poſſeſſion alone of the wife does not make this tranſaction fraudulent. For it was conſiſtent with the deed of ſettlement; and that gave the truſtees as much intereſt in the produce, as in the original property: the wife was the agent of the truſtees in the new purchaſe. BULLER, J. It has been frequently determined, that poſſeſſion alone is not evidence of fraud; the tranſaction muſt be ſhewn to be fraudulent from other circumſtances. If the poſſeſſion be inconſiſtent with the conveyance, that is evidence of fraud. But here, the poſſeſſion is conſiſtent with the deed; by which, the wife was to uſe the cows, and to make a profit of them. There is no other circumſtance to ſhew a fraud as to the firſt cows: and as to the produce, it is the ſame as if the wife had paid the money over to the truſtees, and they had bought the other cows; for ſhe acted as their agent.—*Poſtea* for the plaintiffs.

Pleadings.

An action of treſpaſs for an injury done to the property of the wife, *dum ſola*, muſt be brought by the huſband and wife. But if ſuch an action be brought by the wife alone, the defendant muſt plead the coverture in *abatement*, and not in *bar*. —This was an action of treſpaſs, for ſeizing, taking, and diſtraining a boat, with the tackle, belonging to the plaintiffs, and converting the ſame to the uſe of the defendants; to which there was a plea *in bar*, that *Mary Murgatroyd*, one of the plaintiffs, at the time of exhibiting the plaintiffs' bill, was *covert* with one *R. Medd*, then and yet her huſband, and now living. To this plea, there was a general demurrer. After argument, *the Court* took time to conſider of this queſtion; and, on a ſubſequent day, their judgment was given by Lord KENYON, Ch. J. We have looked into the caſes which were cited (1); and though there is no preciſe precedent in point, we are of opinion, on a review of all the authorities, that this plea in bar cannot be ſupported. It is extremely clear on the one hand, that *the marriage gives to the huſband all the perſonal eſtate which the wife has in poſſeſſion:* it is alſo clear on the other hand, that *where a choſe in action of*

Milner *et al. v.* Milnes *et al.* Ea. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 627.

(1) *Moor*, 25. Bro. Abr. Property, pl. 22. 11 *Mod.* 177. 3 *Bulſtr*, 164. 1 *Sider.* 172. 2 *Lev.* 107. 2 Lord *Raym.* 1207. 1525. 2 *Saund.* 213. *Holt.* 360. *Lutw.* 1641. 1 *Lutw.* 22. 24. 2 *Strange.* 811. Bro. Abr. Tit. Error. pl. 173. *Finder* in Action, pl. 88.

the wife is to be reduced into poſſeſſion, and it is neceſſary to bring an action for that purpoſe, it muſt be brought in the names of both the huſband and wife. And it was abſolutely neceſſary that the wife ſhould be a party to the preſent action. *The defendant, by his plea, imputes to one of the plaintiffs a perſonal defect:* now, in general, we find, that *perſonal diſabilities muſt be pleaded in abatement.* It is laid down as a general poſition in *Com. Dig.* (tit. "*Pleader,*" 2 A. 1.) that *coverture in a woman, when either plaintiff or defendant, muſt be pleaded in abatement:* and though no authority is referred to in ſupport of it, yet the opinion alone of ſo able a lawyer is of great authority. It is true, that there is a precedent in the old entries (*Vet. Intr* 74. *a.*) where the coverture of the plaintiff is pleaded *in bar:* but that is reprobated in 2 *Lutw.* 1641. where it is ſaid, that all the other precedents are of pleas *in abatement.* My brother *Buller* has alſo met with a caſe in the Year Books 39. *E.* 3. 32. *b.* which ſhews, that this matter ſhould have been pleaded in abatement. As to the caſe cited from 1 *Sid.* 172. it is true, that two of the judges gave the opinion which was ſtated by the defendant's counſel: but the other two judges, namely, *Twiſden* and *Windham,* names of great authority, were of a different opinion; and held, that the huſband and wife ought to have joined in that action. We are therefore of opinion, on the authority of the caſe in the Year Books, as well as on that of Lord Ch. B. *Comyns,* and on the reaſon of the thing, that the coverture ſhould have been pleaded in abatement. There is, indeed, the inconvenience which was ſtated at the bar, that the huſband may bring error if he pleaſe: but that does not conclude this queſtion. With reſpect to the inconvenience of the ſhortneſs of time which the defendant has to plead in abatement; where ſuch a plea is not merely dilatory, but goes to the merits of the cauſe, the Court will allow him a longer time than the four days to offer ſuch a plea, leſt the juſtice of the cauſe ſhould be precluded, in the ſame manner that they will permit a tender after a ſpecial imparlance.—Judgment for the plaintiffs.

Morgan *v.* Painter, Ea. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 165.

And if the plaintiff take huſband after ſuing out the writ, and before the declaration, the defendant cannot give her coverture in evidence under the general iſſue, but muſt plead it in abatement if he wiſh to take advantage of it.—In an action for money had and received, the plaintiff was nonſuited, on its appearing in evidence that ſhe was a *feme covert:* but on a motion to ſet aſide the nonſuit, on the ground that the plaintiff *was not married until after the ſuing out of the writ, and before declaration,* in which caſe (it was contended) her coverture could not be given in evidence under the general iſſue, but ſhould have been pleaded in abatement. The rule

for

for ſetting the nonſuit aſide, after cauſe ſhewn, was made abſolute.

A *feme covert* cannot ſue without her huſband as a ſole trader by the cuſtom of London in the ſuperior courts at Weſtminſter. This action was brought by the plaintiff, a widow, in her own right, for goods ſold and delivered by her while ſhe was *covert*. It appeared, on the trial, that the trade was carried on ſolely by the wife in Cheapſide, without the interference of the huſband, though he lived in the ſame houſe with her. The plaintiff obtained a verdict. The objection made at the trial, and again inſiſted on in this Court, on a motion to enter a nonſuit, was, that the goods were, *primâ facie*, the property of the huſband, and conſequently, that the wife could not maintain this action in her own right; for that ſhe could not avail herſelf of the privilege of being a ſole trader, according to the cuſtom of London, in the ſuperior courts at Weſtminſter, ſuch privilege being confined to the city courts. BULLER, J. ſaid, that this point was decided in this Court in the year 1773, in the caſe of *Read* v. *Frances Jewſon*, which was as follows: "The defendant "was the wife of one *Charles Jewſon*, and was a ſole trader "by the cuſtom of London; and being indebted to the "plaintiff, entered into a bond, in which ſhe was deſcribed "'milliner, citizen, and ſole trader;' and alſo executed a "warrant of attorney to enter up judgment on the ſaid bond, "which was entered up accordingly, and a *fieri facias* ſued "out, and the defendant's goods taken in execution. In the "judgment, it was ſtated, that the defendant was a *feme* "*covert* ſole trader; and that the money (mentioned in the "bond) was advanced to the defendant touching her craft. "The objections to the judgment were, that the judgment "was irregular, it not being entered purſuant to the authority; that *the huſband ought to have been impleaded jointly* "*with the wife, though execution muſt be againſt the wife only*; "*and that the action was not maintainable in this court, but* "*ought to have been brought in the court of the city of London.*" After argument, and time taken to conſider, Lord MANSFIELD, Ch. J. obſerved, that *this was an application to ſet aſide a judgment entered up without authority*. In the bond, the defendant is called "milliner, citizen, and ſole trader;" but no inſtance hath been ſhewn where a *feme covert* ſole trader can execute a bond; *ſhe is liable to ſimple contract debts, but cannot give a bond*; *if ſhe could, ſhe might bind her heirs, if ſhe had real aſſets, which certainly no cuſtom can warrant.* An infant may be liable for neceſſaries, but cannot give a bond for them. *A married woman cannot be made defendant without her huſband*; *and if ſhe cannot* (and no caſe has been cited to ſhew ſhe can), *ſhe cannot give a warrant of attorney to confeſs a judgment.* The mode of execution is a commit-

Caudell v. Shaw, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 361.

ment to priſon, though judgment is againſt the goods. *This judgment is entered up without authority, and muſt be ſet aſide.* ASTON, J. "The cuſtom ſeems to operate on ſimple contracts only. By the better authority, it ſeems that the action muſt be brought in the city courts; and the huſband ought to be joined. It is a principle of the common law (*Finch* 12.) that a woman ſhall never be put to anſwer without her huſband. Indeed, in a note in *Dyer*, 271. *b.* it is ſaid, where a huſband was baniſhed, the wife was ſuffered to appear alone to prevent her being waived. The warrant of attorney, in the preſent caſe, is an abſolute nullity." WILLES and ASHHURST agreed. Rule abſolute for ſetting aſide the judgment, *as entered up without authority*; and a clauſe was ordered to be inſerted in the rule, that the huſband being preſent in court conſented to the motion. PER CUR. In the caſe put at the bar, of the *choſe in action*, the right ſurvives to the wife by the common law of the land. But here, the right claimed by the wife only ariſes by the cuſtom of the city of London, of which we can take no notice in this action; and therefore the action ſhould have been brought by the repreſentatives of the huſband. The caſes in 2 *Leon.* 166, and *Moor*, 135, ſhew, that the ſuperior courts at Weſtminſter cannot take notice of this cuſtom.—Rule abſolute.

Clark *v.* Norris *et al.* Ea. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 235.

Where the defendant is joined with his wife in the writ, he may enter an appearance for himſelf *only*; and in ſuch caſe, the plaintiff cannot ſign judgment for want of a plea, without making a demand of a plea; and if he does, the Court will ſet the judgment aſide as irregular.

Marder *et al. v.* Lee, Ea. Ter. 4 Geo. 3. B. R. 3 *Burr.* 1469.

Lee, the defendant, had entered into a warrant of attorney *to confeſs a judgment to the woman plaintiff dum ſola*, and ſhe afterwards married *Marder*, the man plaintiff: after which marriage, the judgment was entered up by the huſband and wife; the plaintiffs having levied by virtue of a *fieri facias*. THE COURT (on a motion to ſet aſide the judgment and writ of *fieri facias* executed thereon) declared their opinion to be, "that the judgment was irregular for want of a previous leave of the Court to enter it up." They held, that in order to warrant this entry of the judgment, there ought to have been an application to the Court for leave to enter it up thus, founded upon a proper affidavit, proving the marriage between the plaintiffs: upon which, a rule of court ſhould have been obtained, giving leave to enter up judgment accordingly; but as this previous ſtep was not taken, the judgment was irregular for want of it: the conſequence of which was, that the rule was made abſolute, but without coſts.

Bidgood *v.* Way and Wife, in the Ex. Ch. in Er. 2 *Black.* 1236.

Huſband and wife cannot join in aſſumpſit, without ſtating the intereſt of the wife.—This was error from the King's Bench. The defendants in error, being the plaintiffs below, brought

brought an action on the caſe, againſt the plaintiff in error *Bidgood*, and declared for the occupation of a meſſuage and lands at Tiverton, and for money had and received to the uſe of *Way* and his wife, on which was founded the aſſumpſit to both *Way* and his wife: judgment by default for both; and on a writ of inquiry, damages 5*l.* 4*s.*: coſts 40*s.*: final judgment ſigned for 5*l.* 4*s.* debt, and 9*l.* 16*s.* coſts, the 5th of December, 1777. The error aſſigned was, that judgment was given for *Thomas Way* and *Sarah* his wife, to recover *their* damages, whereas it appears upon the record, that *Sarah* was the wife of *Thomas*, and could not ſuſtain any damages by reaſon of any thing contained in the declaration. PER CUR. (after the point had been fully argued on both ſides), This judgment is erroneous, becauſe no contract can be made with a married woman: no promiſe, either expreſs or implied, gives any intereſt to her; the whole reſults to the huſband, and the action muſt be brought in his name only: the remedy, if the contract be his, goes after his death to his adminiſtrators. If a joint contract, it ſurvives to the longeſt liver of the huſband and wife; and therefore the diſtinction is ſenſible, and neceſſary to be made. It has been inſiſted, that the Court may *intend* the eſtate in queſtion to have been the wife's; but there can be no intendment contrary to the plain meaning of the words; beſides, theſe are general damages; and the count, for money had and received, cannot be ſupported by intendment: neither can the inertion of the wife be ſurpluſage. It creates an intereſt in the wife, and intitles her to the damages by ſurvivorſhip.—Judgment reverſed.

On a plea of coverture and verdict for the defendant, the huſband cannot have execution for the coſts without *ſcire facias*: the wife, however, may have proceſs in her own name, in ſuch a caſe, becauſe the plaintiff having declared againſt her as *ſole*, he is concluded from denying it. Wortley *v.* Rayner, Ea. Ter. 21 Geo. 3. B.R. 2 *Doug.* 636.

Evidence in Suits.

Huſbands and wives cannot, in any caſe, be witneſſes either for or againſt each other.—This was an action by the executrix of a ſurviving truſtee, under a marriage ſettlement of *J. Lewis*, in 1780, by which, certain houſhold goods, mentioned in a ſchedule annexed to the deed, were ſettled to the ſole and ſeparate uſe of *Lewis*'s wife; and it was brought againſt the defendant, ſheriff of Monmouthſhire, to recover back the value of ſome of thoſe articles which had been ſeized and ſold by him, under an execution againſt *Lewis*. At the trial, *Lewis* was called as a witneſs to prove the identity of the goods; the defendant's counſel objected to his competency Davis *v.* Dinwoody, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 678.

competency, and it was ſaid, that he was intereſted: to which it was anſwered, he came to ſpeak againſt his intereſt; for that if theſe goods, which had been ſeized, were not his own, and could not be taken to pay his debts, he would be liable afterwards; whereas, if they could be taken in execution, his debt would be diſcharged. The judge admitted the witneſs, but reſerved the point. Per Lord KENYON (after motion for a new trial, independently of the queſtion of intereſt), Huſbands and wives are not admitted as witneſſes either for or againſt each other: from their being ſo nearly connected, they are ſuppoſed to have ſuch a bias upon their minds, that they are not to be permitted to give evidence either for or againſt each other. BULLER, J. It is now conſidered as a ſettled principle of law, that huſbands and wives cannot, in any caſe, be admitted as witneſſes, either for or againſt each each.—Rule abſolute.

Alban *et ux.* & Ratcliffe *et ux.* Executors, *v.* Pritchett, Ea. Ter. 36 Geo. 3. B. R. 4 *Ter. Rep.* 680.

Neither can any declaration, made by the wife in prejudice of her huſband's right, be given in evidence.—On the trial of this action, which was aſſumpſit, on a promiſſory note of the teſtator. The defence ſet up was, that *Anne*, one of the plaintiffs, called *Ann Ratcliffe*, was really named *Anne Parker*: that *C. Ratcliffe*, another of the plaintiffs, and her former huſband, was hanged ſeven years ago for forgery, and that *Anne* was ſince married to *R. Parker*; and the defendant propoſed to prove this by a declaration of *Anne* to this effect: a verdict however was taken for the plaintiff, reſerving the point for the opinion of the Court. On a motion for a new trial, it was urged, that this action was brought in right of the wife, as executrix, and therefore declarations by her were admiſſible. SED PER CUR. *C. Ratcliffe* is one of the plaintiffs on the record, he has, therefore, an intereſt in the cauſe, and that cannot be prejudiced *by any act*, or by the evidence of the wife; and it is immaterial whether his right be or be not *jure uxoris*, it is ſtill his right.—Rule diſcharged.

Baſtards.

Of Baſtards in General.

Goodright, on the demiſe of Tompſon, *v.* Saul *et al.* Tr. Ter. 31 Geo. 3. BR. 4 *Ter. Rep.* 356.

The child of a married woman may be proved a baſtard by other evidence than that of the huſband's non-acceſs.—On the trial of this ejectment, the leſſor of the plaintiff made out his title to the premiſes in queſtion, as heir at law to *John Tilyard*, the perſon laſt ſeiſed, being the nephew of his paternal grandmother. In anſwer to this, the defendants, who were the tenants on the eſtate, ſet up the title of *John Turner Hales*, as being the great grandſon of *Elizabeth Tilyard*, a ſiſter of the paternal grandfather of the ſaid *John Tilyard*, in whom the eſtate veſted by purchaſe, under a devi[se], having

having been originally derived from the ſaid *Elizabeth*'s father, *Robert Tilyard*, and conſequently, that *Hales* had the ſuperior title. The queſtion therefore turned upon the evidence by which he deduced his legitimate deſcent from *Elizabeth*. As to which, the defendants did not prove any marriage in fact between her and *Joſeph Hales*, the grandfather of *J. T. Hales*; but they produced a pedigree found in the late *John Tilyard*'s houſe, from whence it appeared, that *Joſeph Hales*, the great grandfather, and the ſaid *Elizabeth* had had iſſue *Joſeph Hales*, through whom the ſaid *J. T. Hales* derived title; and further, that *Robert Tilyard*, the father of the ſaid *Elizabeth*, in his will, dated the 6th of November, 1714, called her his daughter *Elizabeth Hales*; and ſeveral other family wills deſcribed the *Hales* as couſins. Some expreſſions of the late *John Tilyard* were alſo proved, acknowledging *J. T. Hales* as his heir at law; but it appeared, that theſe, as well as the pedigree above-mentioned, took their riſe from the paſſage in old *Robert Tilyard*'s will, wherein he called his daughter *Elizabeth* by the name of *Elizabeth Hales:* and beſides, there were ſimilar expreſſions of acknowledgment from the late *John Tilyard* as to the heirſhip of the leſſor of the plaintiff. To counteract this evidence, the leſſor of the plaintiff proved the marriage of *Elizabeth* in 1705, by her maiden name of *Tilyard*, with one *Simon Kilburn*, with whom ſhe lived in Norwich for ſome time, without having any children; that *Kilburn* then left Norwich; after which time, ſhe and *Hales* lived publicly together as man and wife for ſome years, during which time that ſon was born who was ſtated in the pedigree to be the iſſue of *Elizabeth* and *Joſeph Hales*; and who, it was proved, had always been conſidered in the family as a baſtard.—Where the huſband was, during that time, did not clearly appear; but a very old witneſs ſaid, that he went to London, where it was ſuppoſed he remained; and that he returned to Norwich after his wife's death. It was further proved, that *Joſeph Hales*, the ſon, mentioned in the pedigree, always went by that name, except in one inſtance, where he ſold an eſtate after his mother's death, which had been deviſed to her by her father *Robert Tilyard*; and in the title deeds ſtiled himſelf "*Joſeph Kilburn, otherwiſe Hales:*" and his deſcendants always went by the name of *Hales*. And it was alſo proved, that *Elizabeth* was buried by the name of *Kilburn*. The fact of her marriage with *Kilburn* being thus clearly eſtabliſhed, the defendant's counſel then changed their ground, and contended for the right of *J. T. Hales*, as having deſcended from that marriage, for that *unleſs non-acceſs of the huſband were clearly proved, which had not been, not could be done* at this diſtance of time, it muſt be taken that *Joſeph* the ſon, whatever his reaſons might have been for taking the name

name of *Hales*, muſt, in point of law, be taken to be the ſon of *Kilburn*, and could not be baſtardized by mere evidence, that another perſon had cohabited with his mother, from whom he claimed; and the judge directed the jury to that effect, telling them, that though it was not abſolutely neceſſary to prove the huſband out of the realm, in order to baſtardize the iſſue, yet it was incumbent on the party inſiſting upon that fact, to prove that the huſband could not, by any probability, have had acceſs to his wife at the time, which, he conceived, had not been ſhewn in the preſent inſtance; whereupon, the jury found a verdict for the defendants. It was afterwards moved to ſet this verdict aſide.—ASHHURST, J. (who had tried the cauſe) after conſultation with the reſt of the Court, ſaid, that he was of opinion that there ought to be a new trial. He added, that he was convinced he had laid too much ſtreſs on the neceſſity of proving non-acceſs, when the huſband was within the realm, by witneſſes who could prove him conſtantly reſident at a diſtance from his wife. That the huſband in this caſe left the wife, and went to reſide at another place, as it was believed in London, and that there was no direct evidence of his acceſs, he obſerved was very clear; and then, there were other circumſtances which went ſtrongly to rebut the preſumption of acceſs, and to ſhew that the ſon was a baſtard; among others, a very forcible one occurred, that of the ſon's having taken a different name from his birth, the name of the perſon with whom his mother was living at the time, which had been retained by him and his deſcendants ever ſince: that was a very ſtrong family recognition of his illegitimacy. PER CUR. Rule abſolute for a new trial without coſts.

The King *v.* the Inhabitants of Hodnett, Hil. Ter. 26 Geo. 3 B. R. 1 *Ter. Rep.* 96.

Baſtards are withing the meaning of the marriage-act, 26 *Geo.* 2. c. 33. which requires the conſent of the father, guardian, or mother, to the marriage of perſons under age, who are not married by banns. By an order of two juſtices, the pauper, *Mary Miles*, and *Anne* her infant daughter, were removed from the pariſh of Staunton upon Hine-Heath, in the county of Salop, to the pariſh of Hodnett in the ſaid county; and on an appeal to the ſeſſions, the order was confirmed; ſubject to the opinion of the court of King's Bench, on the following caſe:—"*Mary Miles*, an illegitimate child, "was born in the pariſh of Hodnett. On the 10th of Ja- "nuary, 1782, ſhe, being then under twenty-one years of "age, was married to *Richard Teece*, who was born in the "pariſh of Staunton upon Hine-Heath, and who was alſo "then under twenty-one years of age, and illegitimate, as "appeared by the ſeveral regiſters of their baptiſm, and the "evidence of the mother of the ſaid *Mary Miles*. The pu- "tative father of *Richard Teece* died in 1779; and his mo-

"ther

" ther died in 1764. The putative father of *Mary Miles* " died ſeveral years previous to her marriage; and her mo- " ther, in the year 1772, married *Richard Lowe*, who, as " well as his wife, is ſtill living. Neither *Richard Teece* the " huſband, nor *Mary Miles* the wife, had ever any guardian " or guardians appointed for either of them, nor was any con- " ſent given to their marriage by any perſon acting in that " character, or by the parent or parents on either ſide. No " witneſſes appeared, on procuring the licence from the ſur- " rogate, depoſing to the conſent of the parents or guardians " on either ſide having been obtained, or that the parties to " be married were of the age of conſent; but the perſon, who " applied for the licenſe, being the ſaid *Richard Teece*, ſwore " that the parties were both of age." The queſtion for the opinion of the Court turned on the validity of this marriage. Lord MANSFIELD, Ch. J. Before the act of parliament 26 *Geo.* 2. c. 33. paſſed; by the laws then in being, if a man and woman made a contract in private *per verba de preſenti*, and kept it a ſecret, and afterwards there was a public marriage ſolemnized by either of them, and iſſue born of that marriage, nevertheleſs the private contract took place of the ſubſequent marriage; becauſe the canon law compelled a ſtrict obſervance of theſe contracts, and decreed them to be ſolemnized in the face of the church. Therefore, clandeſtine marriages were ſo far to be ſure *practicable*, that the courts would not avoid the contract; but ſtill they were contrary to law.—The law of England, executed by the eccleſiaſtical courts, prohibited it, and made it unlawful to marry any perſon in private; ſo that no clergyman of reputation dared to marry any perſon without either licenſe or banns. If they married with licenſe, there was an oath that the parties were of age; or, if under age, that they had the conſent of parents or guardians. If by banns, it was no objection to the marriage that the parties were under age. All other marriages were illegal; but not being vacated, the practice ſtill continued. Therefore this act was paſſed in order to prevent theſe illegal practices, which were become ſo very enormous, that places were ſet apart in the Fleet and other priſons for the purpoſe of celebrating clandeſtine marriages. The court of chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to priſon; but that mode of puniſhment was found ridiculous and ineffectual. Then this act, 26 *Geo.* 2. c. 33. was introduced to remedy the miſchief, and in fact only made that leſs practicable, which was before illegal. So that I cannot go into arguments on the impolicy of the law; and if I could, it would be ſufficient to ſay, that ſeveral attempts have been made to repeal this law in parliament, where great characters have taken the lead, all of which

have

have proved ineffectual. Then the queſtion is, What is the law? The meaning of the act is, that where there is the conſent of a father or guardian lawfully appointed, or of a mother, or guardian appointed by the court of chancery, the marriage ſhall be valid: but here, there was no conſent by any one; conſequently, in my opinion, it is void by the marriage-act. *There is no reaſon to except illegitimate children, for they are within the miſchiefs intended to be remedied by the act.* ASHHURST, J. There is no inconvenience in putting this conſtruction upon the act; for perſons in this ſituation may marry by banns. BULLER, J. The objection to the order of ſeſſions, and in ſupport of this marriage, is, that if the Court ſhould determine that a baſtard is within the act of parliament, we ſhall, by conſtruction, multiply the number of felonies; but that is not the caſe. There are but two clauſes which create felonies; the firſt is the 8th ſection, by which, "If any perſon ſhall ſolemnize matrimony in any "other place than a church or public chapel, where banns "have been uſually publiſhed, unleſs by ſpecial licenſe from "the Archbiſhop of *Canterbury*; or ſhall ſolemnize matri-"mony without publication of banns, unleſs licenſe of mar-"riage be firſt had and obtained from ſome perſon or per-"ſons having authority to grant the ſame; every perſon "knowingly and wilfully ſo offending, and being lawfully "convicted thereof, ſhall be adjudged to be guilty of felony." Now it cannot be material, on an indictment for ſuch an offence, what the condition of the parties was, nor can you inquire into it: it is the *fact of celebrating the marriage* under ſuch circumſtances which conſtitutes the felony. Again, by the 16th ſection, "If any perſon ſhall knowingly and wil-"fully inſert, or cauſe to be inſerted, in the regiſter-book of "ſuch pariſh, &c. any falſe entry of any matter or thing "relating to any marriage, or falſely make, alter, forge, or "counterfeit, or cauſe or procure to be falſely made, &c. "any ſuch entry in ſuch regiſter, &c. or falſely make or "procure to be made, &c. any ſuch licenſe of marriage, &c. "or wilfully deſtroy any ſuch regiſter or marriage, &c. the "the ſame ſhall be guilty of felony." It would be no anſwer to a proſecution for ſuch a crime to ſay that the parties were baſtards, becauſe *the fact of forging* an entry or licenſe, or of deſtroying a regiſter, is ſtill the ſame. It is not true, that the Court, in the expoſition of penal ſtatutes, are to narrow the conſtruction. We are to look to the words in the firſt inſtance, and, where they are plain, we are to decide on them. If they be doubtful, we are then to have recourſe to the ſubject-matter; but, at all events, it is only a ſecondary rule. Now theſe words are very general. The act ſpeaks of all perſons, except under particular circumſtances. Then does this come within any of theſe exceptions? If it do not,

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it falls under the general regulations eſtabliſhed by the act. Beſides, the rule that a baſtard is *nullius filius* applies only to the caſe of inheritances; it was ſo conſidered by Lord *Coke*. —Both orders confirmed.

If the putative father of a baſtard obtain the poſſeſſion of her from her mother by fraud, the Court will order her to be reſtored to the mother.—In this caſe, a child of three years of age being brought up at the inſtance of her mother, on an *habeas corpus*, by the putative father, on whom an order of filiation had been made, and who had obtained the poſſeſſion of the child by fraud, was ordered to be reſtored to the mother. Lord KENYON, Ch. J. ſaid, that the putative father had no right to the cuſtody of the child. The King v. Moſes Soper, Ea. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 278.

The reputed mother is a competent witneſs to prove the illegitimacy of her children.—Two juſtices, by an order, removed *Sarah Ward*, widow of *J. Ward*, deceaſed, and her three children, from Leeds to Bramley; againſt this order, the latter pariſh appealed to the Pontefract ſeſſions. On the hearing of the appeal, the reſpondents produced evidence of the ſettlement of *James Ward* being at Bramley; and in order to prove the marriage of the ſaid *James Ward* with the ſaid *Sarah Ward*, they produced witneſſes, who proved that they had cohabited and lived together as man and wife, and were reputed to be man and wife until the death of *James Ward*. *The appellants offered to produce* Sarah Ward *as a witneſs, to prove that ſhe never was married, or that if ſhe ever was, the ceremony took place in Ireland, under ſuch circumſtances as* (the appellants contended) *by the laws of Ireland rendered it wholly void.* The appellants alſo offered witneſſes to prove declarations made both by *James Ward* and *Sarah Ward* at different times that they never were married. The reſpondents' counſel inſiſted that the evidence offered by the appellants was inadmiſſible; and the Court being of that opinion, rejected the ſame, and confirmed the order of the juſtices, ſubject to the opinion of this Court, Whether the evidence offered by the appellants was admiſſible or not? PER CUR. This evidence was certainly admiſſible, though the juſtices at the ſeſſions were to judge of the effect of it. In the caſe of *R.* v. the inhabitants of St. Peter's (1), it was expreſsly held, that the ſuppoſed huſband was a competent witneſs to diſprove the marriage. There are alſo many other caſes, in which it has been decided, that the parents may be called as witneſſes with reſpect to the legitimacy of their iſſue; and if they may be called to prove that they are legitimate children, there is no reaſon why they ſhould be conſidered as incompetent when called to prove that the children are illegitimate. But in all theſe caſes ſuch teſtimony is The King v. the Inhabitants of Bramley, Tr. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 330.

(1) *Burr.* S. C. 25. and *Bull. N. P.* 112. *Standen* v. *Standen*, ſittings after Eaſt. 1784. cor. Lord *Kenyon*, S. P.

open

open to great obſervation. It was then deſired, that the court of ſeſſions, on re-hearing the caſe, might be confined to the evidence of the declarations, &c. without putting the reſpondents to the expence of proving their caſe; BUT LORD KENYON, Ch. J. ſaid, that the whole caſe muſt be gone into again at the quarter ſeſſions; that it was like granting a new trial, in which caſe the whole caſe muſt be proved (1).

The Duty and Authority of Pariſh Officers.

Rex *v.* Inhabitants of Hemlington, Hil Ter. 17 Geo. 3. B. R. *Cald.* 6.

A baſtard living with its mother for nurture, but having a different ſettlement, muſt be maintained by the pariſh in which it is ſettled.—Two juſtices made an order upon the townſhip of Darlington, in the county of Durham, to pay a weekly ſum towards the maintenance of two baſtard children under ſeven years of age, brought by their mother to the townſhip of Hemlington, in the county of York, the place of their mother's legal ſettlement, their own being at Darlington. The ſeſſions, on appeal, diſcharge this order, and ſtate a caſe to the following effect: The caſe found, that *Eleanor Guy*, and *Mary*, her daughter, a baſtard, born at Hemlington, went under a certificate from Hemlington, dated July 11, 1772, to reſide in Darlington; and, that during her reſidence under that certificate, *Eleanor* was delivered of *Ann* and *William*, two other baſtard children; that on the 11th of September, 1775, Darlington, by an order of two juſtices, removed *Eleanor*, the mother, and her daughter, *Mary*, to Hemlington, and that *Eleanor*, the mother, carried with her *Ann* and *William*, her two other children, though not named in the order of removal, as nurſe children, to Darlington. The caſe then proceeded to ſtate at large the order made by two juſtices for the maintenance of theſe children, and which the churchwardens and overſeers of Darlington refuſed to obey: the queſtion ſubmitted to the conſideration and judgment of this court was, WHETHER the churchwardens and overſeers of the poor of the townſhip of Darlington are obliged, or compellable, to pay to the churchwarden and overſeer of the poor of the townſhip of Hemlington, any money, or other thing, for or towards the relief or maintenance of the ſaid *Ann* and *William*, the baſtard children of *Eleanor Guy*, whilſt they remain with their mother as nurſe-children, at, and are maintained at the expence of the townſhip of, Hemlington, ſhe refuſing to part with them, ſo that they may be removed to Darlington? In ſupport of the order of ſeſſions, it was urged, that the natural and legal right of a parent to take children under the age of nurture, wherever they might be ſettled, along with her wherever ſhe might go, was unqueſtionable: that, as to the

(1) Vid. *R.* v. *Cliſton upon Dunſmore*, *Burr. S. C.* 698, 9. and *R.* v. *Page*, 2 *Conſt's Bott.* 853.

queſtion

queſtion before the court, which was, By what pariſh, ſuch children, during ſuch reſidence, were to be maintained? the caſes of *Wangford* v. *Brandon* (1); *the King* v. *the Inhabitants of St. Giles's in the Fields* (2); and *Shermanbury* v. *Bolney* (3); which would be conſidered as having eſtabliſhed that they muſt, during their reſidence with their mother in a pariſh not their own, be maintained at the expence of their own, were all determined when the court had in view a very different inquiry; and not, as here, the *maintenance*, but the *ſettlement* of the pauper: that Dr. *Burn* (4) was decidedly of opinion, that they ought to be maintained by their mother's pariſh, from which the law will not permit them to be removed: that if juſtices have aſſumed the power of apportioning expences between pariſhes in the caſe of baſtard children, it is contrary to the ſpirit and intention of ſtatute 18 *Eliz.* c. 3. which gives them authority to charge the mother or reputed father *in relief of the pariſh:* that ſuch a practice, in all caſes, is contrary to law: and that the inconvenience of ſettling minute and diſputable accounts for ſix or ſeven years together, between pariſhes at the two oppoſite extremities of the iſland, would be monſtrous and intolerable: that there are only two or three caſes in which the power of apportioning is given to juſtices; 1ſt. where, from the inability of one pariſh, it becomes neceſſary, in aid of their poor rate, to aſſeſs another (5); 2dly, where removals and appeals are, in ſeſſions, adjudged vexatious and frivolous (6); or, where, upon the removing of a certificated perſon, the reaſonable charges of the maintenance and removal are allowed by a magiſtrate (7): that the preſent caſe was not one of theſe: that churchwardens and overſeers are not authoriſed to relieve paupers not reſident in their pariſhes; except in the caſe of certificated perſons (8), or ſuch as are in the workhouſe (9): that as the caſe of *Skeffreth* v. *Walford* (10) had ſettled, that the mother may retain her baſtard children under ſeven years of age, though ſettled in another pariſh, it would be much more expedient that they ſhould be maintained as caſual poor in the pariſh, in which, if the mother

(1) *Carth.* 449. 1 Ld. *Raym.* 395. *Salk.* 482.
(2) *Burr.* Sett. Caſes, 2.
(3) *Carth.* 279.
(4) Vol. iii. 315. edit. 11th. and ſo in all parts of the earlier editions of his work that touch on this ſubject. Vol. i. 206. Vol. iii. 305. 502. edit. 11th.
(5) 43 *Eliz.* c. 2. ſ. 3.
(6) 8 and 9 *Wil.* 3. c. 30. ſ. 3. 9 *Geo.* 1. c. 7. ſ. 9.
(7) 3 *Geo.* 2. c. 29. ſ. 9.
(8) 8 and 9 *Wil.* 3. c. 30. ſ. 1.
(9) 9 *Geo.* 1. c. 7. ſ. 4.
(10) *Seſ. Caſ.* vol. ii. 89.

choſe, they muſt neceſſarily remain; and that this caſe warranted that doctrine, and the practice that had obtained under the opinion of Dr. *Burn*. In anſwer to this, the counſel in ſupport of the rule to quaſh the order, obſerved, all that the caſe ſays is, that the mother ſhall not be ſeparated from her children.—LORD MANSFIELD (ſtopping him), And if more, it would be a ſingle authority; whereas, there are ſeveral againſt it, in which the point is ſettled. *The King* v. *Saxmundham* (1), is expreſsly in point; and *the King* v. *the Inhabitants of St. Giles*'s (2), recogniſes the ſame doctrine. ASTON, J. Whether the child be legitimate or not, does not at all vary the caſe: the principle is the ſame; and the authority in *Forteſcue* ſays expreſsly, "ſo if a baſtard." WILLES and ASHHURST, J. of the ſame opinion.—Rule abſolute. Order of ſeſſions quaſhed, and original point affirmed (3).

Simpſon *v* Johnſon, Mic. Ter. 19 Geo. 3. B.R. *Doug.* 7.

This was a caſe reſerved for the opinion of the court, on an action of debt on a bond, wherein a verdict was given for the plaintiff.—It appeared that the defendant, *Johnſon*, being apprehended by virtue of a warrant under the ſtatute 6 *Geo.* 2. c. 3. gave the bond in queſtion to indemnify the pariſh of *Wickham St. Paul* againſt all coſts, charges, and other demands, touching a child, of which *Jemima Waſs* was then pregnant, and which was likely to be born a baſtard. Afterwards *Jemima Waſs* was delivered of the child, which was born a baſtard in the pariſh of Gueſtingthorpe. After her delivery ſhe returned to the pariſh of Wickham St. Paul, where ſhe was legally ſettled, carrying her child with her, in a ſtate of perfect health, and received one ſhilling and ſixpence per week from the plaintiff *Simpſon*, one of the overſeers of the poor of the pariſh, for the maintenance of herſelf *and her child*. No demand was made at any time on *Johnſon*, who lived in the adjoining pariſh of Gueſtingthorpe; but a demand was made by *Simpſon* on *Robert Dolbey* (one of the co-obligors), to defray the expence above ſtated, which he refuſed to do. And there was no order made by a juſtice or juſtices of the peace, directing the allowance of one ſhilling and ſixpence, or any other ſum, to be made by the pariſh-officers of Wickham St. Paul. THE COURT were ſo clearly of opinion with the defendants, that they would not hear their counſel. LORD MANSFIELD ſaid, that the payment by the pariſh-officers of

(1) *Fort.* 317.

(2) *Burr. S. C.* 2. *Selt.* and *Rem.* 74. 1 *Sel Caſ* 104. 193.

(3) The queſtion, By whom a nurture child, ſettled in one pariſh and living with its mother in another, ought to be maintained? was before the court in *Tr.* 8 *Will.* 3. in the caſe of the *King* v. the *Inhabitants of Luckington*, Comb. 380. but was left undecided: but has now been decided by this and by the following caſe of *Simpſon* v. *Johnſon*.

Wickham

Wickham was doubly voluntary: 1ſt, *becauſe there had been no order upon them to pay*; and, 2dly, *becauſe they were not liable to maintain the child, but the pariſh where it was born*, and that they ſhould have applied to the officers of that pariſh.—Judgment for the defendants.

But where a baſtard child is born in a pariſh, for whoſe ſuſtenance the parents neglect to provide neceſſaries, *the pariſh-officers* are obliged to do it without an order from the juſtices.—In an action of debt on bond given to indemnify the pariſhioners of Ridgwell, againſt the charges which ſhould ariſe on account of the maintenance and bringing up of ſuch child or children as one *Elizabeth Winch* then went with, and ſhould be delivered of. It appeared, that this woman was delivered of two children, and that neither the defendant, nor any perſon on his behalf, provided any food or nouriſhment for them; by reaſon whereof the inhabitants, &c. of Ridgwell, *leſt the children ſhould periſh for want of neceſſary food and nouriſhment*, were obliged to expend 3*l*. It was objected, that *no juſtice's order was ever made upon the inhabitants, &c. of Ridgwell, for the maintenance and bringing up of the ſaid children, or for the payment or allowance of the money, &c.*; and ſo if they did expend, &c. it was of their own voluntary act and wrong; and if they were damnified, it was of their own act and wrong, &c. BUT THE COURT held clearly, that an order of juſtices was not neceſſary to make the officers of the pariſh liable to do what they were otherwiſe under a legal obligation of doing, namely, to provide neceſſaries for the children. Hays *v* Bryant, Tr. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 253.

The Duty and Authority of the Juſtices.

The juſtices have authority to commit a *ſoldier* for diſobeying an order of baſtardy; for he is not protected againſt ſuch commitment by the *Mutiny Act*.—The court of quarter-ſeſſions in Worceſterſhire, in April, 1786, having adjudged the defendant, a ſoldier in the firſt regiment of guards, and in actual ſervice, to be the reputed father of a female baſtard child, begotten on *Martha Kent*, of the pariſh of Upton-upon-Severn, ordered him to pay 1*s*. 6*d*. weekly to the churchwardens or overſeers of Upton, for ſo long a time as the child ſhould be chargeable to Upton-upon-Severn. At the next ſeſſions, held in July, 1766, the defendant was committed to the bridewell for diſobeying the order, till he ſhould find ſufficient ſureties for the performance of it. A rule had been obtained laſt term, to ſhew cauſe why the order of ſeſſions, by which the defendant was committed to cuſtody for diſobeying the order of baſtardy, ſhould not be ſet aſide, becauſe the defendant, being a ſoldier in actual Rex *v* Archer, Hil. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 270.

ſervice, was protected from being arreſted for that cauſe under the Mutiny Act. By the 63d ſection of that ſtatute, to prevent, as far as may be, any unjuſt or fraudulent arreſts that may be made upon ſoldiers, whereby his majeſty and the public may be deprived of their ſervice, it is enacted, "that "no perſon whatſoever, who is, or ſhall be, liſted, or who "ſhall liſt and enter himſelf as a volunteer in his majeſty's "ſervice, as a ſoldier, ſhall be liable to be taken out of his "majeſty's ſervice, by any proceſs or execution whatſoever, "*other than for ſome criminal matter*, unleſs for a real debt, "or other juſt cauſe of action; and, unleſs before the tak- "ing out of ſuch proceſs or execution, not being for a "criminal matter, the plaintiff or plaintiffs therein, or ſome "other perſon or perſons, on his or their behalf, ſhall make "affidavit, that to his or their knowledge, the original ſum "juſtly due and owing to the plaintiff or plaintiffs, from the "defendant or defendants, in the action or cauſe of action "on which ſuch proceſs ſhall iſſue, or the original debt for "which ſuch execution ſhall be ſued out, amount to the "value of 20*l.* at the leaſt, over and above all coſts of ſuit "in the ſame action, or in any other action, on which the "ſame ſhall be grounded; and if any perſon ſhall neverthe- "leſs be arreſted, contrary to the intent of this act, it ſhall "and may be lawful for one or more judge or judges of "ſuch court, upon complaint thereof made, to diſcharge "ſuch ſoldier ſo arreſted contrary to the intent of this act."

—Ashhurst, J. It appears to me, that the preſent caſe does not come within the proviſions of the Mutiny Act. The firſt part of the 63d ſection was intended to apply merely to the caſes of civil actions: for, it begins with ſtating, that "to prevent any unjuſt or fraudulent arreſts," &c.; that was the miſchief intended to be guarded againſt: then it provides that no perſon who ſhall enliſt, &c. ſhall be liable to be taken out of his majeſty's ſervice by any proceſs or execution whatever, other than for ſome criminal matter, or for a real debt amounting to 20*l.* It appears from this part of the act of parliament, that the legiſlature had only in view, the preventing of arreſts in civil actions, and it has no relation to crimes, or any thing of a criminal nature. So that the caſe of a ſoldier who is taken up for diſobeying an order of juſtices does not come within this part of the ſtatute. But, I have no difficulty in ſaying, if it were neceſſary to have recourſe to it, that this cauſe of commitment is of a criminal nature. The diſobedience of an order of juſtices is ſo far criminal, that in almoſt every inſtance, the party diſobeying may be indicted for it; this ſhews it to be a crime. Therefore, I am of opinion, that the court of ſeſſions have adjudged rightly, and that we cannot releaſe the defendant from his commitment under the Mutiny Act. Grose, J.

This

This is ſo clear a caſe, that I think it unneceſſary to add any thing to what has been already ſaid.—Rule diſcharged.

The King *v.* W Bowen, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 156.

So, in this caſe, the defendant, having been committed to the houſe of correction at Aylesbury, on the 9th of October (on a charge made by *A. Ives*, of Eton pariſh, for begetting her with child, which child was likely to become a baſtard), for refuſing to give ſecurity to indemnify the pariſh of Eton, and for refuſing to enter into recognizance, with ſufficient ſecurity, to appear at the then next general quarter-ſeſſions for Buckinghamſhire, and to abide by and perform ſuch order as ſhould be made in purſuance of the ſtat. 18 *Eliz.* c. 3. was ordered by the laſt court of quarter-ſeſſions to be continued in cuſtody till, &c. and the following caſe was ſtated for the opinion of this court: *W. Bowen* was, on the 9th of October laſt, committed to the houſe of correction at Aylesbury, upon the charge above mentioned, by warrant of Sir *C. Palmer*, bart. one of his majeſty's juſtices of the peace acting in and for the county of Bucks, under a warrant, and is now in cuſtody. The ſaid *W. Bowen* was, at the time of his being apprehended on the charge ſpecified in the ſaid commitment, and ſtill is, a private ſoldier, inliſted and actually ſerving in his majeſty's 29th regiment of foot, and has no property, except his pay and ſubſiſtence as ſuch ſoldier; and the ſaid *A. Ives* is not yet brought to bed.—Lord Kenyon, Ch. J. No *certiorari* ought to have been granted to remove the order of ſeſſions hither, becauſe the proper mode of obtaining relief in this caſe, if the defendant were intitled to it, is by *habeas corpus*, on a return to which the cauſes of commitment would be ſpecified, and, upon thoſe the court would be enabled to form an opinion whether or not thoſe cauſes were ſufficient to juſtify his detention. With this reſerve, however, and to avoid further expence to the parties, I will conſider the queſtion as it appears before us: the caſe of *R.* v. *Archer* was decided on grounds perfectly ſatisfactory to me. There can be no doubt but that incontinence is a crime, and it has always been conſidered as ſuch in the eccleſiaſtical courts. Now, the clauſe in the mutiny acts, which exempts ſoldiers from arreſt, in caſes where the demand is under 20*l.* is clearly confined to civil actions. And the inſtances put at the bar, in which it was ſuppoſed that the court would interfere on behalf of the ſoldier, are caſes of civil actions; a penal action is ſo far conſidered as a civil action, that a Quaker may be examined on his affirmation as a witneſs on the trial of it; it is a civil action, though ariſing on a penal ſtatute. But this proceeding cannot be conſidered in the nature of a civil action; it is altogether a criminal proceſs. And, therefore, I am clearly of opinion, that the order of juſtices is right, though I do not know how we can ſay that it ſhould be confirmed, this being *coram non judice*. Ashhurst, J.

of the ſame opinion. GROSE, J. When the caſe of the *King* v. *Archer* was before the court, no objection to the *certiorari* was taken: now it has been mentioned, I am inclined to think that the writ ought not to have iſſued. As to the principal queſtion, which has been reſerved for our opinion, I think it was decided in *R.* v. *Archer*. It cannot be ſeriouſly doubted whether incontinence be a crime. The ſtat. 18 *Eliz.* c. 3. ſ. 2. enacts, that "two juſtices ſhall, by their diſcretion, take order, *as well for the puniſhment of the mother and reputed father* of ſuch baſtard child, as alſo for the better relief of every ſuch pariſh," &c. The law conſidered this as a crime, otherwiſe it would not have ſubjected theſe perſons to puniſhment. This ſtatute recognized incontinence as a crime, and did not make it an offence for the firſt time. It has been argued, however, that as this queſtion ariſes on the ſtat. 6 *Geo.* 2. it is not to be governed by the determination in *R.* v. *Archer*, becauſe there the child was born. But the birth of the child does not conſtitute the crime; it conſiſts in the incontinence of the party.—The order of ſeſſions was confirmed: but LORD KENYON, Ch. J. deſired that this might not, in future, be conſidered as a caſe in which the Court had, on conſideration, granted a *certiorari* to remove ſuch an order.

Billings *v* Prinn and another, Tr. Ter. 15 Geo. 3. C.B. 2 *Black. Rep.* 1017.

Both juſtices muſt be preſent at the ſame time and place when a woman is examined, and committed for not filiating a baſtard child.—Treſpaſs and falſe impriſonment for committing the plaintiff to bridewell for refuſing to filiate a baſtard child. She was examined ſeverally, at ſeparate times (but in the ſame day), and in ſeparate places, by the two defendants, who were juſtices of the peace for Glouceſterſhire; and they ſeparately ſigned the warrant of commitment. On the trial there was a verdict for the plaintiff, with 5*l.* damages. It was moved for a new trial, on the ground that it was ſufficient under the ſtatute of 7 *Jac.* 1. if the two juſtices joined in and conſented to the commitment, but that they might examine and adjudge the matter, and ſign the warrant, ſeparately. DE GREY, Ch. J. This caſe is unfortunately too clear to bear an argument. There is no uſe in appointing two or more perſons to exerciſe judicial powers, unleſs they are to act together. Separate examinations, by different magiſtrates, may produce different facts: on which, then, is the adjudication to proceed? It is exceedingly clear, that in the caſe of an action thus brought to try the validity of the commitment, it cannot be ſupported by law. GOULD, BLACKSTONE, and NARES, Juſtices, of the ſame opinion.—Rule diſcharged.

Rex v. Inhabitants of Upton-Gray, Tr. Ter. 23 Geo. 3. B.R. *Cald.* 308.

It is not neceſſary, to the validity of an order of filiation, that the putative father ſhould be preſent at the examination of the woman before the two juſtices.—Two juſtices adjudge *Walter Nation*, of the pariſh of Froyle, in the county of Southampton,

Southampton, ſervant, to be the reputed father " of a female " baſtard child, begotten on *Sarah Arundell*, and that the " ſaid child was chargeable to the pariſh of Upton-Gray, in " the ſaid county: and that he ſhould pay, &c. and alſo one " ſhilling weekly, &c." The ſeſſions, on appeal, quaſhed this order, and ſtated as follows: Upon hearing the order (as above ſtated) read, and what was alleged by counſel thereupon, and *it not appearing upon the face of the order, that the ſaid* Sarah Arundell *was examined in the preſence of the ſaid* Walter Nation, *at the time of making the ſaid order*, this court is of opinion, and doth adjudge, that the ſaid recited order ought to be quaſhed; and the ſame is hereby quaſhed accordingly.—PER CUR. The preſence of the putative father is not neceſſary before the juſtices out of the ſeſſions; and as the ſeſſions have ſtated this, and no other, to have been the foundation of their proceeding, we cannot preſume that they went upon any other.—Order of ſeſſions quaſhed, and original order affirmed.

An order of baſtardy, ſtating, " Whereas it hath ap- " peared to us, &c." without *an expreſs adjudication* that the perſon charged is the putative father, is void.—On a rule to ſhew cauſe why an order of baſtardy made upon the defendant by two juſtices for the county of Hereford, and confirmed by the court of quarter-ſeſſions for that county, ſhould not be quaſhed. The objection was, That the order contained no *expreſs* adjudication, and was, therefore, void, according to the caſe of *Rex* v. *Perkaſſe* (1). WILLES, J. (after ſtating the objection, and obſerving upon the caſes of *Rex* v. *Perkaſſe*, and *Suddlecomb* v. *Burwaſh*, 1 *Salk.* 491), declared the judgment of the court, as follows: the caſe of *St. Giles's, Cripplegate* v. *Hackney* (2), ſeems to be more like the preſent than *Suddlecomb* v. *Burwaſh*. In that laſt caſe, the report concludes by ſaying, " there ought to be a parti- " cular averment, &c." and in *St. Giles's, Cripplegate* v. *Hackney*, the order runs very much in the ſame manner as here, *viz.* " Whereas, on oath made by the ſaid *E. F.* it " appears, that her huſband was legally ſettled at Hackney;" and that order was quaſhed, " becauſe there was no judg- " ment of the juſtices concerning the laſt legal ſettlement, " but only the oath of the woman" (3). We have looked into the proceedings in *Rex* v *Gravſend*, *Bott.* 437. and we find, that there was an *expreſs* adjudication in that caſe. We are, therefore, all of opinion, that this order cannot be ſupported.—Both the orders quaſhed.

Rex v. Pitts, Ea. Ter. 21 Geo. 3. B.R. 1 *Doug.* 662.

The juſtices muſt *adjudge* a baſtard to have been born in the pariſh, to be charged by their order.—Two juſtices of

Rex v. Stanley, Ea. Ter. 22 Geo. 3. B. R. *Cald.* 172.

(1) 2 *Sid.* 363.
(2) Ea. 9 *Will.* 3. 1 *Salk.* 478.
(3) 1 *Salk.* 478.

the Weſt Riding of the county of York, by an order dated the 29th of May, 1781, adjudged *Thomas Stanley*, of Worksop, in the county of Nottingham, to be the reputed father of a baſtard child begotten upon *Ann Storey*, of Anton, in the ſaid Weſt Riding; "which ſaid child is now become chargeable, &c. and is likely ſo to continue;" and then proceed to order maintenance, &c.—WALLACE inſiſted, that there was no adjudication, that the child was born in the pariſh charged with its maintenance, nothing more being ſtated than that it was *chargeable to the pariſh, and likely ſo to continue:* and the order was quaſhed.

5, An *original order* of baſtardy may be made at the quarter-ſeſſions.—An original order of baſtardy was made at the Nottinghamſhire ſeſſions, which having been removed into this court, and a rule granted to ſhew cauſe why it ſhould not be quaſhed, the principal objection was, that the ſeſſions have no original juriſdiction in making orders of baſtardy.—But BULLER, J. read from *Bott*, *Slater*'s caſe, and the Court were clearly of opinion, that the ſeſſions have an original juriſdiction.—The order confirmed.

Ea. Ter. 21 Geo. 3. B. R. 2 *Doug.* 632.

If a court of *general quarter-ſeſſions*, next after an order of baſtardy, quaſh the order, this court will not intend that a court of *general ſeſſions* intervened; and unleſs that appear, the order will be confirmed.—An order was made by two juſtices on the 27th of March, 1789, adjudging *James Lover* to be the reputed father of a baſtard; againſt which order *Lover* appealed to the *general quarter-ſeſſions* held on the 22d of April, where it was quaſhed; and no caſe was reſerved for the opinion of this Court. But both the orders being now returned by *certiorari*, it was moved to quaſh the order of ſeſſions, becauſe that court had no juriſdiction to hear the appeal. The party grieved ſhould have appealed, under the ſtat. 18 *Eliz.* c. 3. to the *next general ſeſſions* (1); and *non conſtat* but that a court of *general ſeſſions* intervened between the 27th of March, when the original order was made, and the 22d of April, when the *general quarter-ſeſſions* were held. And *Rex* v. *Shaw*, *Salk.* 483. (2) was relied on; where the order of ſeſſions was quaſhed for this very reaſon. LORD KENYON, Ch. J. (ſtopping the other ſide) obſerved, that the caſe cited did not appear to be one of the moſt authentic in *Salkeld*'s Reports. But it is a general rule that every intendment ſhall be made to ſupport an order of juſtices (3); and as it does not appear that the

Rex *v.* Chicheſter, Mic. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 496.

(1) The 18 *Eliz.* c. 3. requires the appeal to be made to the next *general ſeſſions*; the 13 and the 14 *Car.* 2. c. 12. ſ. 2. which gives an appeal againſt an order of removal, requires it to be made to the next *quarter ſeſſions*.

(2) *Carth.* 455. S. C.

(3) Vid. 2 *Str.* 998. *Salk.* 442 and 485. *R* v. *Gregory*.

general

general quarter ſeſſions, held on the 22d of April, were not the ſeſſions next following the 27th of March, we will not preſume it for the purpoſe of quaſhing the order of ſeſſions. —Order of ſeſſions affirmed.

If a perſon be bound by a recognizance by one magiſtrate under 6 *Geo.* 2. c. 31. to appear at the next ſeſſions and perform ſuch order as ſhall there be made on him under the 18 *Eliz.* c. 3. reſpecting baſtards, the ſeſſions may make an order of baſtardy on him, but they cannot order him alſo to give ſecurity for the performance of that order.—The court of quarter-ſeſſions for the county of Worceſter made an order on the defendant, in ſubſtance as follows: it recited that *M. Griffin* had been lately delivered of a female baſtard child, and that ſhe charged the defendant with being the father; that the defendant was then preſent in court, in purſuance of a certain recognizance taken before *B. Johnſon*, one of the juſtices, &c. (on a prior day), and entered into by the defendant, and one *J. Price* as ſurety for the defendant, with a condition thereunder written, that if the defendant ſhould appear at the then next general quarter-ſeſſions, &c. and ſhould perform ſuch order as ſhould be made in purſuance of the ſtat. 18 *Eliz.* c. 3. then the recognizance was to be void; and that the court of quarter-ſeſſions had heard the complaint, &c. on oath; the order then ſtated that that court adjudged the defendant to be the father of the ſaid child, and ordered him to pay 20*s.* for the expences of the lying-in, and for the maintenance of the child till that time, and the further ſum of 1*s.* 6*d.* weekly, from that time, ſo long as the child ſhould continue chargeable. *The order further ſtated, that the court of quarter-ſeſſions alſo ordered the defendant to find ſufficient ſureties for the performance of that order; and that on the defendant's alleging that he was not compellable to find ſuch ſureties, they committed him to the houſe of correction until he ſhould find ſufficient ſureties*; and that the court alſo direct d that the recognizance of the defendant, and *J. Price*, for the defendant's appearance and conformity at thoſe ſeſſions, ſhould be diſcharged. The above order having been removed here by *certiorari*, a rule was obtained calling on the proſecutors to ſhew cauſe why that part of it, by which the defendant was committed for want of ſureties, ſhould not be quaſhed. Per Cur. There is no doubt in this caſe reſpecting the illegality of the order, this point having been expreſsly decided in *R.* v. *Fox* (1), *Tr. Ter.* 29 and 30 *Geo.* 2. where an objection taken to the order was, that the juſtices had ordered the defendant to find ſecurity to indemnify the pariſh

The King *v.* R. Price, Hil. Ter. 35 Geo 3. B. R. 6 *Ter. Rep.* 147.

(1) Vide 1 *Conſ's Batt.* 422. *pl.* 555.

before

before there was any breach of the order, when on his refuſal, they ought only to have taken his recognizance to appear at the ſeſſions; and the court determined that the exception was fatal. Lord *Kenyon* then added, as that caſe, which was determined on great conſideration, and by able judges, is directly in point, it ought to govern the preſent caſe. Therefore, ſo much of this order of ſeſſions as reſpects the giving of ſecurity for the performance of the order, and the diſcharging of the defendant's recognizance, muſt be quaſhed, and the reſt of the order confirmed, which was ordered accordingly.

The King v. the Inhabitants of Ravenſtone, Mic. Ter. 34 Geo. 3. B. R. 5 *Ter. Rep.* 373.

The examination of a pregnant woman, taken before a juſtice of the peace, under the ſtat. 6 *Geo.* 2. c. 31. is admiſſible evidence on an application to the quarter-ſeſſions, to make an order of filiation on the putative father, even though the woman die before ſuch application can be made. —On the appearance of *W. Start* (on his recognizance taken before a magiſtrate for Leiceſterſhire, to anſwer a charge againſt him for being the putative father of a baſtard child, of which one *S. Haggs* had been delivered in the pariſh of Ravenſtone, in the county of Leiceſter), at the Leiceſter ſeſſions, the pariſh officers of Ravenſtone applied to the court of ſeſſions to make an order of filiation and maintenance on *Start:* when that court ordered that *Start* ſhould be diſcharged from his recognizance, and that the application ſhould be diſmiſſed, ſubject to the opinion of this court on the following caſe: "It appeared in evidence, on behalf "of the pariſh officers of Ravenſtone, that *S. Haggs* died "within two hours after ſhe was delivered of the child; "that ſhe had previouſly been examined before a juſtice of "the peace, according to the proviſion of the 6 *Geo.* 2. c. 31. "and her examination was produced, in which ſhe depoſed "that the ſaid *W. Start* was the father of the child. When "this examination was offered in evidence, it was objected "to on the behalf of *W. Start*, both as inadmiſſible, and inſufficient; the court received it in evidence, but thought "that, the woman being dead, no order of filiation could "be made."—Per Cur. There is no doubt but that the juſtices may proceed to make the order, although the woman be dead. The examination having been taken before a magiſtrate in the courſe of a judicial proceeding, under the ſtat. 6 *Geo.* 2. c. 31. is certainly admiſſible evidence, like the depoſitions taken under the ſtatute of *Philip* and *Mary* (1): and being admiſſible, and not contradicted by any other evidence, it ſeems to be concluſive. We cannot, indeed, compel the juſtices at the ſeſſions to decide on the weight of

(1) 1 and 2 *P.* and *M.* c. 13.

evidence:

evidence: but when we determine that this evidence is admiſſible in point of law, and that the juſtices may make the order applied for, though the woman be dead, we have no doubt but that they will alſo be of opinion that this evidence is concluſive againſt the party againſt whom the application has been made.

Rex *v.* Stanley, Ea. Ter. 22 Geo. 3. B. R. *Cald.* 172.

An order of baſtardy removed by *certiorari* in due time, may be quaſhed for objections on the face of it, without a previous appeal to the ſeſſions.—Two juſtices of the Weſt Riding of the county of York, by an order dated the 29th of May, 1781, adjudge *Thomas Stanley*, of Workſop, in the county of Nottingham, to be the reputed father of a baſtard child, begotten upon *Ann Storey*, of Anſton, in the ſaid Weſt Riding; "which ſaid child is now become chargeable, &c. "and is likely ſo to continue;" and then proceed to order maintenance, &c. This order was ſerved upon the defendant on the 31ſt of June. The next ſeſſions were at Midſummer, on the 11th of July. Upon an appeal to this order at the Michaelmas ſeſſions, holden by adjournment, on the 10th of October, that court *diſmiſſed the appeal*, upon the ground of its not having been made at the ſeſſions next after the ſervice of the order. In the enſuing Michaelmas Term a *certiorari* iſſued, directed to the keepers of the peace and juſtices for the ſaid Weſt Riding, to remove all orders upon this ſubject made by the ſaid juſtices. Upon the return of theſe orders, a rule was obtained to ſhew cauſe why the *order of ſeſſions* made on the 10th of October, 1781, ſhould not be quaſhed. It was objected, that the defendant could not, under this rule, go into the *original order*, the order of ſeſſions, which alone was moved to be quaſhed, having only diſmiſſed the appeal, and *not confirmed the original order*.—BULLER, J. Though there may be a ſlight impropriety in the form, if in effect the order of ſeſſions confirms the original order, the motion to quaſh the order of ſeſſions is well enough. Cauſe was now ſhewn againſt this rule; and it was urged, that till ſomething to raiſe a contrary preſumption was ſhewn, the intendment of the court was always in favour of the acts of every inferior juriſdiction: that the order of ſeſſions in the preſent inſtance not being objected to, as defective in point of form, and not being ſpecial, but ſimply diſmiſſing the appeal againſt the original order of two juſtices, could not be quaſhed; that there having, in point of law, been no appeal, there ought not to have been any order whatſoever made at the ſeſſions; and that, if any objection was made to the original order, the *certiorari* ought to have been directed to the two juſtices to have returned it. And he contended that, if the other ſide ſhould, as had been intimated, move to amend, by making it a rule to ſhew cauſe why *the order of two juſtices*, which had been appealed againſt,

againſt, ſhould not be quaſhed, or ſhould move an original rule to quaſh *that order*, that in either way, and however ſhaped and pointed againſt ſuch order, the application muſt now be out of time: as the ſtat. 13 *Geo.* 2. c. 18. ſ. 5. requires, that "the *certiorari* be applied for in ſix calendar "months next after proceedings ſhall be had;" that it had been determined in the caſe of (1) *Rex* v. *Baker*, that theſe ſix months are to be computed from the ſervice of the order, which in the preſent inſtance was before the Midſummer ſeſſions; and that the defendant, having neglected to appeal in time at the proper place, could not now come *per ſaltum*, and avail himſelf of an objection in this court.—THE COURT ſeemed to think, that if the defendant had meant to take exceptions to the original order, he ſhould have done it by appeal in due time to the ſeſſions; as they could give relief as well upon the form as upon the merits; and that having declined the bringing of his caſe before the proper juriſdiction in the firſt inſtance, he ought not now to be aſſiſted by the court *per ſaltum:* but they gave time to look for authorities to juſtify ſuch an interference. A few days afterwards, the counſel againſt the rule admitted, that the order might be brought up by *certiorari*, without any appeal having been previouſly lodged at the ſeſſions within time; and he ſtated the general rule as laid down in 1 *Salk.* 147. that no *certiorari* ſhall be granted to remove orders of juſtices *before* the determination on appeal to the ſeſſions, unleſs the time of appeal be expired; becauſe it otherwiſe hinders the privilege of appealing: conſequently, that the court had a general authority to interfere; that the preſent caſe, in which the defendant had declined an appeal within the period preſcribed by law, was not within the exception. He alſo ſaid, that this rule was farther explained in the caſe of the *Borough of Warwick*, 1 *Strange*, 991. which adjudged, that it was only in caſes wherein the time of appeal was limited, and not where it was left open at any time, that this general authority of the court was abridged. He added, that as the *certiorari* appeared to have been moved in time, he ſhould not preſs the court upon the form of the preſent rule, and without a reaſonable proſpect of ſucceſs put the party to the expence of another.—PER CUR. The original order of adjudication of two juſtices muſt be quaſhed, and the order of ſeſſions, diſmiſſing the order of adjudication, affirmed.

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(1) M. 27 *Car.* 2. 1675. 3 *Keb.* 551.

Bill of Exceptions.

In this caſe, ſoon after the court ſat, the Lord Chief Juſtice *Pratt* came *perſonally* into court, to confeſs *(ore tenus)* his ſeal put to a bill of exceptions in this cauſe, purſuant to the requiſition contained in a certain writ (1) iſſued for that purpoſe. Money, Watſon, and Blackmore, v. DrydenLeach, in Er. Ea. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1692.

The bill of exceptions, ſealed by the Lord Chief Juſtice, had been previouſly brought into this court, and was now in the hands of the Secondary of the office of Pleas; and all the proceedings down to, and including the above writ, were entered upon the rolls of the court.

The Lord Chief Juſtice being now come into this court, purſuant to the command contained in the ſaid writ, delivered it to the Lord Chief Juſtice of this court; the Secondary, at the ſame time, delivering the original bill of exceptions into Lord *Mansfield*'s hand; whereupon Lord *Mansfield* ſhewing to the Lord Chief Juſtice the ſeal thereto affixed, aſked him WHETHER that was his Lordſhip's ſeal or not? To which queſtion, his Lordſhip anſwering in the affirmative, Lord *Mansfield* returned the bill of exceptions to the Secondary; at the ſame time delivering to him the above-mentioned writ, with orders that it ſhould be filed.

There was no written return to the writ, but the Secondary indorſed thereon—" Sir *Charles Pratt*, Knt. the chief juſtice within-named, perſonally appeared in the court of the lord the king, before the king himſelf, &c. on the day of the return within written, and confeſſeth that the ſeal put to the bill of exceptions within mentioned is his ſeal."

The Lord Chief Juſtice of the Common Pleas immediately returned without ſitting down: and the Lord Chief Juſtice of the court attended him till he was got paſt the puiſne judge, but not quite to the door of the court.

The court, out of which a record iſſues, cannot take cognizance of a bill of exceptions tendered at the trial of a cauſe. But if a ſpecial verdict be found in the ſame cauſe, upon which the court below pronounces judgment, if that judgment be right, though they likewiſe proceed to hear and determine upon the bill of exceptions, that alone is not a ground for a court of error to reverſe the judgment.—This was a writ of error, from a judgment of the court of King's Bench, in Ireland, in *quo warranto:* at the trial, all the iſſues Symmers v. Regem, Mic. Ter. 17 Geo. 3. B. R. in Er. *Cowp.* 501, 502.

(1) For precedents of the pleadings in this caſe, ſee 3 *Burr. Rep.* 1693, and *Buller's* N. P. 317.

were

were found for the crown; but the defendants had, in their defence, inſiſted that certain evidence which they offered to give (and which the judge of aſſize refuſed to admit) ought to go to the jury: the defendants counſel, upon ſuch refuſal, tendered a bill of exceptions to the judge, which he ſealed: the bill of exceptions having been returned into the court of King's Bench, in Ireland, as part of the record, the judges, after hearing arguments upon it, gave judgment of *cuſter* againſt all the defendants: whereupon this writ of error was brought. On the behalf of the plaintiffs in error, one objection taken was, that the judgment of the court below was founded on the bill of exceptions, of which they had no juriſdiction.—PER CUR. (after argument), The objection is, that the courts below have given judgment not only on the verdict and what ariſes out of it, but have likewiſe gone into arguments on the bill of exceptions; and the judge before whom it was tried, appeared perſonally and brought his bill of exceptions before the court of *B. R.* in Ireland. It certainly is ſo: the court has proceeded by miſtake on the bill of exceptions, and gone into arguments upon it. Till very lately, there was no bill of exceptions in Ireland, and they were at a loſs in this caſe how to proceed: the ſtatute, giving the bill of exceptions, ſays, it ſhall be brought by the judge, who tried the cauſe, into the ſuperior court: it is ſo here.—A bill of exceptions comes into this court immediately:—it goes from hence originally, to the Lords in Parliament—Where there is a bill of exceptions from the *B. R.* in Ireland, the judge muſt bring it into this court. To eaſe him from that trouble, as in this caſe, a commiſſion may iſſue to take the acknowledgment of his hand and ſeal. They were here doubtful, whether they ſhould not certify the tranſcript as they do of all their other records: but although the court of King's Bench, in Ireland, had no juriſdiction upon the bill of exceptions, yet they may have proceeded to give a right judgment both upon good and bad grounds: and, notwithſtanding this court may differ from them on the bad ground, it does not follow that they differ from them on the good; and if there is a good ground to ſupport their judgment, independent of the bill of exceptions, that is ſufficient: if enough appears, upon the whole of the record, to ſhew that the court below have given a right judgment, this court cannot reverſe it, becauſe that court has proceeded erroneouſly in reſpect of ſomething elſe, which they ought not to have entered into.

Gardner *v.* Baillie, Ea. Ter. 37 Geo. 3. C. B. 1 *Pul.* et *Boſ.* 32.

A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of coſts.—PER CUR. The bill of exceptions is no part of the record, till after judgment; if it were, the court ought to take it into conſideration before judgment, which is never done.

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The cauſe proceeds, and judgment is given here, as if there were no bill of exceptions; this may be accounted for, by the practice which formerly prevailed of trying all cauſes in bank: the bill of exceptions is carried into a court of error, and there annexed to the record. If it had been part of the record here, there would be no occaſion to ſend for the judge to acknowledge his ſeal: when that is acknowledged, it is then, for the firſt time, annexed to the record. Being for the benefit of the party who tenders it, and remaining in his poſſeſſion, it is in his breaſt to employ it or not: regularly it ought to be tendered at the time of the trial, and ſealed by the judge in court. And though the practice is to allow the counſel to tender it afterwards, and ſome expence may ariſe to the parties before it is ſettled, yet this is not in a regular courſe of proceedings upon which coſts can be incurred. If the record be lengthened by the bill of exceptions, coſts will be allowed for copying, fees to council, &c. by the court of error: but there can be no coſts in the court below. —Therefore, in this caſe, on a motion that the prothonotary might review his taxation, and allow the coſts of a bill of exceptions, the Court refuſed, in the firſt inſtance, to grant a rule to ſhew cauſe.

Bills of Exchange and Promiſſory Notes.

Their Form and Effect.

A bill of exchange is not good, when drawn on a ſpecific, and future and uncertain fund.—The plaintiffs declared in aſſumpſit on a bill of exchange, drawn in the following words:

Dawkes *et ux.* v. the Earl of Deloraine, Tr. Ter. 11 Geo. 3. C.B. 3 *Wilſ.* 207. 2 *Black.* 782.

" 8th of January, 1768, ſeven weeks after date pay *Miſs Read* (now the wife of the plaintiff) 32*l.* 17*s.* out of *W. Steward*'s money, as ſoon as you ſhall receive it, for

" Your humble ſervant,

" *Deloraine.*

" To *Timothy Brecknock*, eſq. St. Mary-la-Bonne."

Which bill the ſaid *Brecknock* accepted, but afterwards refuſed to pay.—The pleas were: *firſt*, Non-aſſumpſit. *Secondly*, That the ſaid *Timothy Brecknock* did not, at any time, receive any value of the ſaid *William Steward*'s money, mentioned in the ſaid bill, or any part thereof. To this, the plaintiff demurred, and the defendant joined in demurrer. It was inſiſted that this was no bill of exchange: 1ſt, Becauſe it was not made payable to order. 2dly, Becauſe it was not drawn for value received. And 3dly, *Becauſe it was payable out of a particular fund*, at a future time; and might, or might not happen. PER CURIAM (after argument and time taken to conſider), We ſay nothing upon either of the two firſt objections; becauſe OUR OPINION, *that this is no bill of exchange,*

change, IS GROUNDED *upon the laſt objection only.*—The inſtrument, or writing, which conſtitutes a good bill of exchange, according to the law, uſage, and cuſtom of merchants, is not confined to any certain form or ſet of words, yet it muſt have ſome eſſential qualities; without which, it is no bill of exchange: it muſt carry with it a perſonal and certain credit given to the drawer, not confined to credit upon *any thing or fund:* it is upon the credit of *a perſon's hand*, as on the hand of the drawer, the indorſer, or the perſon who negociates it: he to whom ſuch bill is made payable or indorſed, takes it upon no particular event or contingency, except the failure of the general perſonal credit of the perſons drawing or negociating the ſame. In the preſent caſe, the drawer did not make this writing an inſtrument upon his own perſonal general credit, that in all events he would be liable in caſe *Brecknock* ſhould not pay it out of *William Steward's* money; but both the drawer, and the perſon to whom payable, look only at the fund; and no perſonal credit is given to the defendant, the drawer.—It was objected, that this bill was accepted generally and in an unlimited manner; and it muſt be admitted, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and acceptance would have been good: but the acceptance muſt mean, that *Brecknock* accepts it to pay out of *Steward's* money, not out of the *drawer's* money; and upon this record it appears, that *Brecknock* has not received any of *Steward's* money. It would be monſtrous to ſay, that *either the drawer or acceptor* ought to pay this 32*l.* 17*s.* out of their own money. *There is no caſe, in any book, wherever it has been held that an action will lie, as upon a bill of exchange, where the ſame was payable out of a future contingent fund.* The caſe of *Andrews* v. *Franklin*, 1 *Strange* 24. was a caſe on a promiſſory note, to pay within two months after ſuch a ſhip was paid off; it was inſiſted, that this was not negotiable, it being upon a contingency which may never happen. But the Court held, the paying-off the ſhip to be a thing of a public nature, and morally certain.—Upon the whole, we are all of opinion, that judgment muſt be entered for the defendant.

Hauſſoullier *v.* Hartſinck, Tr. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 733.

This was an action, brought by the plaintiff as the payee of the two following notes, againſt the defendants as the makers:

"No. 300. Original Security Bank, London. No. 300.
"35, Cornhill. "This 7th day of September, 1797.
"£.25. On the 19th day of November next, and after that date *on demand*, we promiſe to pay to ——— or bearer, £.25, *being a portion of a value as under, depoſited in ſecurity for the payment hereof*, according to the receipt in our hands.
"*Hartſinck* and Co."

The value depoſited conſiſted in titles to property marked A.

"No.

"No. 41. Original Security Bank, London. No. 41.
"35 Cornhill. "This 5th day of July, 1797.
"£.50. On the 19th day of October next, and after that date on demand, we promiſe to pay to ——— or order £.50 for *value depoſited* and regiſtered ⁂.
"*Hartſinck* and Co."

The plaintiff had diſcounted the above bills; and, on non-payment, brought this action. At the trial, a ſpecial caſe was reſerved for the opinion of the Court, in which the ſole queſtion was, Whether the plaintiff was intitled to recover on both or either of the notes? AND THE COURT were clearly of opinion that, though as between the original parties to the tranſaction, the payment of the notes was to be carried to a particular account, the defendants were liable on theſe notes, which were payable at all events.

A promiſſory note, payable to *A.* without adding *or to his order, or to bearer*, is good.—The promiſſory note, in this caſe, was as follows: "Three months after date, I promiſe "to pay to Mr. *Smith*, currier, 40*l.* value received, in truſt "for Mrs. *E. Thompſon*, as witneſs my hand, *L. Aſkew.*" It was objected, that as this was a note not made payable to order, it was not a promiſſory note within the ſtatute. SED PER CUR. It was decided, in a caſe in 2 Lord *Raym.* 1545. on demurrer, that a note payable to *B.* without adding, or to his order, or to bearer, was a legal note within the act of parliament. It is alſo ſaid, in *Marius*, that a note may be made payable either to *A.* or bearer, *A.* or order, or to *A.* only. Smith *v.* Kendall, Mic. Ter. 35 Geo. 3. B R. 6 *Ter. Rep.* 123.

If a perſon ſigns his name upon a blank paper, ſtamped with a bill ſtamp, and puts it into the hands of another perſon to draw a bill of exchange, in ſuch manner as he ſhall think fit, he will be anſwerable as the drawer of ſuch bill.—This was an action brought by indorſees againſt the drawer of a bill of exchange. The declaration contained ſix counts: 1ſt. Stating, that the plaintiffs and defendant, and *Liveſay*, *Hargreave*, *Anſtie*, *Smith*, and *Hall*, were perſons uſing commerce, &c. That the defendant, on the 5th of April, 1788, drew a bill of exchange, directed to them, by which he required them, three months after date, to pay to Mr. *George Chapman, or order*, 1,551*l.* value received, and delivered the ſaid bill to them; and *authoriſed them to negotiate and indorſe the ſame in the name of* George Chapman, *and thereby to raiſe money thereon*, for the uſe of *Liveſay* and Co. The plaintiffs then averred, that *there was no ſuch perſon as* George Chapman, *the ſuppoſed payee*, but that *the ſaid name was merely fictitious*, which ſaid bill afterwards, by one *Andrew Goodrick*, *being a perſon thereunto, in that behalf, lawfully authorized, by* Liveſay *and Co. upon ſight thereof was accepted.* And the ſaid *Liveſay* and Co. afterwards, &c. *negotiated and indorſed the ſaid bill* Collis *et al. v.* Emett, Hil. Ter. 30 Geo. 3. C. B. 1 *Hen. Black* 313.

of exchange, in and with the name of the ſaid George Chapman; *and by that indorſement, in the name of the ſaid* George Chapman, *appointed the contents of the ſaid bill of exchange to be paid to the ſaid plaintiffs, and thereby raiſed money thereon, for the uſe of the ſaid perſons ſo uſing the names, &c. of* Liveſay *and Co.* and delivered the ſaid bill ſo indorſed to the ſaid plaintiffs, *who thereupon, then and there, on the credit thereof, advanced to the ſaid perſons* uſing the firm of *Liveſay* and Co. the money in the bill mentioned, &c. 2d. count, leaving out the ſpecial circumſtances, ſtated the bill to be drawn by the defendant on *Liveſay*, &c. who were thereby requeſted to pay to Mr. *George Chapman, or bearer*, 1,551*l.* &c.: and the plaintiffs averred, that *they were, and ſtill continued, the bearers and proprietors* of the ſaid bill, &c. Alſo, there were the other common money counts. Plea general iſſue. On the trial of the cauſe, the following ſpecial verdict was found: That the ſaid *John Emett* (who was a *partner* with *Liveſay* and Co. in the ſpinning of cotton at Clithero) *wrote his name upon a piece of blank paper, with a ſhilling ſtamp thereon*, and delivered the ſame to *Liveſay* and Co. for the purpoſe of *drawing a bill of exchange* for ſuch ſum, payable at ſuch time, and to ſuch perſon, or perſons, as they ſhould think fit. That afterwards the ſaid *Liveſay* and Co. on the 5th day of April, 1788, drew on the ſaid paper, above the name of the ſaid *John Emett*, *a certain writing directed to the ſaid* Liveſay *and Co.* in the words and figures following, viz. "Clithero, April 5th, 1788, 1,551*l.* three months "after date, pay to Mr. *George Chapman, or order*, fifteen "hundred and fifty pounds, value received as adviſed, *John* "*Emett.*" That the occaſion and manner of giving the ſaid paper-writing was as follows, viz. That on the ſaid 5th of April, the ſaid *Liveſay* and Co. were indebted to *Thomas Jeffery*, in the ſum of 1,512*l.* 9*s.* upon a bill of exchange, which became due that day, and which had been previouſly given for goods ſold by *Jeffery* to them. That one *Richard Collis*, clerk to the ſaid *Jeffery*, on that day applied at the houſe of *Liveſay* and Co. in Cheapſide, for payment of the ſaid bill; that on ſuch application, he ſaw the ſaid *Anſtie*, one of the ſaid partners, who informed the ſaid *Richard Collis* that he could not conveniently then pay the ſame, but requeſted the ſaid *Richard Collis* to take a bill on the ſaid houſe of *Liveſay* and Co. for the ſaid ſum of 1,512*l.* 9*s.* at three months date, including the intereſt thereof in the mean time, and gave to him the ſaid *blank paper* above mentioned, with the name of the ſaid *John Emett* written thereon, to be filled up by one of the clerks of the ſaid *Liveſay* and Co. That one *Ludlow*, a clerk of the ſaid *Liveſay* and Co. filled up the ſaid writing for 1,551*l.* being the amount of the ſaid bill, and intereſt, in manner and form as above ſet forth, except the acceptance

and

and indorſement thereof as herein-after mentioned; and that immediately afterwards, the ſaid paper-writing was carried to *Andrew Goodrick*, another clerk of the ſaid *Liveſay* and Co. and who was authoriſed by the ſaid *Liveſay* and Co. to accept the ſame, and which the ſaid *Andrew Goodrick* accordingly did, in the name of the ſaid *Liveſay* and Co. *That with the authority of the ſaid* Liveſay *and Co. the name of* George Chapman *was then indorſed on the ſaid paper-writing*; and that the ſaid paper-writing ſo filled up, accepted, and indorſed, was then delivered to the ſaid *Richard Collis*, and the ſaid *Richard Collis* thereon delivered up the bill for 1,512*l.* 9*s.* to the ſaid *Liveſay* and Co. That the ſaid *Thomas Jeffery* afterwards negociated the ſaid paper writing with the *plaintiffs*, and *received the full amount thereof from them*, deducting a diſcount at 4½*l. per cent.* and delivered the ſame to the ſaid plaintiffs. That the ſame was duly preſented for payment, to the ſaid *Liveſay* and Co. who refuſed to pay the ſame, whereof the ſaid *John Emett* had due notice. That there was no ſuch perſon as the ſaid *George Chapman*, the ſuppoſed payee of the ſaid paper-writing, but that the ſaid *George Chapman*, was *merely a fictitious perſon:* that *Emett* gave no *further, or other authority than as aforeſaid*, and *knew nothing of this tranſaction.* That the plaintiffs had *then no knowledge that the ſaid* George Chapman *was a fictitious perſon*, or of the circumſtances under which the ſaid paper-writing was drawn, accepted, and indorſed; but that the ſaid *Thomas Jeffery had full knowledge of the whole of the ſaid tranſactions.* After full argument, and time taken to conſider, the judgment of the Court was given, as follows, by LORD LOUGHBOROUGH, Ch. J. We have taken the whole of the evidence into our conſideration, and the reſult of our opinion is, that the plaintiff is intitled to recover. The ſpecial count in the declaration, ſtating the whole of the tranſaction, would have afforded a ground, upon which I ſhould have thought that judgment might have been very properly pronounced in his favour. But it appears, upon the record, that the caſe, ſtated on the ſpecial count, differs from the finding on the ſpecial verdict in two or three circumſtances; that count, therefore, would clearly not ſupport a judgment in favour of the plaintiff. The circumſtances are not very material; but as the count and the verdict at preſent ſtand inconſiſtent with each other, a judgment for the plaintiff, on the firſt count, would undoubtedly be erroneous. We muſt, therefore, look into the declaration, to ſee if there be any count on the record, on which the plaintiff may ſupport a judgment. And it appears to us, that it may fairly be ſupported on the count, ſtating the bill to be a bill *payable to bearer*. It is certainly not *literatim* payable to bearer, it is drawn payable to *George Chapman* or order. Upon a fact,

ſet forth in the ſpecial verdict, it appears, that by the permiſſion at leaſt, if not ſomething more than the permiſſion, of the defendant, a power was given to *Liveſay* and Co. to frame bills of exchange, binding him in any manner they thought proper, within the limits of that power. There is no doubt they might, within thoſe limits, have drawn a bill in terms payable to bearer; the bill they have choſen to draw, is a bill payable to *Chapman* or order; and it is found, on the verdict, that there is no ſuch perſon as *Chapman*. Now the conſequence of this ſeems naturally and juſtly to be, that when a ſecurity is negotiated, on which, by the terms of it, the party receiving it apprehends he has a clear right to recover, and by the inſertion of the name of a fictitious perſon, his recovery is impeded (it being impoſſible to prove the order of a perſon who has no exiſtence), it ſhould ſeem, in point of law, preciſely the ſame in effect, as if it had been made payable to bearer. A bill of exchange is an authority to pay purſuant to the order of the payee; and it is alſo an undertaking to pay purſuant to that order. But if there be no perſon who, by any poſſibility, can give ſuch order, the engagement muſt be to pay the bill. If the order of the perſon cannot be procured, and with the knowledge and privity of the parties who make the bill ſuch a name is put in as cannot give an order, it is in effect, and in point of law, the ſame thing as if they had made it payable to the perſon who held the bill, namely, the bearer. The determination of the court of King's Bench (1) has approved the ſame rule, and we think that a right determination. Judgment for the plaintiff on the ſecond count.

But if a bill or promiſſory note be made payable to a perſon not in *eſſe*, or his order, and is iſſued with an indorſement in blank, purporting to be made by him thereon, it is as againſt the drawer or maker to be conſidered as a bill or note payable to bearer; and ſo is the bill as againſt the acceptor, if he knew, at the time of his acceptance, that the payee was a fictitious perſon.

The caſes which eſtabliſh the above general point are the following:

Stone *v.* Freeland, B. R. Sittings at Guildhall, after Eaſter Term 1769, cited 1 *Hen. Black.* 316.

Indorſee againſt the acceptor of a bill of exchange, payable to *Butler* and Co. and indorſed in that name. The plaintiff could not prove it to have been indorſed by any perſons uſing that firm; on the contrary, his own witneſſes ſaid, they believed it was indorſed by *Cox* the drawer. It alſo appeared, that there was a houſe of *Butler* and Co. with whom *Cox* had dealings; but it was proved, that the bill in queſtion had never been in their hands. It was admitted, that the bill was a true one, and that the defendant had regularly accepted it; but it was con-

(1) See *Vere* v. *Lewis*, and *Minet* v. *Gibſon*, infra; alſo *Tatlock* v. *Harris*, infra.

tended

tended, that the indorſement was fictitious, which was an eſſential part of the plaintiff's title. Lord MANSFIELD, The intent of the bill was only to enable *Cox* to raiſe money; and the reaſon why it was not made payable to the order of *Cox* was, that there were other bills at that time made payable to his order; if this had been alſo payable to the ſame order, too many would have been in circulation at the ſame time, in the ſame name, which would have had the appearance of fictitious credit. Names are often uſed of perſons who never exiſted. The defendant has enabled *Cox* to do this by lending his acceptance; and when he has, by ſo doing, put the bill in circulation, it ſhall not lie in his mouth to make an objection, that he has nothing to do with it. —Verdict for the plaintiff (1).

Tatlock *et al. v.* Harris, Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 174.

This was an action on the caſe; the firſt count in the declaration ſtated, that the defendant and others, on the 6th of April, 1788, drew a bill of exchange on the defendant *in favour of* Grigſon *and Co. or order, for* 512*l.* 4*s.* payable three months after date, which the defendant accepted; *and that* Grigſon *and Co. endorſed it to* Lewis *and* Potter, who indorſed it to the plaintiffs. The ſecond count, ſtated it to be a bill drawn as above, payable *to certain perſons trading under the firm of* Lewis *and* Potter, or order, and indorſed by *Lewis* and *Potter* to the plaintiffs. There were alſo other counts, for money *paid* by the plaintiffs to the defendant's uſe; money *had and received*, by the defendant, to the uſe of the plaintiffs; and on an account ſtated. Plea, the general iſſue. On the trial, the plaintiffs gave in evidence the bill as ſtated in the firſt count, which was dated from Nottingham.—*Daniel Lovell*, a witneſs, was then called, who ſwore, that there was, at the time of drawing the bill, a houſe of trade at Nottingham, carried on under the firm of *Harris, Harris*, and *Plant*; and that the defendant was one of the partners of ſuch houſe; and that the defendant alone alſo carried on buſineſs in Wood-ſtreet, and reſided in London. He alſo proved that the bill, as well as the ſignature of the drawers and acceptor, was the hand-writing of the defendant; that he had heard the defendant ſay, that he drew the bill payable to the houſe of *Grigſon* and Co. at the requeſt of *Potter*; and that he (the witneſs) believed and underſtood, that when the defendant drew the bill, he (the defendant) did not know, either the one way or the other, whether there was ſuch a mercantile houſe as that of *Grigſon* and Co. *Benjamin Fuller*,

(1) The above caſe of *Stone* v. *Freeland*, it is to be obſerved, was only a *niſi prius* deciſion; and it is likewiſe diſtinguiſhed from the caſes immediately following, by reaſon of the expreſs promiſe to pay the plaintiff, which was the ground of Lord *Mansfield*'s opinion. See 1 *Ter. Rep.* 176.

a witneſs, was then called by the plaintiffs, who ſwore, that he had heard the defendant ſay, that he ſhould not pay the bill, unleſs other bills of exchange, with other *fictitious indorſements* on them, were paid; that if certain perſons, called *Gibſon* and *Johnſon*, and other perſons, on whom fictitious bills of exchange were drawn, ſhould pay, he, the defendant, would pay the within-mentioned bill; but that he, the defendant, would not pay the ſame for the preſent, and till the matter was decided; that the converſation paſſed a day or two before the bill became due; that *the indorſement of* Grigſon *and Co. on the bill, was a fictitious indorſement*; and that the defendant had ſaid, before the bill became due, that *the houſe of* Grigſon *and Co. was a fictitious houſe*; but the defendant did not ſay, that he knew that the houſe of *Grigſon* and Co. was a fictitious houſe at the time he drew the bill. The plaintiffs then called *Matthew Hancock*, who ſwore, that he lived at Nottingham; that *there is no ſuch houſe as that of* Grigſon and Co. *there, nor in any other part of this kingdom, that he (the witneſs) knows of, but that there may be ſuch a houſe ſomewhere.* Two other witneſſes (one living at Nottingham, the other a diſcounting clerk at the bank) proved to the ſame effect as *Hancock*. *Samuel Purſlow*, a clerk to *Lewis* and *Potter*, then ſwore, that the indorſement of *Lewis* and *Potter*, on the back of the bill, was in the hand-writing of one of the partners of the houſe of *Lewis* and *Potter*, and that they received the bill from the defendant, and delivered it to the plaintiffs; that the value of the bill was paid to the houſe of *Lewis* and *Potter*, by the plaintiffs, in draughts on bankers, which draughts were afterwards paid in caſh; and that the defendant had credit given him in account with the houſe of *Lewis* and *Potter*, for the value of the bill. To this evidence the defendant demurred. This demurrer was very elaborately argued.—After which, the unanimous opinion of the Court was delivered by Lord KENYON, Ch. J. thus: What the conſcience of this caſe is, no man living can doubt; for it is extremely clear, that the defendant, who is now called upon to pay this bill, has received the value of it, and therefore ought, in conſcience, to account for it. *The Court are not called upon, and therefore they anxiouſly forbear, to decide a queſtion alluded to in the argument, namely, Whether the perſon who indorſed the names of* Grigſon *and Co. was, or was not, guilty of felony.* I am not clear, that the concluſion, which has been drawn, that it was not meant as a fraud on any one, is the right one: for though the names of *Grigſon* and Co. might not be known, yet the holder of a bill takes it on the credit of thoſe whoſe names appear upon it, to either of whom he may reſort for payment. And if that were the only ground of defence, to which the perſon indorſing the names of *Grigſon* and Co. could have recourſe on a criminal

proſecution,

proſecution, I do not know whether it would ſerve. But upon this we give no opinion; it will be ſufficient to decide it when the queſtion ſhall ariſe. At preſent, this is only a civil right which is put in queſtion on this record; in deciding which, we do not wiſh to have it underſtood, that we mean to break in upon the rule as applicable to caſes in general; for, *generally ſpeaking, there is no doubt but that the indorſee of a bill of exchange, payable to order, muſt, in deriving his title, prove the hand-writing of the firſt indorſer.* But this deciſion proceeds on the ſpecial circumſtances of the caſe, namely, that the defendant, at the time of entering into this engagement, knew that there were no ſuch perſons as *Grigſon* and Co. and therefore, that in point of formal derivation of title, that, which is uſually done, could not be done in this caſe. It is clear, that many inſtruments may be inforced contrary to the wording of them; as if *B.* tenant for life of *C.* (1), and he, in the remainder or reverſion in fee, having ſeveral eſtates in the ſame land, join in the ſame leaſe by deed, during the life of *C.* it ſhall be conſidered as the leaſe of *B.* and confirmation of him in the reverſion or remainder; and after *C.*'s deceaſe, it is the leaſe of the remainder-man, and the confirmation of *B.* But on the firſt count of this declaration our opinion does not proceed: neither is it neceſſary to ſay any thing on the ſecond; though, if it were neceſſary to reſort to that, I confeſs I have an opinion on it. But the counts, on which the judgment of the Court is given, are thoſe for *money paid, and money had and received.* It was decided in Lord *Raymond*'s (2) time, that a general *indebitatus aſſumpſit* might be maintained to recover money for the value of a bill of exchange which was not paid: it is true, indeed, that in that caſe the bill was drawn payable to bearer; and that doctrine was afterwards conſidered in the caſe of *Grant* v. *Vaughan* (3), and confirmed by each of the judges of this court. Here the Chief Juſtice read a manuſcript note of that caſe, which was fuller than the report of it in Sir *J. Burrow*; in which YATES, J. ſaid, "giving ſuch a bill is, as it were, an "aſſignment of ſo much property, which becomes money "had and received to the uſe of the holder of the bill."— Now, on that doctrine, my opinion is grounded in the deciſion of this caſe. For here, the defendant, being a debtor to the houſe of *Lewis* and *Potter*, drew a bill which he delivered to them, and drew it in terms which could not be proved in a formal manner: he was not only privy to the tranſaction, but the very negotiator of it; and by drawing it, he put himſelf in a ſituation to pay what he was in conſcience bound

(1) *Co. Lit.* 45. *a.*
(2) *Ward* v. *Evans*, 2 Lord *Ray.* 930.
(3) Vide this caſe *infra.*

to pay; therefore it was an appropriation of ſo much money to be paid to the perſon who ſhould become the holder of the bill. In making this deciſion, we do not mean to infringe a rule of law, which is very properly ſettled, that a choſe in action cannot be transferred: but we conſider it as an agreement between all the parties to appropriate ſo much property to be carried to the account of the holder of the bill; and this will ſatisfy the juſtice of the caſe, without infringing any rule of law.—Judgment for the plaintiffs.

Vere *et al. v.* Lewis *et al.* Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 182

This caſe ſtood next in the paper to that of *Tatlock* v. *Harris*; but the Court thought it not to be diſtinguiſhed from it, and gave judgment for the plaintiffs without argument. In this caſe, the firſt count ſtated the bill of exchange to be drawn by *Liveſay* and Co. on the defendants, in favour of *Lawrence Aſhworth*, and by him indorſed to the plaintiffs. The ſecond count ſtated it to be a bill payable to *bearer*; the third payable to the order of the drawers, and by them indorſed to the plaintiffs; with the money counts. The defendants attempted to diſtinguiſh this from the former caſe, by obſerving, that there was no evidence that in point of fact they received any value for the bill, and therefore they could not be liable on the money counts: and alſo, that there was ſtrong evidence to ſhew that the defendants were concerned in the forgery of the name of the firſt indorſer. But *The Court* ſaid, that the mere circumſtance of the defendant's accepting, was evidence that he had received value from the drawers; and that on the demurrer to evidence, the Court might draw the ſame inference that the jury would have drawn. And that the latter circumſtance did not vary the queſtion. Lord Kenyon, Ch. J. Ashhurst, J. and Buller, J. *thought* (1) that the plaintiffs might recover on the ſecond count, which ſtated, that the bill was drawn payable to *bearer*.—Judgment for the plaintiffs.

Minet *et al. v.* Gibſon *et al.* Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 481.

This was an action on a bill of exchange; and the firſt count in the declaration ſtated, that *Liveſay* and Co. on the 18th of February, 1788, made a bill of exchange, directed to the defendants, requiring them, three months after date, *to pay* 721*l.* 5*s.* *to* John White, *or order*; Liveſay *and Co. well knowing that no ſuch perſon as* J. White *exiſted*; on which bill, an indorſement was made, purporting to be the indorſement of *J. White*, named in the bill, requiring the contents to be paid to *Liveſay* and Co. or order; that *Liveſay* and Co. (by one *Abſalom Goodrich*, by procuration of *Liveſay* and Co.) indorſed to the plaintiffs; and that the defendant accepted it, *knowing that no ſuch perſon as* J. White *exiſted*, and that the name of *J. White*, ſo indorſed, was not the hand-writing of

(1) And it was ſo held in *Minet* v. *Gibſon*, *infra*.

any

any perſon by that time. The ſecond count, after ſtating the drawing of the bill, as above, proceeded thus; *Liveſay* and Co. knowing that *J. White* was not a perſon dealing with, or known to, *Liveſay* and Co. and *uſing the name of* J. White *in the bill as a nominal perſon only, and intending not to deliver the ſame to him, or to procure the ſame to be actually indorſed by him*; upon which bill a certain indorſement was made, requiring the payment to be made to *Liveſay* and Co.; and that *Liveſay* and Co. indorſed it to the plaintiffs, *without having delivered the bill to* J. White, *and without any actual indorſement or aſſignment of the bill by* White. The third count ſtated, that the bill was made *payable to themſelves*, Liveſay *and Co. by the name and deſcription of* J. White. The fourth treated it as a common bill, *payable to* J. White *or order, and that* J. White *indorſed it to the plaintiffs*. The fifth as payable *to bearer*; and that the plaintiffs were the bearers. The ſixth, payable to J. *White* or order; with an averment that, when the bill was made, there was *no ſuch perſon as* J. White, the ſuppoſed payee, but that *the name was merely fictitious; by reaſon whereof, the ſum* mentioned in the bill *became and was payable to the bearer* thereof, according to the effect and meaning of the bill;—averring alſo, that the plaintiffs were the bearers and proprietors thereof. The ſeventh count ſtated, that there was a *partnerſhip*, or houſe, of certain perſons uſing trade *as well in the name and firm of* Liveſay *and Co. as in the name and firm of* J. White; that the laſt-mentioned perſons made a certain other bill (the hand of one of them on their joint account, and in their copartnerſhip name and firm of *Liveſay* and Co. being thereto ſubſcribed), and directed it to the defendants, requiring them, three months after date, to pay to the ſaid laſt-mentioned copartners, by the name of *J. White* or order, 721*l.* 5*s.*; and that the ſaid laſt-mentioned copartners afterwards, by a certain indorſement in writing, appointed the contents to be paid to the plaintiffs, and delivered the bill ſo indorſed to them. There were alſo other counts: the eighth, for money had and received by the defendents to the uſe of the plaintiffs; the ninth, for money paid, laid out, and expended by the plaintiffs to the uſe of the defendants; and the tenth, for money lent and advanced by the plaintiffs to the defendants.—The defendants pleaded the general iſſue. A ſpecial verdict was found (1), ſtating (in ſubſtance) that *Liveſay* and Co. made a certain inſtrument in writing, directed to the defendants, requiring them, three

(1) This queſtion firſt came before the Court on a motion for a new trial: but, as it was of ſo much importance, bills to the value of near a million a year having paſſed through *theſe houſes only*, the Court recommended it to the parties to conſent to have a ſpecial verdict, in order that the record might be carried to the Houſe of Lords; and the counſel for both parties, without going to another trial, agreed upon ſtating this verdict.

months

months after date, to pay to *John White*, or order, 721*l.* 5*s.*; that *Livesay* and Co. at the time of making it, well knew that no such person as *J. White*, in the bill mentioned, existed; that a certain indorsement in writing was afterwards made by *Livesay* and Co. purporting to be the indorsement of *J. White*, and requiring the contents of the bill to be paid to *Livesay* and Co. or their order; that *Livesay* and Co. afterwards indorsed (by *A. Goodrich* by procuration of *Livesey* and Co.) to the plaintiffs for a full and valuable consideration, when the plaintiffs became, and still are, the holders of the bill; that the defendants afterwards accepted, well-knowing that no such person as *J. White*, in the bill named, existed; and that the name of *J. White*, so indorsed thereon, was not the hand-writing of any person of that name. That the defendants, at the time of the making and accepting the bill, had not, nor had they at any time since, any money, goods, or effects whatsoever, of or belonging to *Livesay* and Co. or of the plaintiffs, in their hands. And that the defendants have not paid the bill (although often requested). But whether, upon the whole matter, the defendants are liable, &c. the jurors are ignorant, and pray the advice of the Court, &c. This verdict was set down for argument: But *The Court* being of opinion that this case was decided by that of *Vere* v. *Lewis*, *ante* p. 360, gave judgment for the plaintiffs, without hearing any argument; adding, that they understood that the reason why it was agreed to be turned into the shape of a special verdict was, that it might be carried up to the *dernier resort*. Judgment for plaintiffs (1).

Gibson and Johnson *v.* Minet and Fector, In Error, *in Dom. Proc.* 26 Ap. 1790. 3 Feb. 1791. 2 *Hen. Black.* 569.

Upon this judgment, a writ of error was brought, returnable in parliament; and after the case had been argued at the bar of the House of Lords, certain questions were put to the judges (2). THE QUESTIONS WERE:—

I. WHETHER THE MAKING OF THE INSTRUMENT DECLARED UPON, APPEARS UPON THE SPECIAL VERDICT TO BE SO CRIMINAL, THAT THE POLICY OF THE LAW WILL NOT SUFFER AN ACTION TO BE FOUNDED ON SUCH AN INSTRUMENT?

II. WHETHER, UPON THE MATTER FOUND IN THE SPECIAL VERDICT, THE BILL MENTIONED IN THE FIFTH COUNT CAN BE DEEMED IN LAW A BILL PAYABLE TO BEARER?

III. WHETHER THE MATTER OF THE SPECIAL

(1) This judgment was afterwards affirmed in the House of Lords. *Vid.* the following case.

(2) As this case was very fully considered, and the decision upon the subject of fictitious indorsements is of great importance, the Editor conceives it proper to give the opinions of the judges, who thought that the judgment ought to be affirmed, at some length; in order that the principles upon which this question was ultimately decided, may be rightly understood.

VERDICT

VERDICT WILL SUSTAIN ANY OTHER COUNT IN THE DECLARATION?

On the 3d of February, 1791, the LORD CHIEF BARON EYRE and Mr. JUSTICE HEATH delivered their reſpective opinions that the judgment ought to be reverſed; AND THE OTHER JUDGES, that it ought to be affirmed.

HOTHAM, Bar. In anſwer to the firſt queſtion, I am of opinion, that no ſuch criminality can be diſtinctly inferred from this verdict.

To conſtitute that degree of criminality, the facts found muſt amount to this, that the parties have uttered the bill or have forged it, with intent to defraud ſome perſon in particular. Now, in the firſt place, acceptance does not import, *ex vi termini*, an utterance. Acceptance may be by writing or by parol. If it be by parol, it would be difficult to maintain *that* to be ſuch an utterance as would amount to the crime ſuppoſed; and if it would not, it ſeems extremely queſtionable, whether, on any principle, the mode of acceptance can change the colour of the act. It is true, that the refuſal to pay may afford a ſtrong preſumption of the original intent, and yet that fact ſtanding alone, can hardly be deciſive. It may admit of different interpretations; and if, by any fair reaſoning, it can receive an innocent conſtruction, that will always be preſumed, unleſs it be excluded by the finding of the jury. As to the bare writing of the name of a non-exiſting perſon, that will not amount to a forgery, unleſs ſome repreſentation be made to give the inſtrument effect and operation; whereas it is not found by this verdict that any ſuch repreſentation was made. It is neceſſary, therefore, for the jury to do more than merely to find the inſertion of a falſe name in the inſtrument: of itſelf that is no crime; but it becomes one by being done with a deſign of defrauding ſome perſon in particular. But in this ſpecial verdict, ſo far from that being found, it is neither found nor alleged, that there was an intention to defraud any perſon. That I take to be a radical and inſurmountable defect in the ſpecial verdict; and therefore, that enough does not appear upon it to warrant the Houſe in ſaying, that the facts found amount neceſſarily to a felony; without which, the making of the inſtrument declared upon is not ſo criminal, as that the policy of the law will not ſuffer an action to be founded upon it.

With regard to the ſecond queſtion, unleſs ſome ſtubborn rule of law ſtand in the way of the preſent judgment of the court of King's Bench, it ought to be ſupported; and I am of opinion, that no ſuch rule does impeach it. It is admitted, that many caſes may be put, ſuch as are mentioned in *Co. Lit.* 45. *a.* and in many other books; in which, deeds and ſolemn inſtruments are not always to be conſtrued, or to have effect, according to their technical or literal import, but that they

they ſhall have ſuch an operation as will carry the intent of the parties into execution, though contrary to the ſtrict letter of the inſtrument themſelves. That principle will, in my apprehenſion, apply directly to the preſent caſe. *The bill in queſtion, on the face of it, imports to be a bill of exchange, payable to* John White, *or his order; but in truth, and in fact, it is not ſo, it never was, nor ever can be ſo, becauſe there is no ſuch perſon exiſting as* John White, *which is found to be a fact, known to the acceptors as well as to the drawers.* Is then the bill ſo vitiated, as (contrary to the principle which operates on deeds and other inſtruments) to loſe all its efficacy, and become mere waſte paper? To anſwer that queſtion, we muſt reſort to what the law never overlooks, the intention of the parties, which, in the preſent caſe was clearly otherwiſe. The plaintiffs in error, as well as *Liveſay* and Co. meant to give the bill a credit by the acceptance, and to put it into circulation; and they all thought the moſt convenient way of doing it was, by inſerting in it this fictitious name. *It having been found then, that the plaintiffs in error knew, at the time of their acceptance, that the name of* John White *was a mere fiction, they muſt be preſumed to have known more, namely, that no regular or formal title could ever be traced through him by any holder of the bill. If, therefore, they have accepted a bill, which they knew was ſo framed as to be incapable of being proved in the ſhape it bore, they ſhall nevertheleſs be held to their undertaking to pay it, though it be preſented to them in another, becauſe they themſelves have induced ſuch neceſſity*; for it is a known rule of law, that no man ſhall take advantage of his own wrong.

——— *Nec lex eſt juſtior ulla,*
Quàm necis artifices arte perire ſuâ.

It is impoſſible not to conſider the drawers and acceptors here as one and the ſame, linked together for the purpoſe of giving colour and effect to this fraudulent tranſaction. The difficulty, on the form of the bill, ariſes from no miſtake or accident, but from the deliberate and concerted act of the acceptors as well as the drawers. But it is ſtill in their power to give effect to the bill; ſhall they not then be obliged to do ſo? Perhaps it may not be too much to ſay, that on this finding, a preſumption will ariſe that the intention of the acceptors was, that it ſhould be payable to the bearer; for they knew that the bill, virtually, had no indorſement upon it by *John White*; they knew that it came into the hands of *Minet* and *Fector*, by the delivery of *Liveſay* and Co.; and that, in truth, whatever ſemblance it bore, it was nothing but a bill payable to bearer. I contend, that it is not competent to theſe partners in the fraud to ſay, "it is true, we did "accept the bill, but we meant nothing by that acceptance, "but to cheat all mankind, let the bill get into what hands

"it

" it might." As little ſhall they be permitted to ſay, after having fabricated this paper, that it is not according to the law and cuſtom of merchants, which I conceive will attach on the bill, notwithſtanding the fraud uſed in its original formation. *The great principle that I go upon is, that parties to a bill ſhould not, any more than parties to any deed or inſtrument, take advantage of their own fraud.* In truth, *What is the end and effect of acceptance but a liability to pay?* The acceptors having given this bill a currency, when they knew that it never could be paid to the order of *White*, the law will preſume that they intended that formality ſhould be waived. If it be waived, What does it remain but a bill payable to bearer? Knowing that it was *impoſſible* to pay it in the ſhape it bore, they accepted it; but knowing, at the ſame time, that it was *poſſible* to pay it in another. The law will conclude then, that ſuch was their intent; and I conceive, that ſuch a conſtruction will be moſt conformable to the policy which affects the principles which operate on all commercial tranſactions. That policy, and thoſe principles, are bottomed in liberality. Bargains ſhall be inforced, undertakings ſhall be executed, and promiſes to pay ſhall be performed. The rule of law, that a man's own acts ſhall be taken moſt ſtrongly againſt himſelf, obtains not only in grants, but extends in principle to all other engagements and undertakings. I conceive, therefore, that the acceptors of this bill ſhall not be heard to ſay in a court of juſtice, that as they never *intended* to pay it; ſo, becauſe they have inſerted *White*'s name in it, they never ſhall be *compelled* to pay it. On the contrary, the law will hold them more ſtrictly to a compliance with their engagement, on the ſingle ground of their own fraud, and will therefore ſtill conſider the bill as capable of tranſfer by delivery. A bill of exchange, in its own nature, amounts to nothing more than an authority on one hand, to pay to the order of the perſon to whom it is made payable; and on the other, to an undertaking on the part of the acceptor that he will pay it. By this acceptance, he puts himſelf into a ſituation that makes it obligatory on him to pay the bill, either in the very terms of it, or as nearly as poſſible to its literal import; and as ſoon as he has made himſelf the principal debtor for the ſum contained in it, the law raiſes a preſumption againſt him. But the preſumption here cannot be that the acceptors will pay it to the order of *White*, becauſe the fact found makes that to be impoſſible, and impoſſible in their own knowledge. The name of *John White* then muſt be conſidered as if it were not on the bill at all, as no name, as a mere non-entity. To whom then muſt the preſumption ariſe that it was intended to be payable, but to the only perſon it could, namely, to the bearer? And I am of opinion, that the great ends of circulation, the ſupport of credit, and the extenſion of commerce, would be in conſtant danger

danger of fatal checks, if bills were permitted to be ſo made as to enable confederate acceptors to ſet up their own fraud, as a juſtification for refuſing payment to a fair and honeſt holder of them for a *bonâ fide* valuable conſideration, which theſe defendants are found to have given. On this queſtion, therefore, I am of opinion, that upon the matter found in the ſpecial verdict, the bill mentioned in the 5th count may be deemed in law a bill *payable to bearer*.

But if the bill cannot be ſuſtained as a bill payable to bearer, then, on the third queſtion, I am of opinion that it will alſo ſuſtain the *firſt count*, by conſidering the bill as a new bill, from the time of the ſubſequent indorſement of *Liveſay* and Co. For every indorſer charges himſelf in the ſame manner as if he had originally drawn the bill. From the moment, therefore, of that ſecond indorſement, by their procuration, they gave the plaintiffs a new title to the bill, and they gave a freſh authority to *Gibſon* and *Johnſon*, namely, to pay it to their own order; and to that authority *Gibſon* and *Johnſon* muſt be taken to have acceded, becauſe it is expreſsly found that their acceptance was ſubſequent to ſuch indorſement; which acceptance, then made, muſt be coupled with the knowledge, which they are found to have had, of the antecedent fiction. I conceive, therefore, that having accepted it after *Liveſay* and Co. had ſo indorſed it, and knowing, at the ſame time, that although there was on the bill a fictitious indorſement, there was alſo a real one, the law will preſume them to have given credit to *that*, and thereby to have accepted a good and valid bill. In this view of it, I conſider them as liable to pay the bill under the firſt count in the declaration, which, I am of opinion, may alſo be ſuſtained by the ſpecial verdict.

Perryn, Bar. As to the firſt queſtion: The law, where a felony has been committed, will not permit the party injured to proceed againſt the offender in a civil ſuit; but, for the ſake of the public, he muſt ſeek his remedy by a criminal proſecution; and the civil action ſhall merge in the felony. This is certainly ſo againſt the perſon who commits the felony. The main ingredient to conſtitute the crime of forgery, is an intention to defraud; it muſt be ſo laid in the indictment and proved. In the caſes of *Wilkes*, at Launceſton (1), *Tuft*'s (2) caſe and

(1) In this caſe one *Wilkes* drew a bill in a fictitious name upon a fictitious drawee, in favour *of a real payee* in payment for goods ſold. He was firſt indicted for the cheat at Launceſton, and acquitted. The caſe being ſtated to the judges, they were all of opinion that the tranſaction was a *forgery* within ſtat. 2 *Geo.* 2. c. 25. He was afterwards indicted again for *forgery*, having drawn another bill under the ſame circumſtances, and tried before Mr. Juſtice *Yates*, at Bodmin, Auguſt, 1767, but again acquitted.

(2) *Leach*'s Crown Law, 182.

Belland's

Bolland's (1) caſe, cited at the bar, there was a falſe repreſentation made, a falſe name put upon the ſeveral bills in each caſe, and in all an intention to defraud particular perſons was charged expreſsly and found. *Putting a fictitious perſon's name on a bill of exchange, will not, I conceive, amount to felony, unleſs done with intent to defraud*; and, I believe, it has not been an unuſual practice amongſt merchants, to draw bills in favour of fictitious payees, without any intention to defraud. But, however that may be, it does not appear, nor is it found by the ſpecial verdict, that there was, in this caſe, an intention to defraud: that, as I think, ought to have been found as a fact by the verdict to merge the civil action; and, therefore, I am of opinion, that the making of the inſtrument declared upon, does not appear, upon the ſpecial verdict, to be ſo criminal, that the policy of the law will not ſuffer an action to be brought on ſuch inſtrument.

As to the ſecond queſtion: In the caſe of drawing bills of exchange to the order of a fictitious payee, the drawer and acceptor, knowing the fact, have no reaſon to complain of any injury to them. The acceptor, either upon the credit, or for the honour of the drawer, engages to pay the bill when due, and can never be diſcharged from that engagement except by ſatisfying the bill, which if he once does to the *bonâ fide* holder, he can run no riſque of any claim from a fictitious payee. Every perſon whoſe real name and ſignature appears on a bill of exchange, is reſponſible to the extent of the credit he gives to it in the negociation of it. It is contrary to juſtice, and not to be endured, that fraudulent drawers and acceptors ſhould receive benefit by their own acts, and their eſtates be exonerated from the demands of their juſt creditors. The claim of the defendants in error certainly, in juſtice and in equity, ought to be ſupported; and, I think, it may, in law, be maintained upon the 5th count, as on a bill *payable to bearer*. The intent of the drawers and acceptors of the bill ſeems to be, to have made a negociable inſtrument; and if, for any defect, it cannot be made ſo by indorſement, it is reaſonable it ſhould be made valid in any way in which that effect can be produced: and there does not occur to me any rule of law to prevent its being made good *by delivery*. If a bill be made payable to a perſon not exiſting, it operates as a bill payable to bearer. Where the bill is in the hands of a purchaſer for a full and valuable conſideration *bonâ fide*, and the acceptor, before his accept-

(1) *Leach*'s Crown Law, 83.

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ance, is privy to the non-exiſtence of the payee, and who cannot give an order, it is in effect and in point of law the ſame thing as if made payable to the *holder*, namely, the *bearer*. Many inſtruments may be enforced contrary to the words, *Co. Litt.* 45. *a.* 301. *b.* words of demiſe may operate as a grant, covenant to ſtand ſeiſed, confirmation, and in other ways: at one time they may operate as a leaſe, at another time as a confirmation, in order to preſerve right and do juſtice; the law being anxious and aſtute to obtain thoſe purpoſes. In the caſe of *Stone* v. *Freeland*, *ante*, p. 356. Lord *Mansfield* ſaid, in bills of exchange, names of payees were often uſed of perſons not having exiſtence, and ſuch bills indorſed by the drawer; and if with knowledge of that fact a bill is accepted and put in circulation, it ſhall not lie in the acceptor's mouth to ſay, the bill is a bad one. And, in that caſe, Lord *Mansfield* held, that the acceptor was liable, though there was a fictitious payee, and that ſuch acceptor ſhould not be at liberty to deny the validity of the bill, which, by lending his acceptance, he had put in circulation. In *Peacock* v. *Rhodes*, *Dougl.* 632 (1), Lord *Mansfield*, in giving the opinion of the Court, ſaid, "the law was ſettled, that the holder of a bill, coming fairly by it, has nothing to do with the tranſaction between the original parties, except in the ſingle caſe of a note for money won at play." *Price* v. *Neale*, 3 *Burr.* 1354 (2), was the caſe of a forged bill, which had been accepted and paid to the defendant in the courſe of trade; there Lord *Mansfield* held, that the acceptor, having given credit to it by his acceptance, ſhould not recover back what he had paid to a *bonâ fide* holder. In *Collis* v. *Emmett*, *ante*, p. 353. where a bill was made payable to a fictitious payee or order, it was holden, that the indorſee might maintain an action againſt the drawer, as on a bill *payable to bearer*. Under the circumſtances ſtated in this ſpecial verdict, I ſee no diſtinction that can be made between the drawer and acceptor of ſuch bill. The bill, indeed, in this caſe, as in *Collis* v. *Emmett*, is payable to *John White*, or order, but before the plaintiffs in error accepted it, they knew that *John White* was not in exiſtence, and could not make an order: the indorſees, ignorant of that fact, pay a full value for the bill; *the acceptors have, by lending their name, given circulation to the bill, and have, as I conceive, undertaken to pay the bill to ſuch perſon as ſhall be the* bonâ fide *holder: their engagement is to pay the bill, in any way in which it can take effect*. Upon the whole, therefore, I concur with the judg-

(1) See this caſe, *infra*.
(2) See this caſe, *infra*.

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ment of both the courts of King's Bench and Common Pleas, and my anſwer to the queſtion is, that upon the matter found in the ſpecial verdict, the bill mentioned in the 5th count may be deemed, in law, a bill *payable to bearer.*

3. As to the third queſtion, I am of opinion, that if the verdict could not be ſupported on the fifth, it may be ſuſtained upon the firſt count in the declaration; and that this tranſaction will ſtand, or may be conſidered in this way, *viz.* that by *Liveſay* and Co. making the bill payable to *John White*, or order, there being no ſuch perſon exiſting by that name, they have themſelves aſſumed and taken the name of *White*, for the purpoſe of indorſing and negociating the bill, with the conſent and by the authority of the perſons, who, afterwards, knowing the fact, accepted the bill; that this was truly and ſubſtantially making the bill payable to *their own order*, and that the caſe may be conſidered as if every thing reſpecting *John White* and order, ſo far as regards the drawers and acceptors, was ſtruck out of the bill, and that, by the indorſement by *Liveſay* and Co. it will operate as a new bill, *Salk.* 125. Upon the third queſtion, therefore, the beſt opinion I can form is, that the verdict may be ſuſtained upon the *firſt*, as well as upon the fifth count of the declaration.

THOMPSON, Bar. There have been caſes, in which the indorſement of a fictitious name upon a bill of exchange has been determined to be a forgery; for it is not eſſential to conſtitute that crime, that there ſhould be a perſon in exiſtence whoſe name is forged, though it is eſſential that it ſhould be done with intent to defraud ſome perſon, who muſt be particularly ſpecified. In the preſent caſe there is nothing ſtated by the verdict to charge *Gibſon* and *Johnſon* with the fact of aſſiſting *Liveſay* and Co. in the falſe making or counterfeiting this indorſement, even ſuppoſing it had been expreſsly found to have been done by *Liveſay* and Co. with intent to defraud *Minet* and *Fector*. If, therefore, there is any ground for imputing to *Gibſon* and *Johnſon* a felony in reſpect of this bill, it muſt be the offence of uttering and publiſhing the indorſement knowing it to be forged. I am, at preſent, by no means prepared to ſay, that the mere undertaking of a man to pay a bill drawn upon him by his correſpondent, in favour of a perſon who has no exiſtence, is of itſelf an uttering and publiſhing of the indorſement knowing it to be forged, within the meaning of the ſtatute. But, whatever may be the determination of ſuch a caſe, if ever it ſhould come before a court of criminal judicature, the queſtion cannot ariſe unleſs the fact be ſtated to be committed with intent to defraud ſome particular perſon, which is not the preſent caſe. And, indeed, it here appears, that *Minet* and *Fector* had parted with their money to *Liveſay* and Co. for the bill, before it was accepted by *Gibſon* and *Johnſon*.

2. To conſider the bill in queſtion as a bill payable to bearer, is undoubtedly to treat it as an inſtrument in a different form from that in which it appears; and yet it is certain that the bill is not in reality what it imports to be. The conſtruction which has been put upon this inſtrument, by the court below, is, that which will give effect to it, and compel the defendants there to do, what in juſtice they are bound to do, *viz.* to make good the engagement they entered into by accepting the bill; *viz.* to pay the amount of it. In order to ſupport this conſtruction, recourſe muſt be had to the facts diſcloſed by the ſpecial verdict; and there it appears that *Liveſay* and Co. when they made, and *Gibſon* and *Johnſon* when they accepted, the bill, knew that there was no ſuch perſon as *John White*, the ſuppoſed payee of the bill, in exiſtence, to receive the money, or authoriſe any other perſon, by indorſement, to receive it; and that the bill was incapable of being negociated in that form. But it was meant to be a negotiable bill of exchange, and has actually been delivered for a valuable conſideration; and, therefore, to give effect to it, and to what we muſt take to be the intention of the parties, it ſeems requiſite to conſtrue it (as between thoſe parties) a bill *payable to bearer*, and conſequently aſſignable by the delivery which has taken place. It is clear (as was ſaid by the court of King's Bench, in giving judgment in the caſe of *Tatlock* v. *Harris*) that many inſtruments may be inforced contrary to the wording of them; as if *B.*, tenant for the life of *C.*, and he in remainder or reverſion in fee, having ſeveral eſtates in the ſame land, join in the ſame leaſe by deed; during the life of *C.* it ſhall be conſidered as the leaſe of *B.*, and confirmation of him in reverſion or remainder, and after the death of *C.* it is the leaſe of the remainder-man and the confirmation of *B.* according to *Co. Lit.* 45. *a.* The caſe of *Collis* v. *Emmett*, which has been referred to in the argument, appears to have been decided on the ſame principle with the preſent caſe.—Upon the whole, therefore, I conceive, on this ſpecial verdict, that the bill mentioned in the fifth count may be deemed, in law, a *bill payable to bearer*.

3. But ſuppoſing that it cannot properly be ſo deemed, then I conceive that the matter of the ſpecial verdict will ſuſtain the *firſt* count in the declaration, and in this way: *viz.* the requeſt contained in the bill directed to *Gibſon* and *Johnſon*, to pay the money to *John White*, or order, inaſmuch as no ſuch perſon exiſted, and that was known both to the drawer and drawee, may be conſidered (as between thoſe parties) as a requeſt to pay ſo much money, without mentioning any payee; and the indorſement of the fictitious name a mere nullity, conveying no intereſt to *Liveſay* and Co.

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as indorſees. It is material, then, to conſider what, under theſe circumſtances, may be the effect of the indorſement from *Liveſay* and Co. on the bill, whereby they direct the contents to be paid to *Minet* and *Fector*. In ſuch caſe, it ſeems no forced conſtruction of that indorſement, to ſay, that *Liveſay* and Co. ſpeak by it this language to *Gibſon* and *Johnſon*, "We have, on the face of this bill, required you "to pay 721*l.* 5*s.*, without mentioning any real perſon to "whom it can be paid (and which you know), we now "direct you to pay that ſum to *Minet* and *Fector*." After which direction, the acceptance is made by *Gibſon* and *Johnſon*. Thus the names of *Minet* and *Fector* may be incorporated in the bill, inſtead of the fictitious name of *John White*; and they will be intitled to maintain their action on the firſt count of the declaration, which has ſtated the ſpecial circumſtances of the caſe, and which are verified by the ſpecial verdict.

Gould, J. As it appears in the firſt count and by the verdict, that the drawers, *Liveſay* and Co. and the drawees, *Gibſon* and *Johnſon*, knew that no ſuch perſon as *John White* exiſted, and, therefore, that it was impoſſible there ſhould be ſuch an indorſement as the bill literally ſeems to require, and, conſequently, that it could never have been intended there ſhould be ſuch an indorſement, I think that muſt be rejected as ſurpluſage and repugnant. The bill then will ſtand as a direction to pay *to order*; and ſuppoſing it to have been drawn in that form, to pay to order, I conſider the word *our* muſt have been ſupplied by a neceſſary *ſubintelligitur*; and then the bill being indorſed to the plaintiffs for a full and valuable conſideration, they became the *bonâ fide* holders, and, upon this conſtruction, clearly intitled to recover againſt the acceptors. Nor would the law allow them or the drawers to ſay, that they intended to cheat and defraud the holders who ſhould purchaſe it as a fair bill, which the acceptors ratified as ſuch, and on whom (the bill being directed to them to pay) the plaintiffs could not but have a principal reliance for payment in caſe they ſhould accept it, which, from the nature of the tranſaction, was to be expected. For *Lex eſt ſanctio juſta, jubens honeſta, prohibens contraria.* I, therefore, conclude, that this bill is to be conſidered as a bill drawn on the defendants, payable to the *order of the drawers*, and in that view is no more than in the ordinary courſe of a bill payable to order within the cuſtom of merchants; in which caſe, whether the acceptor had effects of the drawer or not, is immaterial. Upon the ſuppoſition, that the opinion I entertain and have delivered on the firſt count, ſhould be conceived not to be tenable, the next conſideration will be, whether the ground taken by the court of King's Bench, to conſtrue it to be a bill under

the circumſtances of the caſe payable to *bearer* is right, *ut res magis valeat quam pereat*; whether, when it is impoſſible for the inſtrument to operate literally, the equity of the law will not put ſuch a ſenſe upon it as will anſwer the intention of the parties, and give it effect. It would be enough to ſay, to give it effect to the innocent party (but I do not heſitate to ſpeak plurally, the *intention of the parties*, ſince it appears that both drawers and acceptors knew it could not have effect literally, in the form in which it was fabricated, and, as I have already obſerved, the law will not endure that they ſhould allege that their intention was fraudulent; *allegans ſuam turpitudinem non eſt audiendus*) that it is a rule of law, that every inſtrument ſhall be conſtrued in the moſt forcible manner againſt the maker. The argument then reſults to this: it was in the power of the drawers and acceptors (for it is evident they acted in concert) to have framed the bill to be payable to a real perſon or order, or to bearer; and, in either caſe, it would have been effectual to charge the drawers, and after acceptance, the drawees. But they do not chooſe to take the firſt courſe, and it is highly probable (I might ſay apparent) that the reaſon was, they knew that no ſubſtantial payee would indorſe the bill, and ſo their purpoſe in that form would be defeated. They therefore reſort to an eluſory form, which could not, in that ſhape, have any force or effect. It remains then, that it ſhould be conſtrued, that *they meant* the bill ſhould be *payable to bearer*, as being the only way in which, in its original formation, it could take effect, and oblige them as a bill of exchange. No violence is done; it follows and enforces what muſt be *preſumed to be their intention*, the payment to the perſon juſtly intitled to the money. No inconvenience can enſue, becauſe, by the ſatisfaction of the bill, all farther circulation of it is at an end. For theſe reaſons, I am of opinion, that the court of King's Bench had ſufficient foundation to decide for the plaintiffs on the fifth count.

After the judges had thus delivered their opinions, the houſe adjourned. On Monday, February 14, a debate took place, in which, Lords *Kenyon*, *Loughborough*, and *Bathurſt*, ſpoke in favour of the judgment, and the Lord Chancellor againſt it. After the debate, the Lord Chancellor put the queſtion, whether the judgment of the court of King's Bench ſhould be reverſed, which paſſed in the negative without a diviſion.—Judgment affirmed.

Bowman *v.* Nichol, Tr. Ter. 34 Geo. 3 B.R. 5 *Ter. Rep.* 537.

If a bill or note is altered, after it has once iſſued, and after the time when it was originally payable, a new ſtamp is requiſite, though it be done with the conſent of the parties, and before its negociation.—A bill was dated the 2d of September, and made payable twenty-one days after date: while it was in the hands of the drawer, it was altered, with the conſent

conſent of the acceptor, to fifty-one days; on the 30th of September, it was again altered to twenty-one days, but the date was brought forward to the 14th of September; after which it was negociated.—LORD KENYON ſaid, that every alteration in an inſtrument, requiring a ſtamp, made a new ſtamp neceſſary; and nonſuited the plaintiff. Upon a rule *niſi*, for a new trial, it was urged, that there was a diſtinction between an alteration made *after* the negociation of a bill, and an alteration made *before*; and that, in the latter caſe, the whole might be conſidered as one tranſaction. BUT the Court ſaid, that as the operation of the bill, as it originally ſtood, was quite ſpent when the laſt alteration was made, that alteration made it a new and diſtinct tranſaction between the parties, and, therefore, that there ſhould have been a new ſtamp; and the nonſuit was confirmed.

But a note given for ſecuring the weekly allowance to a priſoner, under the Lords' act, need not be ſtamped.

The above queſtion firſt came before the court of King's Bench, on a motion for the diſcharge of a priſoner, to whom the plaintiff had given a note for the weekly payment of 3*s*. 6*d*. under the Lords' act, in the uſual form: this note not being ſtamped, the Court were of opinion, that it was invalid, and diſcharged the defendant out of cuſtody. Pitman *v* Haynes, Hil Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 53.

Afterwards, in the court of Common Pleas, on ſhewing cauſe againſt a like motion for the diſcharge of a priſoner, it was inſiſted (notwithſtanding the above caſe of *Pitman* v. *Haynes*) that no ſtamp was neceſſary, for that by 31 *Geo.* 3. c. 25. the duty is impoſed upon thoſe notes only, "where "the ſum expreſſed therein, or made payable thereby, ſhall "amount to 40*s*;" whereas, the ſum expreſſed in the note in queſtion was only 3*s*. 6*d*.; and, it was urged, that the ſum owing under ſuch note, never could amount to 40*s*. ſince it is provided by the Lords' act, that if the allowance be not paid weekly, the defendant may apply for his diſcharge, even in the time of vacation.—THE COURT inclined to this opinion, but ordered the matter to ſtand over, that they might have an opportunity of conferring with the other judges:—afterwards, EYRE, Ch. J. ſaid, that a conference had taken place between the judges, who were of opinion, that no ſtamp was neceſſary. Bowring *v*. Edgar, Ea. Ter. 32 Geo. 3. C.B. 1 *Pull* et *Boſan.* 270.

Acceptance of Bills.

If the drawee of a bill of exchange ſays he cannot accept it, till ſtores are paid for, it is an undertaking to accept when the ſtores are paid for.—This was an action brought by the plaintiff againſt the defendants, as acceptors of a bill of exchange, drawn, by one *Robert Mac Lintot*, upon them, for the ſum of 300*l*., payable fifteen days after ſight, to the Pierſon *v*. Dunlop, Hil. Ter. 17 Geo. 3. B.R. *Cowp.* 571.

order of *Wm. Nicholl*, which bill had been indorſed over to the plaintiff: the facts, in this caſe were, in ſubſtance, as follows: "*Mac Lintot* drew upon the defendants, in favour of *Nicholl*, and gave *Nicholl* a navy-bill, aſſigned to the defendants, as a ſecurity, till the bill of exchange ſhould be accepted; both bills were ſent to the defendants, who ſaid, the bill of exchange would not be accepted till the navy-bill was paid, but they would receive the money on the navy-bill; and *they wrote to* Mac Lintot, *ſaying his bill would receive due honour, but it was drawn too ſhort, being payable before the navy bill;* they afterwards received the money on the navy-bill, but refuſed to pay the bill of exchange: upon which, this action was brought. The plaintiff obtained a verdict, but the defendant had a rule to ſhew cauſe why there ſhould not be a new trial, and inſiſted, that the letter to *Mac Lintot*, upon which the jury had, in ſome meaſure relied, was no acceptance; but, on cauſe ſhewn, LORD MANSFIELD ſaid, I conſider what the defendant did as an acceptance. It has been truly ſaid, as a general rule, that the mere anſwer of a merchant to the drawer of a bill, ſaying, *he will duly honour it*, is no acceptance; unleſs accompanied with circumſtances which may induce a third perſon to take the bill by indorſement: but, if there are any ſuch circumſtances, it may amount to an acceptance, though the anſwer be contained in a letter to the drawer: in this caſe there is great reaſon to ſay, that what the defendants did was equivalent to an acceptance. When the plaintiff tendered the bill for acceptance, the defendant told him, *it could not be accepted till the ſtores were paid for.* There may be a conditional as well as an abſolute acceptance: What then is this declaration by the defendants, but an undertaking that the bill ſhould be accepted when the ſtores were paid for? after this, he writes to the drawer, ſaying, "he would honour the bill, but he ſhould not have drawn it at ſo ſhort a date, as it would be due before the ſtores were paid for;" this is an admiſſion that he looked to the navy-bill as the fund out of which the bill of exchange was to be paid; and after he had actually received the money upon the navy-bill, he was bound to pay it to the plaintiff.—Rule for a new trial refuſed.

Sproat v. Matthews, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 182.

This was an action by an indorſee of a bill of exchange againſt the acceptor. The bill was drawn on the defendant, and was made payable forty days after ſight to one *Lenox*, or order. *Allen*, the plaintiff's clerk, ſwore, that on the 24th of September, 1785, he preſented the bill to the defendant, who lived in London, for acceptance, who told him, "that the drawer had conſigned a ſhip and cargo to "him and another perſon at Briſtol, but as he could not "then tell whether the ſhip would arrive at London or "Briſtol, he could not accept at that time;" upon which

Allen

Allen ſaid, that he would leave the bill, upon this condition, that in the event of the defendant's not accepting it from the day when it was preſented, he ſhould be at liberty to note it for non-acceptance as from that time. To this the defendant aſſented, and the bill was accordingly left at his houſe till the 8th of October, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not; who, on being preſſed to accept, ſaid, "the bill was a good one, and *that it would be "paid, even if the ſhip were loſt.*" *Allen*, immediately upon this, carried the bill to a notary public, and had it noted for non-acceptance from the time when it was firſt left with the defendant. The ſhip afterwards arrived ſafe at the port of London, and the cargo was diſpoſed of by the defendant.—BULLER, J. who tried the cauſe, was of opinion, that this amounted only to a *conditional acceptance*, which the plaintiff was at liberty to refuſe, or not, as he choſe, and that his noting the bill immediately after the ſecond converſation ſhewed that he was not ſatisfied with ſuch conditional acceptance; he, therefore, nonſuited the plaintiff. Afterwards, on a motion to ſet the nonſuit aſide, the Court, *viz.* WILLES, ASHHURST, and BULLER, Juſtices, concurred in opinion, that the acceptance was conditional only, BUT WILLES, J. thought that if there were a doubt whether this was a conditional or an abſolute acceptance, or whether (admitting it to be a conditional one only) the party had precluded himſelf by his ſubſequent conduct, the whole of the facts ſhould have been left to the jury, and, therefore, he thought that the nonſuit ought to be ſet aſide. The other judges, however, thought differently, and the rule was diſcharged. WILLES, J. When the bill was firſt preſented to the defendant for acceptance, he ſaid he could not accept at that time, becauſe he did not know whether the ſhip would come to London or not. The reaſon of this anſwer is obvious, becauſe if the ſhip arrived at Briſtol, ſhe was conſigned to another perſon. Then, in a ſubſequent converſation, he ſaid, "the bill will be paid, even if the ſhip be loſt." So that he accepted on two conditions; namely, the *one*, if the ſhip came to London, in which caſe he ſhould be enabled to pay himſelf with the profits of the cargo: the other, in caſe the ſhip was loſt, when he would have wherewithal to ſatisfy the bill, he having a policy of inſurance, on the ſhip, in his hands: but he did not accept in the third inſtance, which was in the event of the ſhip's going to Briſtol. The court has not, of late, been very nice with regard to what ſhall be conſtrued to be an acceptance. For, though formerly it was held neceſſary that an acceptance ſhould be in writing, yet, of late years, a parol acceptance has been deemed ſufficient. And, indeed, at preſent, almoſt any thing

amounts to an acceptance. ASHHURST, J. I do not concur with my brother *Willes*, that this nonſuit ought to be ſet aſide. In the caſe of a written acceptance, the acceptance ſpeaks for itſelf. But this being a parol acceptance, the conduct of the plaintiff is deciſive againſt him. And the *evidentia rei* ſhews that he put the right conſtruction on this tranſaction, by procuring the bill to be noted. It was only a conditional acceptance, in caſe the ſhip arrived at London, or was loſt; *which the plaintiff afterwards waived.* If the party had conceived it to be an acceptance, he ſhould have required that to be ſignified on the bill itſelf. Then, it was ſaid, that the reaſon why the bill was noted was, to mark the time from which it was to be conſidered as accepted; but that might have been better effected on the bill, by accepting it as from that day. Then it is manifeſt, that the parties underſtood at the time, that the matter was left unconcluded. If ſo, the plaintiff is abſolutely bound by his ſubſequent act; for *he proteſted the bill for non-acceptance*; therefore, there could be nothing to leave to a jury. BULLER, J. It is the ſole province of the court to decide whether this is an abſolute or a conditional acceptance. The caſe was proved by one witneſs on the part of the plaintiff; the defendant's counſel admitted the evidence to be true, but inſiſted, that upon that evidence, the defendant was not liable in point of law. Then there was nothing to be left to the jury. If theſe facts had been ſtated on a ſpecial verdict, the court would have been bound to determine whether this, in point of law, was an acceptance or not. And this brings it to the true queſtion before us, namely, whether this is a conditional or an abſolute acceptance. There is no ground for ſaying it was an abſolute one; for, it is evident, from what paſſed, that the defendant did not intend to accept, unleſs he had wherewithal in his hands to reimburſe himſelf. If the ſhip came to London, he had the diſpoſal of the cargo; if ſhe were loſt, he was in poſſeſſion of the policy; this, therefore, was a conditional acceptance; and, in theſe caſes, the holder may chooſe whether he will be ſatisfied with it or not: but here the plaintiff has waived it by proteſting the bill for non-acceptance; and his reaſon for noting it for non-acceptance, as from the firſt day, was, that he might proceed againſt the drawer for intereſt for a longer time.—Rule diſcharged.

Smith *et al. v.* Niſſen *et al.* Tr. Ter. 26 Geo. 3. B R. 2 *Tur. Rep.* 269.

Upon a requeſt to *A.* to accept a bill, and draw upon *B.* for the like ſum, the mere act of drawing upon *B.* does not amount to an acceptance. This caſe was as follows:—One *Taubert* ſent an order to the defendants for goods, and deſired that they would draw a bill on the plaintiffs for the value, which they did, after they had ſent the goods. The plaintiffs, in a letter written to the defendants, on the 23d of September, ſaid,

ſaid, that they could not accept the bill, on account of *Taubert*, at preſent, becauſe they (the defendants) had ſent a larger quantity of goods than were ordered; adding, that they had written to *Taubert* for further directions. Two days afterwards, the defendants wrote to the plaintiffs, preſſing that the bill might be taken up; and on the 28th of the ſame month received for anſwer, that the plaintiffs had written to *Taubert*, and were waiting for his anſwer before they could accept; and that they had deſired the holder to keep the bill in the mean time. On the 14th of October, *Taubert*, in a letter to the plaintiffs, took notice that the order had been exceeded, but deſired that they would accept the bill, and draw upon *Govertz*, at Hamburgh, for the amount; in conſequence of which, the plaintiffs drew on *Govertz*, who refuſed to accept; and afterwards the plaintiffs paid the bill for the honour of the drawer. This action was brought, therefore, to recover back the amount of ſuch bill; and at the trial a verdict was given for the plaintiffs. A motion was made for a rule to ſhew cauſe why this verdict ſhould not be ſet aſide: but *The Court* held, that what the plaintiffs had done, did not amount to an acceptance, for they never meant to make themſelves liable, unleſs the bill drawn upon *Govertz* was accepted and paid; and they would not imply a contract which the parties themſelves had refuſed to enter into.—Rule refuſed.

Maſter *et al.* v. Miller, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 320.

An alteration of the date of a bill of exchange, after acceptance, whereby the payment may be accelerated, avoids the inſtrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable conſideration.—The firſt count in this declaration was in the uſual form, by the indorſees of a bill of exchange againſt the acceptor; it ſtated, that *Peel* and Co. on the 20th of March, 1788, drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to *Wilkinſon* and *Cooke*, who indorſed to the plaintiffs. The ſecond count ſtated the bill to have been drawn on the 26th of March. There were alſo four other counts, for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account ſtated. The defendant pleaded the general iſſue; on the trial of which, a ſpecial verdict was found. "It ſtated, "that *Peel* and Co. on the 26th of March, 1788, drew their "bill on the defendant, payable three months after date to "*Wilkinſon* and *Cooke*, for 974*l.* 10*s.*; which ſaid bill of "exchange, made by the ſaid *Peel* and Co., *as the ſame hath* "*been altered*, accepted, and written upon, as hereafter men"tioned, is now produced, and read in evidence to the ſaid "jurors, and is now expreſſed in the words and figures fol"lowing, to wit; '*June* 23*d.* 974*l.* 10*s.* *Mancheſter*, *March* "26, 1788, *Three months after date*, *pay to the order of Meſſ.* "Wilkinſon *and* Cooke 974*l.* 10*s.* *received*, *as adviſed*, Peel,

"Yates,

" Yates, and Co. *To Mr.* Chas. Miller. C. M. 23d June, " 1788.' That *Peel* and Co. delivered the ſaid bill to *Wil-* " *kinſon* and *Cooke*, which *the defendant afterwards, and before* " *the alteration of the bill hereinafter mentioned, accepted.* That " *Wilkinſon* and *Cooke* afterwards indorſed the ſaid bill to the " plaintiffs, for a valuable conſideration, before that time " given and paid by them to *Wilkinſon* and *Cooke* for the ſame. " That *the ſaid bill of exchange, at the time of making thereof,* " *and at the time of the acceptance, and when it came to the* " *hands of* Wilkinſon *and* Cooke *as aforeſaid, bore date on the* " *26th day of March*, 1788, *the day of making the ſame.*— " And that *after it ſo came to, and whilſt it remained in the* " *hands of*, Wilkinſon *and* Cooke, *the ſaid date of the ſaid* " *bill, without the authority, or privity, of the defendant, was* " *altered, by ſome perſon or perſons to the jurors aforeſaid un-* " *known, from the 26th day of March*, 1788, *to the 20th day* " *of March*, 1788. That the words, ' June 23d,' at the top " of the bill were there inſerted to mark that it would be- " come due and payable on the 23d of June next after the " date; and that the alteration herein-before mentioned, and " *the blot upon the date of the bill of exchange, now produced,* " *and read in evidence, were on the bill of exchange, when it* " *was carried to and came into the hands and poſſeſſion of the* " *plaintiffs.* That the bill of exchange was, on the 23d of " June, and alſo on the 28th of June, 1788, preſented to the " defendant for payment; on each of which days reſpectively " he refuſed to pay. The verdict alſo ſtated, that the bill ſo " produced to the jury, and read in evidence, was the ſame " bill; upon which, the plaintiffs declared, &c."—The queſtion was, Whether the plaintiffs were intitled, notwithſtanding the alteration in the bill of exchange, to recover according to the truth of the caſe, ſet forth in the ſecond count of the declaration, namely, upon a bill dated the 26th of March; which the ſpecial verdict found, was in point of fact accepted by the defendant. The caſe was elaborately argued: after which, the judgment of the Court was pronounced as follows: Lord KENYON, Ch. J. That the alteration in this inſtrument would have avoided it, if it had been a deed, no perſon can doubt. And why, in point of policy, would it have had that effect in a deed? Becauſe no man ſhall be permitted to take the chance of committing a fraud, without running any riſk of loſing by the event, when it is detected. At the time when the caſes cited, of deeds, were determined, forgery was only a miſdemeanor: now the puniſhment of the law might well have been conſidered as too little, unleſs the deed alſo were avoided; and therefore the penalty for committing ſuch an offence was compounded of thoſe two circumſtances, the puniſhment for the miſdemeanor, and the avoidance of the deed. And though

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the puniſhment has been ſince increaſed, the principle ſtill remains the ſame. It is ſtated, that this alteration was made while the bill was in the poſſeſſion of *Wilkinſon* and *Cooke*, who were then intitled to the amount of it; and from whom the plaintiffs derive title: and it was for their advantage (whether more or leſs is immaterial here) to accelerate the day of payment, which, in this commercial country, is of the utmoſt importance. The caſes cited, which were all of deeds, were deciſions which applied to and embraced the ſimplicity of all the tranſactions at that time; for, at that time, almoſt all written engagements were by deed only. Therefore thoſe deciſions, which were indeed confined to deeds, applied to the then ſtate of affairs: but they eſtabliſh this principle, *that all written inſtruments, which were altered or eraſed, ſhould be thereby avoided.* Then let us ſee whether the policy of the law, and ſome later caſes, do not extend this doctrine farther than to the caſe of deeds. It is of the greateſt importance that theſe inſtruments, which are circulated throughout Europe, ſhould be kept with the utmoſt purity, and that the ſanctions to preſerve them from fraud ſhould not be leſſened. It was doubted ſo lately as in the reign of *George* the firſt (1), whether forgery could be committed in any inſtrument leſs than a deed, or other inſtrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that caſe, the policy of the law ſhould not be extended to it. But it was there held, that the principle extended to other inſtruments as well as to deeds; and that the law went as far as the policy. It is on the ſame reaſoning that I have formed my opinion in the preſent caſe. It has been contended, that no fraud was intended in this caſe; at leaſt, that none is found: but I think that, *if it had been done by accident, that ſhould have been found, to excuſe the party*, as in one of the caſes, where the ſeal of the deed was torn off by an infant. With reſpect to the argument drawn from the form of the plea, it goes the length of ſaying that a defendant is liable, on *non-aſſumpſit*, if at any time he has made a promiſe, notwithſtanding a ſubſequent payment: but the queſtion is, Whether or not the defendant promiſed in the form ſtated in the declaration? and the ſubſtance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion, that this falſification of the inſtrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange. ASHHURST, J. It ſeems admitted that, if this had been a deed, the alteration would have vitiated it. Now *I cannot ſee any reaſon why the principle, on which a deed would have been avoided, ſhould not*

(1) 2 *Str.* 747. and 2 *Lord Raym.* 1461.

extend

extend to the caſe of a bill of exchange. All written contracts, whether by deed or not, are intended to be ſtanding evidence againſt the parties entering into them. There is no magic in parchment, or in wax. And a bill of exchange, though not a deed, is evidence of a contract, as much as a deed; and the principle to be extracted from the caſes cited is, that any alteration avoids the contract. If, indeed, the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this inſtrument, which I conſider to be a nullity. It is found by the verdict, that the alteration was made while the bill was in the poſſeſſion of *Wilkinſon* and *Cooke*; and it certainly was for their advantage, becauſe it accelerated the day of payment. Now, upon theſe facts, the jury would, perhaps, have been warranted in finding, that the alteration was made by them; at all events, it was their buſineſs to preſerve the bill without any alteration. If *Wilkinſon* and *Cooke* had brought this action, they clearly could not have recovered, becauſe they muſt ſuffer for any alteration of the bill while it was in their cuſtody: then, if the objection would have prevailed in an action brought by them, it muſt always hold with regard to the plaintiffs, who derive title under them. For wherever a party takes a bill under ſuch ſuſpicious circumſtances appearing on the face of it, it is his duty to enquire how the alteration was made; he takes it at his riſk, and muſt take it ſubject to the ſame objection as lay againſt the party from whom he received it. Upon the whole, there ſeems to be no difference between deeds and bills of exchange in this reſpect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly neceſſary, that bills of exchange, which are daily circulated from hand to hand, ſhould be preſerved with greater purity than deeds, which do not paſs in circulation. It would be extremely dangerous to permit the party to recover on a bill, as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For theſe reaſons, therefore, I concur in opinion with my Lord. Mr. JUSTICE BULLER differed in opinion; and in a ſpeech of conſiderable length, aſſigned, in very learned and emphatical terms, a number of forcible reaſons for his being of opinion, contrary to the other judges, that the plaintiffs were intitled to judgment on either of the three counts in the declaration, namely, on the count on the bill of exchange, ſtating the date to be the 26th; or, on the count for money paid; or on the count for money had and received (1).—

(1) Mr. Juſtice *Buller's* argument is inſerted at length in the Term Reports, vol iv. 332 to 344.

GROSE,

Grose, J. The firſt count is on a bill of exchange, dated the 20th of March; but, there being no proof of any bill of that date, there is clearly an end of that count. The ſecond is on a bill dated the 26th of March; but the defendant objects to the plaintiffs' recovering on this count alſo, becauſe, the bill having been altered while it was in the hands of *Wilkinſon* and *Cooke*, it is not the ſame bill as that which was accepted; and that is the true and only queſtion in the cauſe. My idea is, that the plaintiffs' right of action, as ſtated in this count, cannot be maintained at common law, but is ſupported only on the cuſtom of merchants, which permits theſe particular *choſes in action* to be transferred from one perſon to another. The plaintiffs, as indorſees, in order to recover on this bill, muſt prove the acceptance by the defendant, the indorſement from *Wilkinſon* and *Cooke* to them, and that this was the bill which was preſented when it became due. Now has all this been proved? The bill was drawn on the 26th of March, payable at three months date. The defendant's engagement by his acceptance was, that it ſhould be paid when it became due, according to that date; but afterwards the date was altered; the date, I conſider as a material part of the bill; and by the alteration, the time of payment is accelerated ſeveral days: according to that alteration, the payment was demanded on the 23d of June, which ſhews that the plaintiffs conſidered it as a bill drawn the 20th of March; then the bill, which was produced in evidence to the jury, was not the ſame bill which was drawn by *Peele* and Co. and accepted by the defendant; and here the caſes, which were cited at the bar, apply. *Piggott*'s, 11 *Co.* 27. 1 *Rol. Rep.* 40. is the leading caſe; from that I collect that when a deed is eraſed, whereby it becomes void, the obligor may plead *non eſt factum*, and give the matter in evidence, becauſe, at the time of plea pleaded, it was not his deed; and 2dly, that when a deed is altered in a material point by himſelf, or even by a ſtranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed cauſes it no longer to be the ſame deed. Such is the law reſpecting deeds: but it is ſaid, that that law does not extend to the caſe of a bill of exchange; whether it do or not, muſt depend on the principle on which this law is founded. The policy of the law has been already ſtated, namely, that a man ſhall not take the chance of committing a fraud; and, when that fraud is detected, recover on the inſtrument as it was originally made. In ſuch a caſe, the law intervenes, and ſays, that a deed thus altered, no longer continues the ſame deed, and that no perſon can maintain an action upon it. In reading that, and the other caſes cited, I obſerve, that it is no where ſaid, that the deed is void, merely becauſe it is the caſe of a deed, but becauſe it is *not the ſame deed.*

deed. A deed is nothing more than an inſtrument or agreement under ſeal: and the principle of thoſe caſes is, that any alteration in a material part of any inſtrument or agreement avoids it, becauſe it thereby ceaſes to be the ſame inſtrument. And this principle is founded on great good ſenſe, becauſe it tends to prevent the party, in whoſe favour it is made, from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of inſtrument as to another. But it has been contended, that there is a difference between an alteration of bills of exchange and deeds; but I think that the reaſon of the rule affects the former more ſtrongly, and the alteration of them ſhould be more penal, than in the latter caſe. Suppoſing a bill of exchange were drawn for 100*l.* and after acceptance, the ſum was altered to 1000*l.* It is not pretended that the acceptor ſhall be liable to pay the 1000*l.*: and I ſay, that he cannot be compelled to pay the 100*l.* according to his acceptance of the bill, becauſe it is not the ſame bill. So, if the name of the payee had been altered, it would not have continued the ſame bill. And the alteration, in every reſpect, prevents the inſtrument's continuing the ſame, as well when applied to a bill as a deed. It was ſaid, that *Piggott*'s caſe only ſhews to what time the iſſue relates: but it goes further, and ſhews, that if the inſtrument be altered at any time before plea pleaded, it becomes void. It is true, the Court will enquire to what time the iſſue relates in both caſes. Then, to what time does the iſſue relate here? The plaintiffs, in this caſe, undertook to prove every thing that would ſupport *the aſſumpſit* in law, otherwiſe the *aſſumpſit* did not ariſe. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, preſented, and refuſed: but if the bill, which was accepted by the defendant, were altered before it was preſented for payment, then that identical bill, which was accepted by the defendant, was not preſented for payment; the defendant's refuſal was a refuſal to pay another inſtrument; and therefore the plaintiffs failed in proving a neceſſary averment in their declaration. If the bill had been preſented and refuſed payment, and it had been altered after the action was brought, then it might have been like the caſe mentioned at the bar. It was contended, at the bar, that the enquiry before a jury, in an action like the preſent, ſhould be, whether or not the defendant promiſed to pay the bill at the time of his acceptance: but granting that he did ſo promiſe, that alone will not make him liable, unleſs that ſame bill were afterwards preſented to him. It has been ſaid, that a deciſion in favour of the plaintiffs will be the moſt convenient one for the commercial world: but that is much to be doubted; for if, after an alteration of this kind, it be competent

petent to the Court to enquire into the original date of the inſtrument, it will alſo be competent to enquire into the original ſum, and the original payee, after they have been altered, which would create much confuſion, and open a door to fraud. Great and miſchievous neglects have already crept into theſe tranſactions; and I conceive that keeping a ſtrict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad conſequences, becauſe the party, who has paid a value for the bill, may have recourſe to the perſon who immediately received it from him. On theſe grounds, therefore, I am of opinion, that the plaintiffs cannot recover on the ſecond count. Neither do I think that they can recover on the general counts, becauſe it is not ſtated as a fact in the verdict, that the defendant received the money, the value of the bill.—PER CUR. Judgment for the defendant.

The plaintiff, in the above caſe, afterwards brought a writ of error, returnable in the Exchequer Chamber, and the point was again ſolemnly argued there: after which, the judgment of the Court was pronounced as follows:—LORD CH. J. EYRE, When it is admitted that the alteration of a deed would vitiate it, the point ſeems to me to be concluded; for by the cuſtom of merchants, a duty ariſes on bills of exchange, from the operation of law, in the ſame manner as a duty is created on a deed, by the act of the parties. With reſpect to the argument, from the negotiability of bills of exchange, and their paſſing through a variety of hands, the inference is directly the reverſe of that which was drawn by the counſel for the plaintiff. There are no witneſſes to a bill of exchange, as there are to a deed; a bill is more eaſily altered than a deed. If, therefore, courts of juſtice were not to inſiſt on bills being ſtrictly and faithfully kept, alterations in them highly dangerous might take place, ſuch as the addition of a cypher in a bill for 100*l.* by which the ſum might be changed to 1000*l.*; and the holder having failed in attempting to recover the 1000*l.*, might afterwards take his chance of recovering the 100*l.* as the bill originally ſtood: but ſuch a proceeding would be intolerable. It was ſaid in the argument, that the defendant could not diſpute the finding of the jury, that they had found, that he accepted the bill, and therefore that the ſubſtance of the iſſue was proved againſt him. But the meaning of the plea of non-aſſumpſit is, not that he did not accept the bill, but that there was no duty binding on him at the time of the plea pleaded. There are many ways by which the obligation of the acceptance might be diſcharged; for inſtance, by payment. And it was certainly competent to him to ſhew, that the duty which ariſes *primâ facie* from the acceptance of a bill, was diſcharged in the

Maſter v. Miller, in the Exch. Cham. in Error, Tr. Ter. 33 Geo. 3. [a] *Hen. Black.* 142.

the preſent caſe, by the bill itſelf being vitiated, by the alteration which was made.—MACDONALD, LORD CH. BAR. I ſee no diſtinction, as to the point in queſtion, between deeds and bills of exchange; and I entirely concur with my Lord Chief Juſtice in thinking, there would be more dangerous conſequences follow from permitting alterations to be made on bills than on deeds. THE OTHER JUDGES declaring themſelves of the ſame opinion, THE JUDGMENT was affirmed.

Dingwall v. Dunſter, Mic. Ter. 20 Geo. 3. B. R. 1 *Doug.* 247.

Nothing but an expreſs declaration by the holder will diſcharge the acceptor of a bill of exchange.—The caſe was as follows: *Dunſter* lent one *Wheate* his acceptance, which became due the 13th of December, 1774, the payee, named in the bill, indorſed it over to the plaintiff, in payment for jewels. After it became due, the plaintiff, underſtanding that the acceptor never had any conſideration for accepting it, and that *Wheate* was the real debtor, wrote to his (*Wheate's*) attorney in February and November, 1775, for payment, received intereſt upon the bill from *Wheate*, and ſuffered ſeveral years to elapſe without calling on *Dunſter*. On the 13th of February, 1775, *Dunſter* wrote to thank the plaintiff for not proceeding againſt him; and ſaid, he had been informed by a perſon, that *Wheate* had taken up the bill and given another to the plaintiff's ſatisfaction: it did not appear that the plaintiff took any notice of that letter.—He afterwards ſued *Dunſter* as acceptor of the bill: and at the trial the jury found a verdict for the defendant. BUT upon a rule to ſhew cauſe why there ſhould not be a new trial, THE WHOLE COURT were of opinion with the plaintiff. Lord MANSFIELD, There is no doubt but a holder of a bill may diſcharge any of the parties; but there is this difference between the acceptor and the others, that the acceptor is firſt liable; and, to be intitled to have recourſe againſt him, it is not neceſſary to ſhew notice given to him of non-payment by any other perſon. No uſe has been made of the defendant's letter, probably the fact did not warrant him in aſſerting that a perſon had told him *Wheate* had taken up the bill: had the plaintiff, by any thing in his conduct, confirmed him in ſuch a belief, it might have altered the caſe. WILLES, J. I do not think ſilence can diſcharge the acceptor. No caſe of a tacit diſcharge has been produced. In *Black* v. *Peele* (1),

(1) *Black* v. *Peele*, cited in 1 *Doug.* 248.—*Black* arreſted *Peele* as acceptor of a bill drawn by *Dallas*; but, on finding that the acceptance was an accommodation one, his attorney took a ſecurity from *Dallas*, and ſent word to *Peele* that he had ſettled with *Dallas*, and that *Peele* need give himſelf no further trouble. *Dallas* afterwards became bankrupt, upon which *Black* again ſued *Peele*; but it was held, that as *Black* had, in expreſs words, diſcharged *Peele*, the action could not be maintained.

the

the diſcharge was in expreſs words: in *Walpole* v. *Pulteney* (1), the caſe was put upon the entry in the book being an expreſs diſcharge. ASHHURST, J. An acceptor makes himſelf a debtor, and his caſe is different from that of the other parties to the bill: nothing but an expreſs diſcharge will do. The defendant endeavours to prove a diſcharge from letters, but they do not come up to it: and the conduct of the plaintiff amounts only to indulgence towards the acceptor. BULLER, J. Nothing but an expreſs agreement can diſcharge the acceptor; and nothing of that ſort appears in this caſe: the plaintiff's conduct meant nothing more, but that he would try to recover from the drawer, who was the original and true debtor, if he could.—Rule for a new trial abſolute.

If the holder of a bill receives a part of the money from the drawer, and gives him a further time for the payment of the remainder, this ought to be left to the jury to ſay whether it is not a waiver of the acceptance. One *James Galindo* drew upon his brother for 30*l.* in favour of the plaintiff. When the bill became due, *James* paid the plaintiff 3*l.* 15*s.* 4*d.* and indorſed a promiſe to pay the remainder in three months on the back of the bill: after three years had elapſed, this action was brought againſt the defendant as the acceptor At the trial, LORD MANSFIELD thought the defendant diſcharged, and nonſuited the plaintiff. On a motion for a rule to ſhew cauſe why there ſhould not be a new trial, LORD MANSFIELD ſaid, he thought the caſe did not interfere with that of *Dingwall* v. *Dunſter*; but a rule to ſhew cauſe was granted. After cauſe was ſhewn, LORD MANSFIELD ſaid, "The doubt is, whether the queſtion ſhould not have been left to the jury;" and PER BULLER, J. "I rather think the caſe ſhould have gone to the jury; but I am not therefore of opinion, that there ought to be a new trial: the indorſement could not have been meant as an additional ſecurity, for the drawer was equally liable before. I ſhould have left the queſtion to the jury, but with very ſtrong obſervations: and as the demand is ſo ſmall, I do not think there ought to be a new trial.

Ellis v. Gallindo, Mic. Ter. 24 Geo. 3. B.R. cited 1 *Doug.* 249. († 71.)

(1) *Walpole* v. *Pulteney* cited in 1 *Doug.* 248.—*Walpole* held a bill accepted by *Pulteney*, but agreed to conſider his acceptance as at an end; and wrote in his bill-book, oppoſite the entry of this bill, "Mr. *Pulteney*'s acceptance at an end." *Walpole* kept the bill from 1772 to 1775, without calling upon *Pulteney*, and then brought this action. The jury found a verdict for the plaintiff; but the Court of Exchequer thought the verdict wrong, and granted a new trial, upon which, the jury found for the defendant.

The Indorſement of Bills and Notes.

Ancher *et al. v.* The Bank of England, Ea. Ter 21 Geo. 3. B.R. 2 *Doug.* 637.

A bill at firſt negotiable may, by the indorſement, be reſtrained from being further negotiable.—A bill was drawn by the plaintiffs, on *Claus*, *Heide*, and Co. payable to *Jens Mæſtue*, or order: *Mæſtue* indorſed it to this effect, "The within muſt be credited to Capt. *M. L. Dahl*, value in account," and ſent it to *Claus*, *Heide*, and Co. who credited *Dahl* for the amount, and gave notice to *Dahl*, and the plaintiffs, that they had done ſo: afterwards an indorſement was forged upon the bill in Engliſh, "for me to pay Mr. *Detleff Muller*, or order, *Morten L. Dahl*." *Muller*, who was a clerk in the houſe of the acceptors, carried the bill, thus indorſed, but which never had been in the hands of *Dahl*, to the bank, and indorſed it with his own name; upon which, it was diſcounted in the uſual courſe of buſineſs. When the day of payment came, the acceptors having become inſolvent, and *Muller* having abſconded, the bill was proteſted; and one *Fulberg*, as a friend, or agent, for the plaintiffs, came to the bank, and paid it for their honour as the drawers: but the forgery having been diſcovered, *this action, for money had and received, was brought againſt the bank, on the ground that the bill was not negotiable, on account of the ſpecial indorſement*, and that it had, therefore, been diſcounted by the bank in their own wrong, and the money paid by *Fulberg* to take it up, paid by miſtake. At the trial, Lord MANSFIELD directed a nonſuit. BUT upon a rule to ſhew cauſe why there ſhould not be a new trial, and cauſe ſhewn, Lord MANSFIELD and WILLES, and ASHHURST, Judges, thought the indorſement reſtrictive, and that the plaintiffs were intitled to recover: but BULLER, J. thought otherwiſe, and aſſigned his reaſons: upon which, Lord MANSFIELD ſaid, the whole turned on the queſtion, Whether the bill continued negotiable? and if they altered their opinion, they would mention the caſe again, but it never was mentioned afterwards; and upon the ſecond trial, Lord MANSFIELD directed the jury to find for the plaintiffs, which they did.

LORD MANSFIELD, and WILLES, and ASHHURST, Judges, in this caſe, aſſigned the following reaſons for being of opinion that the negotiability of the bill was reſtrained. LORD MANSFIELD, Where there is equal equity, poſſeſſion muſt prevail; and the equity is equal between perſons who have been equally innocent and equally diligent: the queſtion, therefore, is, Whether the bank has been equally diligent? A bill, though once negotiable, is certainly capable of being reſtrained: this has been determined upon argument. *A blank indorſement makes the bill payable to bearer; but by a ſpecial indorſement, the holder may ſtop the negotiability.* It does

does not ſeem to me, that, after the ſpecial indorſement by *Mæſtue*, *Dahl* himſelf could have indorſed it over: *Mæſtue* did not mean to make himſelf anſwerable as an indorſor, or to enable *Dahl* to raiſe money on the bill: the bank could not have maintained an action on the bill, againſt the plaintiffs. It was their negligence not to read the ſpecial indorſement. WILLES, J. The bank either did read, or ought to have read, the indorſement. ASHHURST, J. The queſtion is, Did the bank uſe due diligence? if they had attended to the indorſement they would not have diſcounted the bill. I think *Dahl* himſelf could not have indorſed it: it was never the intention that *Claus*, *Heide*, and Co. ſhould pay money to *Dahl*, but only that the amount ſhould be ſet off in his account: if the bank have taken a bill not negotiable, it is their own fault, and they are not intitled to retain the money which has been paid them by miſtake.

Edie *et al. v.* East-India Company, Tr. Ter. 1 Geo. 3. B. R. 2 *Burr.* 1216. 1 *Black.* 295.

A bill of exchange, payable to order, becomes negotiable, and may be indorſed over without the word order to the indorſement.—This was an action brought by the indorſees upon two foreign bills of exchange, drawn by Col. *Clive*, then in the Eaſt-Indies, upon the Eaſt-India Company, and accepted by them, payable to Mr. *Campbell*, or order, then alſo in India; and indorſed by Mr. *Campbell* to Mr. *Robert Ogilby*: one of theſe bills was, by ſuch indorſement, directed to be paid to *Robert Ogilby*, or order, in the uſual way of indorſing; and no diſpute or queſtion aroſe upon it: the other bill was alſo indorſed by Mr. *Campbell*, to *Robert Ogilby*: but *the words, or order, were originally omitted in this indorſement*, and afterwards put in by another hand, before the trial. Theſe bills, thus indorſed by Mr. *Campbell* to Mr. *Ogilby* (without adding the words "*or order*" in the indorſement of the latter), were indorſed by him to the plaintiffs, or order. *Ogilby* became inſolvent; and the queſtion then was, who was to bear the loſs, whether Mr. *Campbell*, or the plaintiffs? (for the Eaſt-India Company were no more than ſtake holders): the diſpute aroſe only upon this latter bill; for the firſt bill was given up, at the trial, by the counſel for the defendants; and a verdict was taken for the plaintiff, upon that count—but on the ſecond, an objection was taken to the *want of the words* "*or order*," which the defendants' counſel inſiſted were neceſſary to be originally inſerted by the indorſer; that the omiſſion of them was equivalent to the moſt reſtrictive words that he could have made uſe of, in order to limit the payment; and, accordingly, on this ſecond count, a verdict was found for the defendant:—a rule having been obtained to ſhew cauſe why a new trial ſhould not be granted, THE COURT (after cauſe ſhewn) were clearly of opinion, that as the bill was originally, in its nature, negotiable, it continued ſo in the

hands of *Ogilby*, and that his indorſement was good; and a new trial was granted.—LORD MANSFIELD, I thought at the trial, that the defendants might be at liberty to go into *the uſage of merchants*, upon this occaſion; and ſeveral witneſſes were examined thereon: ſince the trial, I have looked into the caſes, and have conſidered the thing with a great deal of care and attention, and thought much about it; and I am very clearly of opinion, that I ought not to have admitted any evidence of the particular uſage of merchants in ſuch a caſe; of this, I ſay, I am now ſatisfied: for the law is already ſettled:—I go upon two caſes, *Moore* v. *Manning*, *Comyns*, 311. and *Atchiſon* v. *Fountain*, *Strange*, 557. *Buller*'s N. P. 275. "The firſt was aſſumpſit, on a note drawn by the defendant, payable to *Statham*, or order; *Statham* indorſed it to *Witherhead*, but did not add "*or to his order*;" and *Witherhead* indorſed it to the plaintiff: the defendant contended, that as there were no expreſs words to authoriſe *Witherhead* to aſſign it, he had no ſuch power; but the whole court contended, that as the bill was at firſt aſſignable by *Statham*, as being payable to him, or order, and as all *Statham*'s intereſt was transferred to *Witherhead*, the right of aſſigning it was transferred alſo: and the plaintiff had judgment. In the other caſe, a bill was payable to *Abercrombie*, or order, and he indorſed it thus, "Pray pay the contents to *Louiſa Atcheſon*:" this being ſtated in the declaration as an indorſement to *Atcheſon*, or order, it was objected that it was a fatal variance; but, upon conſideration, the whole Court was of opinion againſt the objection, becauſe this was the legal import of the indorſement, and *Louiſa Atcheſon* was authoriſed by it to make an indorſement over. A draft drawn upon one perſon, directing him "to pay money to another, *or order*," is, in its original creation, not an authority, but a bill of exchange, and is negotiable; it belongs to the payee, to do what he thinks proper with it, and to uſe it as beſt ſuits his convenience: it is his property; and he may aſſign it as ſuch, and to whom he pleaſes: and his direction "*to pay it to ſuch an one*," is a direction to pay it to him, or his order, for he aſſigns his whole property in it, and has had a valuable conſideration for ſo doing: there can be no doubt that ſuch an intereſt is *tranſmiſſible* to executors or adminiſtrators; and the words *or order* are not neceſſary to be inſerted in the indorſement, any more than the words *executors* or *adminiſtrators* are neceſſary to be added to it. The point has been already ſettled by the two determinations above-mentioned; and, therefore, witneſſes ought not to have been examined as to the uſage, after ſuch ſolemn determinations of what was the law; and, therefore, there ought to be a new trial. [As to the coſts: the queſtion is very peculiar; there is a verdict, in

in part, for the plaintiff, which always carries coſts for him; but, for form's ſake, the whole verdict muſt be ſet aſide generally, and not in part only: this is uſually done on payment of coſts; but here it would be giving the defendant coſts, which they could not otherwiſe have; for this verdict is agreed to be right upon the firſt count; and that is found for the plaintiffs; therefore, there ought to be no coſts, upon granting a new trial, in the preſent caſe; ſince the merits were always clear for the plaintiffs, on the firſt count; and it now appears that nothing remained to be tried on the ſecond.] DENNISON, J. concurring, ſaid, This verdict, upon the ſecond count, is not well founded: the point in queſtion is not matter of fact, but matter of law: where a bill is originally made payable to *A.* or to order, it is, of courſe, and in its very eſſence, negotiable from hand to hand: an inland bill of exchange is aſſignable in its nature, *toties quoties*; and promiſſory-notes are now upon the ſame foot with them; foreign bills of exchange are equally ſo, by the law of merchants, and by the ſettled determinations of courts of law in England: this is a matter of law, and the law is clearly and fully fixed: there is no inſtance of a reſtrictive limitation, where the bill is originally made payable to a man, or order: in general, the indorſement follows the nature of the thing indorſed; and is equally negotiable: there is nothing from whence to collect an intent to limit and reſtrain it; the law has determined that the bill is negotiable in itſelf; and there is no law to the contrary, nor any practice for it in the preſent caſe; and it would be infinitely inconvenient if it ſhould be otherwiſe; for as no circumſtances at all appear, it would deſtroy or diſturb that certainty, which tranſactions of this nature require. An executor, or adminiſtrator, may indorſe a bill, or promiſſory-note, within the cuſtom of merchants, *Rawlinſon* v. *Stone*, 2 *Strange*, 1260. for he is only aſſignee in law, and not in fact; and yet he may aſſign it by the name of executor, or adminiſtrator; now the preſent caſe includes that, and more; for here the firſt indorſee was an aſſignee, in fact; and it ought to be ſo for the ſake of certainty, and for the benefit and convenience of trade: no intention appears here to reſtrain it; and, in general, the law ſays it is aſſignable, and it is not material when or how filled up; for it is every day's practice to fill up the indorſement long after it is made, nay, even in court, at the trial. I will not give any opinion whether the indorſee might have limited his aſſignment by ſome clear, plain, negative words, if, in fact, it had been his intention to limit and reſtrain it; but here no ſuch intention appears; the indorſement is general; and the law is ſettled, that the aſſignment follows the nature of the thing aſſigned; and the law being already ſo

ſettled, the jury ought not to have given their verdict upon an opinion contrary to it. FOSTER, J. concurred, and ſaid, Much has been ſaid about the cuſtom of merchants; but the cuſtom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not ſufficiently diſtinguiſh between cuſtoms of different ſorts; the true diſtinction is between general cuſtoms (which are part of the common law), and local cuſtoms (which are not ſo). This cuſtom of merchants is the general law of the kingdom; part of the common law. WILMOT, J. was of the ſame opinion, and ſaid, The law, with regard to this point, is ſettled, and fully eſtabliſhed, by the two caſes which have been cited, and upon right and proper principles; the original contract is "to pay to ſuch perſon or perſons, as the payee, or his aſſignees, or their aſſignees, ſhall direct:" and there is as much privity between the laſt indorſor, and the laſt aſſignee, as between the drawer and the firſt payee. When the payee aſſigns it over, he does it by the law of merchants; being a choſe in action, not aſſignable by the general law: and the indorſement is part of the original contract, and is incidental and appurtenant to it, in the nature of it, and muſt be underſtood and interpreted to be made in the ſame manner as the bill was drawn; and the indorſee holds it in the ſame manner, and with the ſame privileges, qualities, and advantages, as the original payee held it; that is, as an aſſignable negotiable note, which he may indorſe over to another, and that other to a third, and ſo on at pleaſure. There is a great deal of difference between giving a naked authority *to receive it*, and transferring it over by indorſement: and I doubt whether he can limit his indorſement of it by way of aſſignment, or transfer to another, ſo as to preclude his aſſignee from aſſigning it over as a thing negotiable; for the aſſignee purchaſes it for *a valuable* conſideration; and, therefore, purchaſes it with all its privileges, qualities, and advantages; one of which is, its negotiability. To be ſure he may give a mere naked authority to a perſon "to receive it for him;" he may write upon it, "Pray pay the money to my ſervant for my uſe;" or uſe ſuch expreſſions as neceſſarily import that he does not mean to indorſe it over, but is only authorizing a particular perſon to receive it for him, and for his own uſe: in ſuch a caſe it would be clear that no valuable conſideration had been paid him: but, at leaſt, that intention muſt appear *upon the face of the indorſement*; whereas, here, no ſuch thing, nor any thing tending to it, appears upon the face of the indorſement: it is a general aſſignment, without any reſtriction at all. The principle I rely upon is, the paying *a valuable conſideration* for the aſſignment.—The cuſtom of merchants is part of the law of England; and courts of law muſt take notice of

of it as ſuch: there may, indeed, be *ſome* queſtions depending upon cuſtoms amongſt merchants; where, if there be a doubt about the cuſtom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful, and even there *the cuſtom muſt be proved by facts, not by opinion only*; and it muſt alſo be ſubject to the control of the law. *Hawkins* v. *Cardy*, *Carth.* 66. 1 *Salk.* 65. The two caſes that have been cited ſerve to prove that there is no ſuch cuſtom of merchants as the defendants pretend; for they could not have been ſo determined as they were, if there had been ſuch a cuſtom of merchants. Therefore, theſe judicial determinations of the point are the *lex mercatoria*, as to this queſtion; for they ſettle what is the cuſtom of merchants; which cuſtom is part of the law of the land: but this finding of the jury, in the preſent caſe, is directly contrary to the *lex mercatoria* ſo fully ſettled and eſtabliſhed by legal adjudications.—Verdict ſet aſide, and new trial ordered (but without coſts).

A blank indorſement, ſo long as it continues blank, makes a bill or note payable to the bearer; and, if it be loſt or ſtolen, and afterwards negotiated, the innocent indorſee may recover upon it.—This caſe was as follows: the defendant, on the 22d of October, 1763, drew a bill in London, on Sir *Charles Aſgill* and Co. for 70*l.* payable to *Ship Fortune*, or bearer; which he gave to Mr. *Bignell*, the ſhip's huſband, who loſt it; it was found by a perſon unknown, who, on the 25th of October, paid it to the plaintiff, a grocer, in Portſmouth, for a parcel of teas, and took the change, having firſt made inquiry, and found that the drawer was a reſponſible perſon; in the mean time, the defendant directed Sir *Charles Aſgill* to ſtop payment of this bill, which produced this action: on the trial, Lord *Mansfield* left it to the jury to conſider, 1ſt, Whether the plaintiff came to the poſſeſſion of the bill fairly, and *bonâ fide*; 2dly, Whether ſuch a draft was, in fact and practice, negotiable; and the jury which was a ſpecial jury of merchants, found for the defendant. But, upon an application for a new trial, and cauſe ſhewn againſt it, The Court were clear, that the ſecond point ought not to have been left to the jury; becauſe it was clear, that ſuch draughts were negotiable; and, if the jury thought the plaintiff took the note fairly and *bonâ fide*, of which there appeared to be no doubt, he was intitled to recover, and a new trial was granted.—PER LORD MANSFIELD, It is a queſtion of law, Whether a bill or note be negotiable or not? It appears by the books, that theſe notes are by law negotiable; and the plaintiff's maintaining his action, or not maintaining it, depends upon the queſtion, Whether ſuch a note is negotiable or not: It appears, likewiſe, that the bearer of them may maintain an action as

Grant v. Vaughan, Tr. Ter. 4 Geo. 3. B. R. 3 *Burr.* 1516. 1 *Black.* 485.

bearer, where he can intitle himſelf to them on a valuable conſideration: the act 3 and 4 *Ann.* c. 9. puts promiſſory-notes upon the ſame foot throughout with inland bills of exchange; and, therefore, whatever is the rule as to inland bills of exchange, payable to bearer, muſt be ſo likewiſe as to notes payable to bearer. It is alſo quite clear beyond all diſpute, that an action for money had and received to the plaintiff's uſe, may be brought by the *bonâ fide* bearer of a note made payable to bearer; for it is certainly money received for the uſe of the original advancer of it; and if ſo, it is for the uſe of the perſon who has the note as bearer. WILMOT, J. If a verdict be given without evidence at all, or againſt plain evidence, or againſt law, it ought not to ſtand: whether ſuch bills or notes as this is, are in their own nature negotiable, is a point of law; and, by law, they are negotiable: this verdict is, therefore, againſt law, and ought to be ſet aſide; for, though, when facts and law happen to be ſo complicated and intermixed that a jury cannot help taking both into their conſideration, it may be difficult, or even impoſſible, for them to avoid finding their verdict upon both; yet they are not at liberty to determine contrary to law: they ought to take their notice of the law from the direction of the judge who tries the cauſe. Formerly, a jury would have been liable to an attaint, for ſuch a verdict: now the court control their verdicts, by ſetting them aſide, and granting a new trial. This is a negotiable note; and the action may be brought in the name of the bearer, "*Bearer*" is *deſcriptio perſonæ:* and a perſon may take by that deſcription, as well as by any other. In the nature of the contract there is no impropriety in his doing ſo. It is a contract "to pay the bearer, or to the perſon to whom he ſhall deliver it;" whether it be a note or a bill of exchange; and it is repugnant to the contract, that the drawer ſhould object that the bearer has no right to demand payment from him; but, on the other hand, it is but juſt and reaſonable, that if the bearer brings the action, he ought to intitle himſelf to it on a valuable conſideration; and ſtrictly to prove his coming by it *bonâ fide.* Upon the whole, I think this to be a verdict againſt law, and that it ought to be ſet aſide. YATES, J. concurred.

Peacock *v.* Rhodes *et al.* Eaſter Term. 21 Geo. 3. B.R. 2 *Doug* 632.

On a verdict taken by conſent for the plaintiff, ſubject to the opinion of the court, on a ſpecial caſe: the following facts were ſtated: "A bill was drawn by the defendants upon *Smith*, *Payne*, and *Smith*, payable to *Wm. Ingham*, or order, thirty-one days after date, for value received: it was indorſed by *Wm. Ingham*, and was preſented by the plaintiff for acceptance and payment, but both were refuſed, of which due notice was given, by the plaintiff, to the defendants, and the money demanded of the defendants: the plaintiff,

tiff, who was a mercer, at Scarborough, received the bill from a man not known, who called himſelf *Wm. Brown*, and, by that name indorſed the bill to the plaintiff, of whom he bought cloth and other articles in the way of the plaintiff's trade as a mercer, in his ſhop at Scarborough, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth, and other articles, and caſh, and ſmall bills: the plaintiff did not know the defendants, but had, before, in his ſhop, received bills drawn by them, which were duly paid: *Wm. Ingham*, to whom the bill was payable, indorſed it; *John Daltry* received it from him, and indorſed it; *Joſeph Fiſher* received it from *John Daltry*, and it was ſtolen from *Joſeph Fiſher*, at York (without any indorſement or tranſfer thereof by him), along with other bills, in his pocket book, whereof his pocket was picked, before the plaintiff took it in payment, as aforeſaid. The plaintiff declared as indorſee of *Ingham*.—The opinion of the Court (after argument) was delivered by LORD MANSFIELD, as follows: The holder of a bill of exchange, or promiſſory-note, is not to be conſidered in the light of an aſſignee of the payee: an aſſignee muſt take the thing aſſigned, ſubject to all the equity to which the original party was ſubject. If this rule applied to bills and promiſſory-notes, it would ſtop their currency; the law is ſettled, that a holder coming fairly by a bill, or note, has nothing to do with the tranſaction between the original parties, unleſs, perhaps, in the ſingle caſe (which is a hard one, but has been determined) of a note for money won at play (1). I ſee no difference between a note indorſed blank, and one payable to bearer; they both go by delivery, and poſſeſſion proves property in both caſes. The queſtion of *mala fides* was for the conſideration of the jury: the circumſtances that the buyer, and alſo the drawers, were ſtrangers to the plaintiff; and that he took the bill for goods, on which he had a profit, were grounds of ſuſpicion very fit for their conſideration, but they have conſidered them, and have found it was received in the courſe of trade, and, therefore, the caſe is clear.—*Poſtea* to the plaintiff.

In an action by the indorſee againſt the acceptor of a bill of exchange, drawn payable to "*A.* or order," it is competent to the defendant to give evidence that the perſon, who indorſed to the plaintiff, was not the real payee, though he be of the ſame name, and though there be no addition to the name of the payee on the bill. And if a bill of exchange, payable to *A.* or order, get into the hands of another perſon of the ſame name as the payee, and ſuch perſon, knowing

Mead v. Young, Mic. Ter. 31 Geo 3. B. R. 4 *Ter. Rep.* 28.

(1) *Robinſon* v. *Bland*, vol. i. p. 273. alſo in Uſury, *vide Lowe* v. *Waller*, under title USURY, and STOCK-JOBBING TRANSACTIONS, *vide Brown* v. *Turner*, *infra*.

that

that he was not the real perſon in whoſe favour it was drawn, indorſe it, he is guilty of a forgery.—This was an action brought by the indorſee of a bill of exchange for 90l. againſt the acceptor. The bill was drawn at Dunkirk, by *Chriſtian*, on the defendant, in London, payable "to *Henry Davis*, or order;" and, having been put into the foreign mail, incloſed in a letter from *Chriſtian*, *it got into the hands of another* Henry Davis *than the one in whoſe favour it was drawn.* The defendant accepted the bill; and when *Davis* deſired the plaintiff to diſcount it, the latter made application to the defendant to know whether or not it was his acceptance; and, on receiving an anſwer in the affirmative, coupled with an aſſurance that it was a good bill, he diſcounted it, not knowing the *H. Davis* from whom he took it. There was no ground to impute any fraud to the plaintiff. On the trial, after the plaintiff had proved the defendant's hand-writing, and the indorſement by *Davis*, the defendant offered evidence to ſhew that the *H. Davis*, who indorſed to the plaintiff, was not the real *H. Davis* in whoſe favour the bill was drawn: but Lord *Kenyon* being of opinion that ſuch evidence was inadmiſſible, the plaintiff recovered a verdict. After a rule had been obtained to ſhew cauſe why a new trial ſhould not be granted on this miſdirection, and cauſe ſhewn, the rule was made abſolute. LORD KENYON, Ch. J. retained his former opinion, and ſaid, that if any fraud, or even neglect, could be imputed to the plaintiff, that would vary the caſe: but circumſtanced as theſe parties were, he thought that, if the plaintiff could not recover, it would put an inſuperable clog on this ſpecies of property; that he could not diſtinguiſh this caſe on principle from that of *Miller* v. *Race* (1), where the innocent holder of a note, which had been taken when the mail was robbed, was held intitled to recover; that it would throw too great a burthen on perſons taking bills of exchange, to require proof of an indorſee, that the perſon from he received the bill, was the real payee; that ſuch proof has never yet been required of an indorſee in ſuch an action: and, therefore, He thought that, as there was no fraud, or want of due diligence on the part of the plaintiff, he was intitled to recover. THE OTHER JUDGES WERE, HOWEVER, OF A DIFFERENT OPINION. ASHHURST, J. In order to derive a legal title to a bill of exchange, it is neceſſary to prove the hand-writing of the payee; and, therefore, though the bill may come by miſtake into the hands of another perſon, though of the ſame name with the payee, yet his indorſement will not confer a title. Such an indorſement, if made with the knowledge that he is

(1) 1 *Burr.* 452.

not

not the perſon to whom the bill was made payable, is, in my opinion, a forgery; and no title can be derived through the medium of a fraud or forgery. This is diſtinguiſhable from the caſe of *Miller* v. *Race*; for there the note was payable *to bearer*; in ſuch caſes the bearer, who purchaſes for a valuable conſideration, and without notice of any fraud, is intitled to receive the contents of the bill; and payment to him is a diſcharge to the drawer. But in this caſe the bill was drawn payable to *H. Davis, or order*; and though the name of *H. Davis* were indorſed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be ſatisfied that that was the indorſement of the real payee. —Buller, J. If we were to inquire whether any laches were to be imputed to the plaintiff, or the drawer, I rather think the plaintiff is more in fault than any other perſon, in advancing his money to *H. Davis*, who was a total ſtranger to him. But, without going into any ſuch inquiry, I am of opinion that it is incumbent on a plaintiff, who ſues on a bill of exchange, to prove the indorſement of the perſon to whom it is really payable; the general form of the declaration ſhews that it is ſo; for that is, that "the *ſaid A. B.* "to whom, or to whoſe order, the payment of the ſaid ſum "of money mentioned in the ſaid bill was to be made, "afterwards, &c. indorſed the ſaid bill, his own proper "hand-writing being thereto ſubſcribed." Now here it is clear that the indorſement was not made by the ſame *H. Davis* to whom the bill was made payable; and no indorſement, by any other perſon, will give any title whatever. Then, is there any thing, in this caſe, that eſtops the defendant from ſaying, that the perſon who indorſed to him was not the real payee? Now, the act of that perſon who indorſed, and who, in ſo doing, was guilty of a forgery, cannot prevent an innocent perſon from ſhewing the truth. Then it was argued, that *Chriſtian* was guilty of negligence, in not deſcribing more particularly the payee; but I know of no authority which requires that to be done. This bill was drawn in the common form, payable "to *H. Davis* or order;" and the drawer could not foreſee that it would get into the poſſeſſion of any other *H. Davis*. If any other ſtranger had received this bill, and indorſed it over to the plaintiff, it is not pretended that ſuch indorſement would have conveyed any title to the bill; and it cannot make any difference, whether ſuch ſtranger bear the ſame name with the real payee, or not; for no perſon can give title to a bill but he to whom it is made payable. Independently of theſe reaſons, I think that convenience requires that the determination ſhould be in favour of the defendant. I have no difficulty in ſaying, that this *H. Davis*, knowing that the bill was not intended for him, was guilty of a forgery; for the circumſtance of his bearing the *ſame name* with the

payee

payee cannot vary this caſe, ſince he was not the *ſame perſon.* Then if the plaintiff cannot recover on this bill, he will be induced to proſecute the forger; and that would be the caſe even if it had paſſed through ſeveral hands, becauſe each indorſor would trace it up to the perſon from whom he received it, and at laſt it would come to him who had been guilty of the forgery: whereas, if the plaintiff ſucceed in this action, he will have no inducement to proſecute for the forgery; the drawer, on whom the loſs would, in that caſe, fall, might have no means of diſcovering the perſon who committed the forgery, and thus he would probably eſcape puniſhment. As far, therefore, as convenience can have any effect, it weighs ſtrongly with me to receive the evidence. But, at all events, the plaintiff cannot recover, ſince he derives his title under a forgery. GROSE, J. I am of opinion, that it was competent to the defendant to ſhew in evidence, that the perſon, who indorſed to the plaintiff, was not the perſon named as the payee in this bill of exchange; and I form that opinion, as well on the ſubſtance of the tranſaction, as on the form of the pleadings in ſuch caſes. A bill of exchange is only a transfer of a choſe in action, according to the cuſtom of merchants; it is an authority to one perſon to pay to another the ſum which is due to the firſt, and it is generally directed to be paid to the payee or his order. When the perſon, on whom it is drawn, accepts, he only engages, by the terms of his acceptance, to pay the contents of the bill to the perſon named in it, or to his order. The general form of the declaration, which is to be found in ſome of the old entries, alſo agrees with this doctrine, and points out what the law is: I obſerve, indeed, that this declaration is not drawn in the uſual form, for the words, "to whom, or to whoſe order," are omitted; but ſtill it is, that the ſaid *H. Davis*, that is, the ſame *H. Davis*, who is mentioned in a former part of the declaration as the payee, indorſed to the plaintiff. It clearly, therefore, appears, that, as no perſon can demand payment of a bill of exchange but the payee, or the perſon authoriſed by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other perſon. If he pay the amount of the bill to any other perſon, he pays it in his own wrong; and ſuch payment does not diſcharge his debt to the drawer. If this deciſion will prove a clog on the circulation of bills of exchange, I think it will be leſs detrimental to the public, than permitting perſons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we conſider the definition of it; which is the falſe making of any inſtrument, indorſement, &c. with intent to defraud (1). It makes no difference whe-

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1 *Vid.* 2 *Geo.* c. 25. ſ. 1.

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ther the perſon, making this falſe indorſement, were or were not of the ſame name with the payee, ſince he added the ſignature of *H. Davis*, with a view to defraud, and knowing that he was not the perſon for whom the bill was intended. I agree alſo with my brother *Buller*, that this deciſion will be more convenient to the public; becauſe, then the plaintiff will proſecute the perſon, who indorſed to him, for the forgery. For theſe reaſons, I am of opinion, that as this bill of exchange was only payable to the payee or his order, it was competent to the defendant, the acceptor, to enquire, whether the perſon, under whom the plaintiff claims, were or were not the payee.—PER CUR. Rule abſolute.

If a bill or note be made payable to ſeveral perſons *who are not in copartnerſhip*, the indorſement muſt be by all of them.—A bill was drawn by father and ſon, who were not partners, payable to *their own order*. The ſon alone indorſed it; and upon an action by his indorſee againſt the acceptor, LORD MANSFIELD thought an indorſement by both parties eſſential, and nonſuited the plaintiff: a new trial, however, was afterwards granted. The Court, after time taken to conſider, being of opinion, that by making the bill payable to their own order, the father and ſon had made themſelves partners as to this tranſaction; but upon the ſecond trial LORD MANSFIELD ſaid, he did not think the queſtion ſo decided as to preclude evidence which was offered, that by the univerſal uſage and underſtanding of all the bankers and merchants in London, the indorſement was bad, as not being *ſigned by both the payees*; and the jury, *unâ voce*, declared, that that was the uſage and underſtanding; and without hearing any evidence upon the point, they found a verdict for the defendant.

Carvick *v.* Vickery, Hil. Ter. 28 Geo. 3. B. R. 3 *Doug.* 653.

Where a payee of a bill of exchange indorſes it to *A.* and *B. as executors*, they may declare as ſuch in an action againſt the acceptor.—This was an action by indorſees of a bill of exchange, who were executors, &c. againſt the acceptor. The declaration ſtated, that one *Brand* made a bill of exchange, directed to the defendant, and payable to one *A. Thom*, which bill the defendant accepted. That *Thom* indorſed the ſaid bill to the plaintiffs, who were the ſurviving executors of *Stevenſon, in right of the plaintiffs, as ſurviving executors as aforeſaid*, by means whereof, and *according to the ſaid uſage and cuſtom of merchants, the defendant became liable to pay to the plaintiffs, as ſurviving executors, &c.* The ſecond count was, for money had and received by the defendant to the uſe of the plaintiffs, as executors. And the third, on an account ſtated with the plaintiffs as executors. To this declaration there was a ſpecial demurrer; becauſe the *promiſe*, ſtated in the firſt count of the declaration, could not, by law, be made to plaintiffs as executors, but *was made* (if at all) to them *in their*

King *et al.* executors of Stevenſon *v.* Thom, and the ſame *v.* M'Linnan, Mic. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 487.

their own right, and *not as such executors*; and that the said first count of the said declaration is inconsistent with, and cannot by law be joined together with, the said several other counts thereof, &c. ASHHURST, J. There is no doubt but that this action may be supported. It must be taken for granted, that the indorsor was indebted to the testator, and to the plaintiffs, as executors, and so he might indorse to the plaintiffs, as such executors. Then *they held the bill, as executors*, and, upon the acceptor's refusing to pay it, they *may declare upon the right in which they hold it*. No case has been cited to shew that this cannot be supported: and the acceptor is not in a worse situation than he would have been, if the plaintiffs had declared against him in their own right. They have only declared according to the truth of the case. BULLER, J. It is clear that a plaintiff cannot join two counts, one on a debt to himself, and another to him in the character of executor. Then, have the plaintiffs done it in this case? The only question is, Whether the sum, when recovered, will be considered as assets of the testator: if so, that is all the Court look to; and here it certainly would. There can be no such inconvenience, as has been suggested, from the executors indorsing the bill; for it is immaterial whether they indorse it as executors or not. If they indorse it at all, they are liable personally, and not as executors; for their indorsement would not give an action against the effects of the testator.—Judgment for the plaintiffs.

Taylor *v.* Mather Ea. Ter. 27 Geo. 3. B. R. 3 *Ter. Rep.* 83. (*n. a.*)

If a promissory-note is indorsed after it becomes due, evidence may be given of its being a fraudulent transaction.—This was an action by the indorsee of a promissory-note against the maker. The note was indorsed some time after it was due; and there were many circumstances which led the Court and the jury to conclude, that it was fraudulently obtained; whereupon, a verdict was found for the defendant. Upon a motion for a new trial, it was refused upon the merits; and BULLER, J. at the same time said, It has never been determined, that a bill or note is not negotiable after it becomes due; but if there are any circumstances of fraud in the transaction, and it comes into the hands of a plaintiff, by indorsement, after it is due, I have always left it to the jury upon the slightest circumstance to presume that the indorsee was acquainted with the fraud—The rest of the Court concurred in this opinion.

Brown *v.* Davis, Hil. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 80.

So in this case, which was an action by the indorsee of a promissory-note, against the maker.—The plaintiff, at the trial, rested his case upon the proof of the maker's and payee's hand-writing. "The note appeared upon the face of it to have been drawn on the 6th of October, 1788, payable to *Sandal* or order, and to have become due the 13th of November: it had *Sandal*'s indorsement upon it; and had been noted

noted for non-payment. Whereupon, the defendant's counſel offered to prove theſe facts; that *Sandal* having indorſed it in blank, delivered it to *Taddy*, by whom it had been noted for non-payment. That on the 6th of December, *Sandal*, having been paid by the defendant, the maker of the note, took it up from *Taddy*, and, afterwards, without the knowledge or conſent of the defendant, negotiated it to the plaintiff. But his lordſhip being of opinion that, unleſs knowledge was brought home to this plaintiff, it would make no difference between theſe parties, rejected the evidence, and the plaintiff had a verdict." A rule to ſhew cauſe why there ſhould not be a new trial, having been obtained, The Court, after cauſe ſhewn, made the rule abſolute. LORD KENYON, Ch. J. I think this matter ought to be further inquired into. It did not ſtrike me, at the trial, that there was this ſuſpicious circumſtance on the face of the note; for if it appeared to have been noted for non-payment, at the time the plaintiff received it, that ought to have awakened his ſuſpicion, and led him to make further inquiries into the goodneſs of the note. ASHHURST, J. I think the rule laid down by my brother *Buller*, in the caſe of *Banks* v. *Cokwell*, at Launceſton ſpring aſſizes, 1788, is a very ſafe and proper one; that *where a note is overdue, that alone is ſuch a ſuſpicious circumſtance as makes it incumbent on the party receiving it, to ſatisfy himſelf that it is a good one*, otherwiſe much miſchief might ariſe.— BULLER, J. There is this diſtinction between bills indorſed before and after they become due. If a note indorſed, be not due at the time, it carries no ſuſpicion whatever on the face of it, and the party receives it on its own intrinſic credit. But if it is overdue, though I do not ſay that by law it is not negotiable, yet certainly it is out of the common courſe of dealing, and does give riſe to ſuſpicion. Still ſtronger ought that ſuſpicion to be, when it appears on the face of the note to have been noted for non-payment; which was the caſe here. But generally, when a note is due, the party receiving it takes it on the credit of the perſon who gives it to him. Upon this ground, it was that, in the caſe in *Cornwall*, I held that the defendant, who was the maker, was intitled to ſet up the ſame defence that he might have done againſt the original payee; and the ſame doctrine has been often ruled at Guildhall. A fair indorſee can never be injured by this rule; for if the tranſaction be a fair one, he will ſtill be intitled to recover. But it may be a uſeful rule to detect fraud, whenever that has been practiſed. [Upon Lord *Kenyon*'s appearing to diſſent from the generality of the doctrine held by Mr. Juſtice *Buller*, he proceeded to obſerve] My Lord thinks I have gone rather too far in ſomething that I have ſaid; but it is to be obſerved, that I am ſpeaking of caſes where the note has been indorſed after it became due, when I conſider it as a

note

note newly drawn by the perſon indorſing it. Lord KENYON, Ch. J. I agree with that, with the addition of this circumſtance, that it appears, on the face of the note, to have been diſhonoured; or if knowledge can be brought home to the indorſee, that it had been ſo. But I ſhould think otherwiſe, if no notice can be fixed on the party; at leaſt, I am not prepared to go that length at preſent. GROSE, J. If colluſion ſhould be proved between the defendant and *Sandal*, then the former will not be intitled to ſet up this objection. But, at preſent, I am of opinion, that a new trial ought to be granted.—Rule abſolute.

Boehm et al. v. Sterling et al. Mic. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 423.

But where the drawers of a banker's check, iſſued at nine months after it bore date, upon a conſideration which afterwards failed, as between them and the perſons to whom they delivered it; it was held that they could not be permitted to object this circumſtance in an action brought by a ſubſequent holder for a valuable conſideration, and without notice; though, by the general rule, any perſon receiving a negotiable inſtrument, after it is due, is deemed to have taken it upon the credit of the perſon from whom he received it, and ſubject to the ſame equities as between him and the party ſued on ſuch inſtrument.—The plaintiffs declared, upon a bill of exchange, dated the 17th of February, 1796, drawn by the defendants upon Meſſrs. *Down, Thornton*, and Co. payable to bearer for 2,444*l.* 14*s.* which was refuſed payment by the drawees. It appeared, that the houſe of *Muilman* and *Nantes*, having agreed to lend the defendants their acceptance, had accordingly, on the 15th of November, 1796, accepted a bill of exchange of that date, drawn on them by the defendants, for 2,444*l.* 14*s.* at three months date, which would become due on the 18th of February, 1797, which bill the defendants negotiated. And as a counter ſecurity, for the purpoſe of enabling *Muilman* and *Nantes* to take up their acceptance when due, the defendants gave them the following check upon their bankers, upon which, the preſent action was founded:

" Bartholomew-Lane. " London, 17th February, 1796(1).

" Meſſrs. *Down, Thornton, Free*, and *Cornwall*, pay Mr. *Dobſon* or bearer 2,444*l.* 14*s.*

" *Sterling, Hunters*, and Co."

Muilman died, and *Nantes*, his ſurviving partner, became a bankrupt, before the day when their acceptance became due, in conſequence of which, the defendants were obliged to take up their bill drawn upon that houſe. In the mean time, on the 20th of January, 1797, *before the death of* Muilman, *or bankruptcy of* Nantes, *they had paſſed the defendants' draft on*

(1) This was ſuggeſted by the defendants' counſel, to have been ſo dated by miſtake for 1797.

Down

Down *and Co. to the plaintiffs, for a valuable conſideration*, namely, a precedent debt, the plaintiffs being, at that time ignorant of the tranſaction between the defendants and *Muilman* and *Nantes*. The draft, when tendered at *Down* and Co.'s, was refuſed payment; and the defendants afterwards refuſed to pay the draft. It was contended, at the trial, on the part of the defendants, that this was like the common caſe where a perſon takes a bill of exchange, from an indorſer, after it has become due; in which caſe, the indorſee muſt ſtand in the ſame ſituation, and ſubject to the ſame equities, as the perſon from whom he received it, according to the caſe of *Brown* v. *Davies* (1) and *Taylor* v. *Mather*, there cited.—Lord KENYON, however, was of opinion, that it was a queſtion for the jury to decide, Whether the plaintiffs had received this draft *bonâ fide*, and without knowledge of the circumſtance under which *M.* and *N.* held it; and if ſo, he thought, though not without ſome doubt, that the mere circumſtances of its being ſo long outſtanding at the time, was not ſufficient to exonerate the defendants from their liability, under the circumſtances of this caſe; whereupon, the jury found a verdict for the plaintiffs. A rule having been granted to ſhew cauſe why there ſhould not be a new trial; on the ground that, in point of law, the taker of ſuch a bill or draft, after it is due, muſt ſtand or fall upon the title of the perſon from whom he received it; and that here, as *M.* and *N.* could not have recovered on the draft under the circumſtances, the plaintiffs could not be in a better ſituation.—Cauſe was ſhewn againſt the rule. Lord KENYON, Ch. J. The caſe of *Brown* v. *Davies* came before me at *niſi prius*, very ſoon after I took my ſeat in this court; and the grounds on which I then proceeded were ſuch as my own reaſon ſuggeſted to me at Guildhall, not being then much acquainted with the practice at *niſi prius*. I then thought, that if a perſon gave a check on his banker, and meant to act honeſtly, he would not afterwards alter the ſtate of his accounts ſo as not to leave a ſufficient ſum in his banker's hands to anſwer that demand, but that ſo much money ſhould, at all events, be appropriated to the payment of the check; and if that were done, no inconvenience could poſſibly ariſe to any perſon; and I obſerve, in a caſe in Lord *Raymond* (2), that ſuch was Lord *Holt*'s opinion. But when that caſe was brought before this Court, on a motion for a new trial, it appeared, that there was a rule in ſuch caſes, that the party taking a bill of exchange after it is due, takes it ſubject to all the equity to which the party, from whom he takes it, is liable. And I do not mean to call that rule in queſtion now; though, in that caſe, I grounded my opinion on the particular cir-

(1) *Ante*, p. 398.
(2) *Mutford* v. *Walcot*, 1 Lord *Raym.* 575.

cumſtances of the caſe, it appearing, on the face of the bill, that it had been diſhonoured; I thought that that diſtinguiſhed it from the general caſe, and that diſtinction was not denied by the majority of the Court. However, I do not wiſh to ſet that queſtion afloat again. At the time of this trial, I thought there was a difference between bankers' checks and bills of exchange, and that the rule adopted with regard to the latter, did not apply to the former: but, on further conſideration, I do not think that that diſtinction is well founded. But the defendant's poſition, that bankers' checks are not conſidered by merchants as negotiable inſtruments, appears moſt extraordinary; for this very inſtrument, on which the action is brought, ſhews the contrary: it was made payable to *Dobſon* or bearer; and inſtead of being given to *Dobſon*, to whom it was payable in the firſt inſtance, it was immediately delivered to thoſe under whom the plaintiffs claim. The propoſition on which the defendants rely is, not that the plaintiffs have not given a valuable conſideration for the check; nor that the bankers, on whom the check is drawn, had not aſſets in their hands to pay it; nor that the plaintiffs, when they took it, conceived any doubt, but that the defendants would pay it, but that they (the defendants) on the 15th of November, 1796, ſent this check into the world with its own death-wound about it, and that it was not negotiable at all, even when it was iſſued by them: and after having perplexed the world with the confuſion of dates occaſioned by their own act, they now have the audacity to ſay, in a court of juſtice, that becauſe payment was not demanded by the plaintiffs nine months before it was even iſſued by themſelves, payment of the bill cannot be enforced at all. But this is too groſs a fraud to be practiſed on the plaintiffs, who are *bonâ fide* holders of the bill. The rule eſtabliſhed in *Brown* v. *Davis*, and in the other caſe there referred to, was framed to exclude fraud, and it profeſſed to be founded on grounds of juſtice. Whereas, here the demand is founded in juſtice; and all the difficulty is occaſioned by the defendants themſelves, who iſſued this bill with the objection, of which they now wiſh to take advantage, appearing on the face of it: but I am clearly of opinion, on principles of law as well as juſtice, that it is not competent to them to take this objection. GROSE, J. The particular circumſtances of this caſe, take it out of the general rule. To determine that the plaintiffs cannot recover, would be permitting the defendants to practiſe a groſs fraud. LAWRENCE, J. This caſe depends on its own particular circumſtances, and it ought not to be governed by the deciſion in *Brown* v. *Davis*. It was evidently the intention of the parties that this check ſhould be a negotiable inſtrument; for though it was drawn in favour of *Dobſon* or bearer, it

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was immediately put into the hands of *Muilman* and Co. And when it is conſidered that it was not iſſued until nine months after it bore date, it could not have been intended by the defendants that the date of the bill ſhould throw any difficulty on the holder. It was manifeſtly the intention of the parties, that if *Muilman* and Co. paid their acceptance, they ſhould be at liberty to paſs this check to whom they pleaſed; and if ſo, it was not neceſſary for the plaintiffs to inquire how *Muilman* and Co. got poſſeſſion of the check. Therefore, as between theſe parties, the rule laid down in *Brown* v. *Davis* does not apply, though I think it ought to obtain in all other caſes, and that it is not infringed by a determination in favour of the plaintiffs in this caſe.—Rule diſcharged.

A bill or note cannot be indorſed over after it has been once paid.—In this caſe, one *Brown* drew a bill upon *Robley* the defendant, which *Robley* accepted; payable to *Hodgſon* or order. *Robley* did not pay it when it was preſented, upon which *Brown* took it up. *Brown* afterwards indorſed it to *Beck* the plaintiff, and *Beck* brought this action upon it againſt *Robley*; but the jury thought, that when *Brown* took up the bill, its negotiability ceaſed, and found for the defendant: and on a rule *niſi*, for a new trial, the Court thought the jury right; and Lord MANSFIELD ſaid, When a draft is given payable to *A.* or order, the purpoſe is, that it ſhall be paid to *A.* or order; and when it comes back unpaid, and is taken up by the drawer, it ceaſes to be a bill. If it were negotiable here, *Hodgſon* would be liable, for which here is no colour. Beck v. Robley, Tr. Ter. 14 Geo. 3. B. R. 1 *Hen. Blackſt.* 89 n.

An indorſement, written on a blank note or cheque, will afterwards bind the indorſer for any ſum and time of payment which the perſon, to whom he intruſts the note, chooſes to inſert in it.—The defendant, to accommodate one *Galley*, indorſed his name on five copper-plate cheques, made in the form of promiſſory-notes, but in blank, without any ſums, dates, or times of payment being mentioned therein, and delivered them to *Galley*. *Galley* filled them up as he thought fit, and the plaintiff diſcounted them; the plaintiff knew the notes were blank at the time of the indorſement. *Galley* not paying them when they became due, the plaintiff brought this action. HOTHAM, BAR. before whom the cauſe was tried, was of opinion, that as the notes were in blank when the defendant indorſed them, they were not then promiſſory-notes; and that no ſubſequent act of *Galley* could alter the original nature and operation of the defendant's ſignature, which when written, was a mere nullity; and he accordingly directed a verdict for the defendant: but upon an application for a new trial, after cauſe ſhewn, Lord MANSFIELD ſaid, that nothing could be ſo clear: the indorſement on a blank note is a letter of credit for an indefinite ſum: the defendant ſaid, Ruſſel v. Langſtaffe, Mic. Ter. 21 Geo. 3. B. R. 2 *Doug.* 514.

truſt *Galley* to any amount, and I will be his ſecurity. It does not lie in his mouth to ſay, the indorſements were not regular.—A new trial was accordingly granted, and a verdict having been found for the plaintiff, in a ſimilar action, before Lord *Mansfield*, the defendant ſubmitted in this without going to a ſecond trial.

Fenn et al. v. Harriſon et al. Tr. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 757.

If the holder of a bill of exchange gets it diſcounted, but poſitively refuſes to indorſe it, the indorſee takes it only upon the credit of the names on the bill, and he cannot recover againſt ſuch holder if the bill is diſhonoured.—On a motion for a new trial, the facts appeared to be theſe: This was an action for money lent, money paid by the plaintiffs to the uſe of the defendants, and money had and received by the defendants to the uſe of the plaintiffs. A bill of exchange was drawn by *Liveſay* and Co. on *Gibſon* and *Johnſon*, in favour of one *Norman*, which came, by indorſement, to the defendants; who, being deſirous of getting it diſcounted, employed *Francis Huet* for that purpoſe, telling him to carry it to market and get caſh for it, *but that they would not indorſe it*. *F. Huet* applied to his brother, *James Huet*, to get the bill diſcounted, informing him that it was the defendants bill, and that, though they did not chooſe to indorſe it, yet he added (as a reaſon of his own) that, as their number was on the bill, it was equivalent to an indorſement; and that he (*F. Huet*) would indemnify him if he indorſed the bill. On an application, by *James Huet*, to the plaintiffs, and on his indorſing the bill, without which indorſement he could not have got the bill diſcounted, the plaintiffs diſcounted it; chiefly relying on the credit of *Gibſon* and *Johnſon*, for at that time they did not know that the defendants had had any concern with the bill. Afterwards, however, on the failure of *Gibſon* and *Johnſon*, *the plaintiffs, having heard that the bill had paſſed through the defendants' hands, applied to them for payment, who at firſt refuſed, but afterwards promiſed to take it up*; and, on their not doing ſo, this action was brought to recover the amount of it. Lord KENYON, before whom the cauſe was tried, after reporting the above facts, ſaid, that he had told the jury that, if they were of opinion that *James Huet* had made himſelf anſwerable to the plaintiffs, as agent for the defendants, that was a ſufficient conſideration for the defendants' promiſe: and that they were of that opinion, and found a verdict for the plaintiffs. A rule having been obtained to ſhew cauſe why the verdict ſhould not be ſet aſide, and another trial granted, on the ground that this was *nudum pactum*; cauſe was ſhewn againſt it. Lord KENYON, Ch. J. It is extremely clear that if the holder of a bill of exchange ſend it to market without indorſing his name upon it, neither morality nor the laws of this country will compel him to refund the money, for which he has ſold it, if he did not know at the

the time that it was not a good bill. If he knew the bill to be bad, it would be like ſending out a counter into circulation to impoſe upon the world, inſtead of the current coin. In this caſe, therefore, if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund the money. *I agree, that* Francis Huet *was circumſcribed in his authority; and, if that circumſtance would protect the defendants, they would not be anſwerable in this action.* But I am of opinion, that that circumſtance is not a deciſive anſwer to this action. For I very much doubt the caſe, alluded to by the defendants' counſel, of the ſervant warranting the horſe againſt the direction of his maſter; to ſuch a caſe, I think the maxim, *reſpondeat ſuperior*, applies; and the principal has his remedy againſt his agent for his miſconduct. But the difficulty I meet with is this, this is not an action wherein *Francis Huet* calls on the defendants for an indemnity; if it were, I admit that, as he exceeded the authority of his principal, he could not recover againſt him. But here, *James Huet*, who is an innocent man, and not involved in the miſconduct of his brother *Francis Huet*, has a claim on the defendants. When *James Huet* received this bill, he was informed that it came from the defendants; and, on his aſking why they had not indorſed it, he was told, by *Francis Huet*, that they had done that which was equivalent to it, for that their number was on it: in this, indeed, he was miſtaken. However, he told *James Huet* that he ſhould be ſafe, and that he would guarantee him; on which, the latter indorſed his name on the bill, and thus indorſed, it got into the hands of the plaintiffs. Then, it is clear, that the plaintiffs might reſort to *James Huet* for payment: and that brings it to this queſtion, Whether *James Huet*, who took the bill from *Francis Huet*, knowing him to be the agent of the defendants, has not a right to call on the defendants, who conſtituted *Francis Huet* their agent, although that agent exceeded his authority? I think that he has. *And if ſo, that is a good conſideration for the promiſe made by the defendants.* Ashhurst, J. Although I have had doubts upon this caſe, *I am of opinion, that the defendants are not liable.* If *Francis Huet* had been the *general* agent of the defendants, I admit, that they would be chargeable with his acts: but it appears from the evidence, that he was conſtituted their particular agent with a circumſcribed authority. And that brings it to the caſe put at the bar of the ſale of a horſe; where I take the diſtinction to be, that, if a perſon keeping livery ſtables, and having a horſe to ſell, directed his ſervant not to warrant him, and the ſervant did nevertheleſs warrant him, ſtill the maſter would be liable on the warranty, becauſe the ſervant was acting within the general ſcope of his authority, and the public cannot be ſuppoſed to be cognizant of any private converſation

verſation between the maſter and ſervant (1): but if the owner of a horſe were to ſend a ſtranger to a fair, with expreſs directions not to warrant the horſe, and the latter acted contrary to the orders, the purchaſer could only have recourſe to the perſon who actually ſold the horſe, and the owner would not be liable on the warranty, becauſe the ſervant was not acting within the ſcope of his employment. And that is like this caſe: Here *F. Huet*, who was employed by the defendants to get the bill diſcounted, was expreſsly directed by them not to indorſe it, which was equivalent to ſaying that they would not pay it. I agree, that *F. Huet* would be liable to *James Huet*, either as for money paid to his uſe, or on the expreſs promiſe to guarantee: but there it ſtops: for, as to the defendants, he paid the money in his own wrong, becauſe the authority which they gave was exceeded. *Therefore, on the whole, I think, that the defendants are neither liable on account of the indorſement made by* James Huet, *nor on their ſubſequent promiſe to pay, becauſe not being under any obligation, it was* nudum pactum. BULLER, J. *My opinion is, that, as between theſe parties, the plaintiffs have no conſcience or equity; and that the defendants are not under any legal or moral obligation whatever to pay the amount of this bill.* I conſider this action as a new attempt; and it is difficult to ſay to what extent it may be carried, if it be encouraged. In the caſe of a bill of exchange, we know preciſely what remedy the holder has, if the bill be not paid; his ſecurity appears wholly on the face of the bill itſelf; the acceptor, the drawer, and the indorſers, are all liable in their turns; but they are only liable becauſe they have written their names on the bill. But this is an attempt to make ſome other perſons liable, whoſe names do not appear on the bill, and that, under circumſtances very alarming to mercantile houſes through whoſe hands bills of exchange paſs. For even indorſers, whoſe names are on the bill, can only be called on after notice of non-payment, and without delay. But if theſe defendants be anſwerable, by what rule are we to be guided? What notice is to be given to them? Are they to be liable at any diſtance of time? I think this is a dangerous attempt, and ought to be diſcouraged; for on all caſes ariſing on bills of exchange, there ſhould be ſome limitation of time, beyond which, none of the parties ſhould be called on. *In this caſe, the defendants ſaid, in the moſt expreſs terms, that they would not make themſelves liable on the bill*; for when they told *F. Huet* that they would not indorſe it, it was the ſame as if they had told him in terms *to ſell it*. When a perſon refuſes to indorſe a bill, it cannot be implied that he means to make himſelf liable on the bill, much leſs in a more extenſive way than if he had

(1) *Vide* 10 *Mod.* 109.

indorſed

indorſed it; conſequently, theſe defendants were under no obligation whatever to promiſe, and it is *nudum pactum*. I agree with my brother *Aſhhurſt*, that there is a wide diſtinction between *general* and *particular* agents. If a perſon be appointed a general agent, as in the caſe of a factor for a merchant reſiding abroad, the principal is bound by his acts.—But an agent, conſtituted ſo for a particular purpoſe, and under a limited and circumſcribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to ſay, that one man may bind another againſt his conſent. There is a claſs of caſes, which have been thought to bear extremely hard upon maſters, who are held liable for the miſfeaſance of their ſervants in driving their carriages againſt thoſe of third perſons: but thoſe caſes have been determined, on the ground that it muſt be preſumed that the ſervants have acted under the orders of their maſters. But, ſuppoſe a maſter ordered his ſervant not to take his horſes and carriage out of the ſtable, and the latter went in defiance of his maſter's orders; there is no authority which ſays, that the maſter ſhall be liable for any injury done to another by ſuch an act of the ſervant: though, indeed, if the maſter had ordered the ſervant to go a particular journey, and in the courſe of it the latter did an injury to ſome third perſon, the authorities, which have been determined, ſay, that the maſter is liable in that caſe. GROSE, J. The queſtion is, Whether, at the time when the defendants made this promiſe, it was *nudum pactum*, or whether there were any legal conſideration for it? In the firſt place, this is a new attempt to make the defendants liable, as if they had indorſed the bill, when, in fact, they refuſed to indorſe it. The ſubſtance of the converſation between the defendants and *F. Huet* was this: they ſaid, "take the bill, get it diſcounted, and ſell it, but we will "not be anſwerable to the holder of the bill, in any way "whatever." If that be ſo, undoubtedly they were not liable to the holder; and then, the ſubſequent promiſe is without conſideration, unleſs ſomething paſſed at the time when it was made to raiſe a conſideration.—But nothing is ſtated to ſhew that the defendants received any benefit, or that the plaintiffs renounced any advantage.—Rule abſolute.

But if an agent, employed by the indorſees of a bill to get it diſcounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund if the bill be afterwards diſhonoured by the acceptor.—On the next trial of this cauſe the ſame evidence was given as on the ſecond trial, with this difference, that *when the defendants deſired* F. Huet *to get the bill diſcounted*, THEY DID NOT SAY THAT THEY WOULD NOT INDORSE IT. The jury found a verdict for the plaintiffs, which the defendants' counſel moved to ſet aſide: but, after cauſe ſhewn, THE COURT were unanimouſly

Fenn *et al.* v. Harriſon *et al.* Hil. Ter. 31 Geo. 3. B. R; 4 *Ter. Rep.* 177.

mouſly of opinion, that, *as the defendants had authorized* F. Huet *to get the bill diſcounted, without reſtraining his authority as to the mode of doing it, they were bound by his acts*; and that, if it were doubtful at the time when they applied to him to get the bill diſcounted, what authority the defendants intended to confer on him in this tranſaction, their ſubſequent conduct, in promiſing to pay the bill, was deciſive. But ASHHURST, BULLER, and GROSE, Juſtices, ſaid that, *unleſs the evidence on this trial had varied from that given before, they ſhould have continued to entertain the ſame opinion which they delivered on the former occaſion.* Rule to grant a new trial diſcharged.

Preſentment of Bills and Notes.

Saunderſon *et al.* v. Judge, Ea Ter. 35 Geo. 3. C.B 2 *Hen. Black* 509.

If a bill or note is made payable at a banker's, it is ſufficient to preſent it for payment at the banker's, and notice of non-payment ſent by the poſt is ſufficient.—A note made payable at the banking-houſe of the plaintiffs, was indorſed to them: when it became due, the maker having no effects in their hands, they wrote, by poſt, to *Judge*, one of the indorſors, giving him notice of the non-payment, and demanding payment of him: but *there was no other evidence* of the notice, than the putting the letter into the poſt-office: the declaration was in the uſual form, by the indorſee againſt the indorſor of a promiſſory-note, without ſtating that it was to be paid at the houſe of *Saunderſon* and Co. At the trial, the plaintiffs were non-ſuited, on the ground that it was incumbent on them to prove an actual demand on the maker of the note: a rule having been granted to ſhew cauſe why there ſhould not be a new trial, THE COURT (after cauſe ſhewn) made the rule abſolute.—PER CUR. It was no part of the contract, in this caſe, that the note ſhould be paid at the houſe of *Saunderſon* and Co. and therefore that was not neceſſary to be ſtated in the declaration; but the maker merely appointed the houſe of his banker, as the place where he was to be called upon for payment, and where it would be paid: yet this was both an undertaking that there ſhould be caſh there, and alſo, an order to the bankers to pay it. It is not neceſſary that a demand ſhould be perſonal; it is ſufficient if it be made at the houſe of the maker of the note; and it is the ſame thing, in effect, if it be made at the place where he appoints it to be made. If *Judge* had been the holder of the note, it would have been enough for him to have preſented it for payment at the houſe of *Saunderſon* and Co. and as they, at whoſe houſe it was to be paid, were themſelves the holders of it, it was a ſufficient demand for them to turn to their books, and ſee the maker's account

account with them, and a ſufficient refuſal, to find that he had no effects in their hands—As to the notice to the defendant, the ſending the letter by the poſt was ſufficient evidence of that notice.

If a bill be payable abroad, it is not neceſſary to ſend it by the firſt opportunity to the place where it is payable; and it is ſufficient if notice of ſuch a bill being diſhonoured is ſent to England by the firſt uſual and regular mode of conveyance.—This was debt on a bond of indemnity conditioned to ſecure the due payment of certain bills drawn by one *Goodwin*, on Major *Wm. Palmer*, at the houſe of Meſſrs. *Palmer* and *Tucker*, at Calcutta, in the Eaſt-Indies, at ſixty days after ſight, in caſe they ſhould be returned proteſted. The defendant pleaded that they were not preſented for acceptance within a reaſonable time after the drawing. At the trial a verdict was found for the plaintiffs, the following being the facts of the caſe: On the 5th of March, 1793, the bills were drawn by *Goodwin*, on *Palmer*, in Calcutta, in favour of the defendant, and on the ſame day indorſed by him for their full value, in a courſe of negotiation on the Royal Exchange, to the plaintiffs, who had previouſly received directions from *Biderman* and Co. of Paris, with whom they had a correſpondence, to procure bills on India. The plaintiffs then ſent advice to *Biderman* and Co. of their having procured the bills, and at the ſame time drew on *Biderman* and Co. for the amount of them, by way of indemnifying themſelves, and requeſted farther orders as to the perſons to whom the bills in queſtion ſhould be indorſed: on the 17th of March, in the ſame year, *Goodwin* wrote general letters of advice to the drawee, which were ſent on board an Eaſt-India ſhip, which ſailed, with ſeveral others, from Spithead, on the 5th of April, and arrived at Calcutta early in September: on the 19th of April *Goodwin* ſtopped payment: on the 30th of April four of the bills were indorſed by the plaintiffs (by the direction of *Biderman* and Co. from whom they had heard in the mean time, and who had paid the bills which the plaintiffs had drawn on them as an indemnity), to the order of *Deverin*, of Calcutta, and the fifth to the order of *Pelon*, of the ſame place, for value in account with *Biderman* and Co.: on the 22d of May the bills were ſent to India, by another fleet of Indiaman which ſailed on that day, and arrived in the Huguely river on the 3d of October: on the 5th of October, the holder of the bills wrote to the drawee, who was not then at Calcutta, informing him of the arrival of the bills, and requeſting his acceptance of them, which, by letter of the 17th of October, he refuſed. In conſequence of which, four of the bills were proteſted for non-acceptance on the 29th of October, and the fifth on the 18th of November, 1793. Four were proteſted

Muilman *et al.* v. D'Eguino, Mic. Ter. 39 Geo. 3. C. B. 2 *Hen. Black.* 565.

teſted for non-payment on the 1ſt of December, 1793, and the fifth on the 3d of January, 1794, and were all returned by the firſt Engliſh ſhips, which ſailed from India on the 23d of February, and arrived in England in July, 1794. But it alſo appeared, that the plaintiffs had received, by the accidental conveyance of a foreign ſhip not bound to England, a letter from their agents at Calcutta (with whom the holders of the bills had a conſtant communication), dated the 11th of December, 1793, reſpecting ſome other bills, but which was totally ſilent as to the bills in queſtion. A rule having been granted to ſhew cauſe why there ſhould not be a new trial, THE LORD CHIEF JUSTICE reported the evidence as above ſtated, and ſaid, that at the trial, the material queſtions he had left to the conſideration of the jury were, *Whether the bills were preſented to the drawee in reaſonable time?* which included the queſtion *Whether they were ſent from England in reaſonable time? and alſo, Whether proper notice had been given to the defendant of their non-payment?* That his lordſhip was of opinion that there was no rule of law to fix the time when foreign bills ſhould be ſent to the place of their deſtination, and that the jury were to determine what was reaſonable time for that purpoſe: that under the particular circumſtances of this caſe, he thought the bills had been tranſmitted in reaſonable time to India, having been originally put up on the Exchange for negotiation, and therefore liable to be delayed here, and purchaſed by the plaintiffs, as the agents of *Biderman* and Co. who were to give their orders for the diſpoſal of them. As to the time of their being preſented in India after their arrival in that country, there was no evidence to ſhew that they were not preſented in reaſonable time, and it muſt be always in the diſcretion of the holder of bills drawn payable at ſight, or a certain time after, at what time they ſhould be preſented. that with reſpect to the notice of the bills being diſhonoured, it appeared that due notice of that circumſtance had been given to the defendant in this caſe; for it would be too ſtrict a rule to lay it down that the party in India ſhould be bound to ſend notice to England, by the chance conveyance of a foreign ſhip, and that in this inſtance notice had been ſent by the firſt regular ſhips which ſailed from Bengal to this country. Cauſe having been ſhewn, THE COURT pronounced their opinion in the following manner: EYRE, Ch. J. It would be a very ſerious and difficult thing to ſay, that a perſon buying a foreign bill, in the way that theſe bills were bought, ſhould be obliged to tranſmit it by the firſt opportunity to the place of its deſtination. There would alſo be a great difficulty in ſaying, at what time ſuch a bill ſhould be preſented for acceptance. The courts have been very cautious in fixing any time for an inland bill payable at a certain

period

period after ſight, to be preſented for acceptance, and it ſeems more neceſſary to be cautious, with reſpect to a foreign bill payable in that manner. If, inſtead of drawing their foreign bills payable at uſances, in the old way, merchants chooſe, for their own convenience, to draw them in this manner, and to make the time commence when the holder pleaſes, the courts cannot lay down any preciſe rule on the ſubject. The holder is bound to preſent the bill in reaſonable time, in order that the period may commence, from which the payment is to take place. The queſtion, What is reaſonable time? muſt depend on the particular circumſtances of the caſe; and it muſt always be for the jury to determine, whether any laches is imputable to the plaintiff. With reſpect to point of notice of the non-payment being delayed, I think there is no colour for that part of the argument, for I hold that it is ſufficient for the party in India to ſend notice by the firſt regular ſhips going to England, and that he is not bound to accept the uncertain conveyance of a foreign ſhip. BULLER, J. The only rule that I know of, which can be applied to all caſes of bills of exchange, is, that due diligence muſt be uſed. Due diligence is the only think to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at ſight, at ſo many days after, or in any other manner. But I muſt obſerve, that I think a rule may thus far be laid down as to laches, with regard to bills payable at ſight or a certain time after ſight, namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world, and their credit is looked to; and if a bill drawn at three days ſight were kept out in that way for a year, I cannot ſay there would be laches. But, if inſtead of putting it in circulation, the holder were to lock it up for any length of time, I ſhould ſay that he was guilty of laches. But farther than this no rule can be laid down. With reſpect to the notice, it was clearly ſufficient to ſend it by the ordinary mode of conveyance. I do not ſay that the party was bound to ſend the proteſt by an Engliſh ſhip, but it was enough to do ſo by the firſt ſhip, whether Engliſh or foreign, that was going to England in the regular courſe of conveyance. HEATH, J. No rule can be laid down as to the time for preſenting bills drawn payable at ſight, or a given time after. In the French ordinances of 1673, *Poſtlethwaite's Dict.* tit. *Bills of Exchange*, it is ſaid, that a bill payable at ſight or at will, is the ſame thing: and this agrees with *Marius*. ROOKE, J. of the ſame opinion.—Rule diſcharged.

And if a bond be given to indemnify an indorſee if a bill drawn on India *be returned proteſted for non-payment*, the bond is not forfeited by the obligor refuſing to pay the bill after it was returned to England *proteſted for non-acceptance*.—This was

French and Hobſon v. Campbell, Tr. Ter. 33 Geo. 3. C. B. 2 *Hen. Black.* 163.

WAS AN ACTION OF DEBT ON THREE BONDS, described in three counts in the declaration; the 1ſt, dated July 17th, 1776, for 12,104*l.*; the 2d, the 23d of September, 1776, for 6,104*l.*; and the 3d, on the ſame day, for 6000*l.* To this declaration THE DEFENDANT PLEADED ſeven pleas: 1ſt, the general iſſue; 2dly, the defendant craved over of the bond in the firſt count, by which it appeared that the defendant was jointly and ſeverally bound with Sir *J. Cockburne*, *H. Douglas*, and *L. Macleane*. He then craved over of the condition, which (after reciting that Sir *J. Cockburne* had delivered to the plaintiffs below for value received a ſet of bills of exchange, four in the ſet, of the ſame date with the bond, drawn by him on Lieut. Col. *Cockburne*, at Bombay, for 12,104 ſtar pagodas, payable ſixty days *after ſight*, at the houſe of *Mowbray* and *Renton*, in Madras, to the order of *Douglas* and Sir *J. Cockburne*, and by them and alſo by *Macleane* and the defendant, *Campbell*, indorſed) was that if the ſaid ſet of bills, or any of them, ſhould be duly paid at Bombay according to the tenor thereof, or if they ſhould be returned to England *proteſted for want of payment*, and Sir *J. Cockburne*, *Douglas*, *Macleane*, and *Campbell*, or either of them, ſhould pay to *French* and *Hobſon*, within thirty days next after any of the ſaid ſet of bills *returned with proteſt duly made for want of payment* ſhould be produced, or legal notice thereof given to Sir *J. Cockburne*, *Douglas*, *Macleane*, and *Campbell*, or either of them, the amount of ſuch bills as ſhould be *ſo returned* at and after the rate of 10*s.* ſterling per pagoda, then the obligation was to be void. *The defendant then pleaded, that the bills were not returned to England duly proteſted for want of payment*; 3dly (after a proteſt that this ſet of bills was not returned duly proteſted for want of payment), that no one of the ſet was returned with proteſt duly made for want of payment, nor was any one of them produced, or legal notice thereof given to Sir *J. Cockburne*, *Douglas*, *Macleane*, and *Campbell*, or either of them; 4thly, the defendant craved oyer of the bond in the ſecond count, and of the condition, which (after reciting that *Macleane* had delivered to *French* and *Hobſon*, for value received, another ſet of bills of the ſame date with that bond, drawn by *Macleane* on *J. Macpherſon*, Eſq. at Madras, for 6,104 ſtar pagodas, payable at ſixty days *after ſight* to the order of Sir *J. Cockburne*, and indorſed by him, and alſo by *Douglas*, Lieut. Col. *Cockburne* and *Campbell*) was ſimilar to the condition of the firſt bond, namely, for payment here after this ſet of bills ſhould be returned to England duly proteſted for want of payment, &c.; and then pleaded that neither of this ſet of bills was returned to England duly proteſted for want of payment; the 5th plea was ſimilar to the 3d, *mutatis mutandis*; the 6th and 7th pleas were like the 4th and 5th, except

except that they were applicable to another ſet, mentioned in the condition of the 3d bond, drawn by *Mackleane* on *Macpherſon*, at Madras, for 6000 ſtar pagodas, payable forty days after ſight to Sir *J. Cockburne*. THE REPLICATION to the ſecond plea ſtated, that the ſet of bills in that plea mentioned, was ſent over to Bombay, to *D. Scott*, as the agent of *French* and *Hobſon*, in order to be there preſented to Lieut. Col. *Cockburne*; that at the time of their arrival there, namely, on the 22d of Auguſt, 1776, Lieut. Col. *Cockburne* was not there, but had left that place and reſided elſewhere; whereupon *J. Todd*, a notary public, at Bombay, went, at *Scott*'s requeſt, to *R. Taylor*, the attorney of Lieut. Col. *Cockburne*, and demanded acceptance of the bills; to which *Taylor* anſwered, that Lieut. Col. *Cockburne*, who then reſided at Tanna, had determined not to accept the ſaid bills, as he had no advice from Sir *J. Cockburne*; that *Taylor* refuſed to accept them on behalf of Lieut. Col. *Cockburne*, whereupon the notary *proteſted them for non-acceptance* according to the cuſtom of merchants; with an averment that Lieut. Col. *Cockburne* was not at Bombay at any time after the arrival of thoſe bills and before they were returned to England; that Lieutenant Col. *Cockburne* did not leave any perſon either at Madras or Bombay to accept them, and that they were *not accepted there*; wherefore they were returned, on the 21ſt of May, 1778, to England *ſo duly proteſted*, &c.: the replication to the third plea was like that to the ſecond, with this additional averment, that one of the bills was, after ſuch return to England, &c. produced, together with the proteſt to *Campbell*. To theſe two replications the defendant demurred. The replication to the fourth plea ſet forth, that that ſet of bills was ſent to *P. Martin*, at Madras, as the agent of *French* and *Hobſon*, to be there preſented to *Macpherſon* for acceptance, who was returned to England when they arrived there, without leaving orders with any perſon to accept or to pay them; that they were proteſted there *for want of acceptance*, ſent back to England, and preſented to *Macpherſon* here, for payment, who refuſed to pay, &c.; whereupon *French* and *Hobſon* cauſed them to be proteſted here for non-payment. The replication to the fifth plea alleged, that after ſuch return and proteſt for non-payment here, as mentioned in the preceding replication, the bills were produced, together with the proteſt to *Campbell*. The replications to the ſixth and ſeventh pleas were ſimilar to the two laſt, *mutatis mutandis*. The rejoinder to the replication to the fourth plea alleged, that after the arrival of that ſet of bills, to wit, on the 2d of July, 1777, *Martin* cauſed one of them to be preſented to *J. H. Caſamajor* and *C. Oakley*, the attornies and agents of *Macpherſon*, for acceptance, who refuſed to accept, whereupon *Martin*, on the

ſame

ſame day, cauſed them to be proteſted for want of acceptance. The rejoinders to the remaining replications alſo ſet forth, that thoſe ſeveral ſets of bills were reſpectively preſented to *Caſamajor* and *Oakley* for acceptance, and that they refuſed to accept, &c. To theſe rejoinders there were general demurrers.—The court of Common Pleas, after hearing two arguments, gave judgment for the defendant on the pleadings on the firſt count; and for the plaintiffs on thoſe relating to the ſecond and third counts. Lord Ch. J. Eyre, The whole queſtion comes before the court upon a demurrer joined between the parties, upon different parts of the pleadings; and the points that ariſe upon this demurrer, reſult to theſe few and ſimple queſtions, *viz. Whether the plaintiffs have ſhewn that they have performed the conditions, on their part to be performed, ſo as to intitle them to call for a performance of the conditions on the part of the defendant, or in failure of that performance, to demand payment?* And the caſe does not lie very wide, but rather in a narrow compaſs. We agree with thoſe who object, that the plaintiffs have not, in this inſtance, performed their part of the conditions, that theſe conditions are to be underſtood according to the true intent of the parties. We agree farther, that if it appears that the condition of a bond is impoſſible to be performed, the bond becomes a ſingle bond, becauſe the obligation is created, and the party is to obtain a defeaſance of that obligation as he may; if he cannot obtain that defeaſance, in conſequence of the terms of it being originally impoſſible, the conſequence is, that he has entered into a bond, and he has nothing to ſay againſt the penalty of it, therefore he muſt pay it. We alſo agree, that if there be a default in the defendant, by occaſion of which default it is impoſſible that ſomething, which, according to the terms of the condition, is in the order of things precedent, and to be performed on the part of the plaintiff, ſhould be performed, in that caſe, as it cannot be performed, the performance of it is diſpenſed with. On the other hand, every poſſible condition, upon which money is to become payable, muſt be performed, or muſt be diſpenſed with upon ſufficient ground, before the money is demandable in an action; and in the action in which it is demanded, it muſt appear that the condition has been performed, if not literally, at leaſt ſubſtantially; or that by reaſon of ſome default in the oppoſite party, the performance of the condition has been prevented, which diſpenſes with that performance. And, to come nearer to the preſent caſe, if there is a condition annexed to a writing obligatory, for the benefit of the obligor, and the obligee is, by the terms of it, to do the firſt act, or to concur with the obligor in doing the firſt act, he muſt do, or concur in doing, that firſt act, before he can demand the

penalty,

penalty. If a ſtranger is to do the firſt act, the obligor is to procure that ſtranger to do it, it being for his benefit; but if the obligee himſelf is to do it, the obligee cannot demand the penalty till he has done it; it is, with regard to him, in the nature of a condition precedent. With regard to the language of the conditions ſtated in the pleadings, there is no ambiguity in it, nor any doubt as to the intent of the parties. The words are plain, that *the money is to be payable here, in the event of the bills being ſent back proteſted for non-payment.* A proteſt for non-payment is perfectly intelligible and known; and it is undoubtedly a different thing from a proteſt for non-acceptance; that difference was ſo clearly demonſtrated in the courſe of the argument, that it is not neceſſary for me now to point it out. With regard to any ſuppoſed difficulty having ariſen, which prevented the returning the bills proteſted for non-payment, it is impoſſible to make out that there was any difficulty created by any body: and, therefore, the queſtion, by whom the difficulty was created, does not ariſe; in truth, there was no difficulty at all; it was in the power of the parties, whether the perſons upon whom the bills were drawn were reſident or not reſident, to proteſt them for non-payment, as much in their power as it was to proteſt them for non-acceptance: certainly, if it were material, there was no fault in the defendant, which prevented, in any manner, the plaintiffs from proteſting theſe bills for non-payment. The queſtion, therefore, is reduced to a ſingle point: *Have the plaintiffs ſhewn, that they have ſubſtantially performed the conditions on their part to be performed, before the right to call for the performance of the conditions on the part of the obligor, or the penalty is to attach?* With regard to the bills drawn on Colonel *Cockburne*, which are the bills mentioned in the condition of the bond in the firſt count in the declaration, there ſeems to be no colour to argue, that they have performed that condition; they have totally failed. *The condition called upon them to return theſe bills proteſted for non-payment*; to this hour they have not been proteſted for non-payment; they, therefore, never could be returned; there never could be notice of their having been returned proteſted for non-payment, not having been ſo returned; according to the plain import of the condition, they have failed in performing that preliminary act, upon which the condition to be performed by the defendant was to ariſe, and conſequently they cannot be permitted to maintain their action upon that count. With reſpect to the bonds in the other counts of the declaration, whether the condition, on the part of the plaintiffs, has been ſufficiently performed, ſo as to enable them to call upon the defendants to pay the money ſtipulated to be paid, or in

failure

failure to pay the penalty of the bond, depends upon this, *Whether we can conſtrue a proteſt for non-payment, made here after the bills are returned for non-acceptance, to be equivalent to a proteſt for non-payment there, and the bills returned from thence, with that proteſt upon them.* I at firſt heſitated with regard to that, becauſe it occurred to me, that it might be very poſſible, that if the bills had been kept till they were due in India, they might have been paid there; that it was a very different thing, whether the payment was to be exacted there, or here; becauſe the bills might have been drawn upon a perſon who was only an agent, who, while he remained in India, might have effects in his hands, which effects might be liable to the payment of theſe bills, and which he might be willing to apply to the payment of them, and that when he came home he might leave thoſe effects in the hands of other perſons; that he might come home without effects of the drawer in his hands, and be unable to pay here, what he might have been willing and able to have paid there, by himſelf or his agents. But, upon conſideration, I think, that this would be aſſuming too much; theſe facts do not appear upon the record, and, I think, we can hardly take it for granted that the caſe was ſo, ſo as to eſtabliſh a ſubſtantial difference between the preſenting for payment, and the proteſt for non-payment there, and the preſenting for payment, and proteſt for non-payment here. If we were to refine, we might refine to another concluſion, namely, that this whole buſineſs is neither more nor leſs than downright uſury. But it is not enough that it has an uſurious aſpect; the parties have taken other ground, and the facts are ſtated upon the record, with a view to the ground which they have taken. I agree, that upon the whole of the caſe, it ſeems reaſonable to conſtrue the proteſt *here*, after perſonal application to the party, and a demand founded upon the proteſt *here*, to be a ſubſtantial performance of the conditions, by which, upon the bills being returned with a proteſt for non-payment, theſe parties are bound to pay the money expreſſed in the conditions, and that not having paid the money, they are conſequently liable upon theſe bonds. The reſult of the whole is, that we are of opinion, that with reſpect to the bond in the firſt count, the plaintiffs have not made good their title to demand that money, and that the judgment, as to that count, ought to be for the defendant: That with reſpect to the two other bonds, it appears to us, that the conditions are, though not literally, yet ſubſtantially performed; conſequently, with reſpect to the counts upon theſe two bonds, the judgment will be in favour of the plaintiffs. The manner of entering theſe judgments will depend upon the particular manner in which the demurrers are joined; to which the parties will take care to attend.

The

The defendant below brought a writ of error to reverſe the judgment on the ſecond and third counts, and the plaintiffs below joined in error, praying that the judgment aforeſaid in form as given might in all things be affirmed. BUT THE COURT, after two arguments and time taken to conſider, were unanimouſly of opinion, that the judgment ought to be reverſed. Lord KENYON, Ch. J. delivered the opinion of the Court; in which, his lordſhip obſerved, the other judges, who were not preſent, concurred. Two points were argued at the bar: firſt, Whether we could give ſuch a judgment upon the whole record, as we ſhould have given if the cauſe had originated here; or whether we are confined to the ſecond and third counts of the declaration, and the proceedings upon them. I am perfectly ſatisfied we cannot examine the whole record; becauſe there are two ſeparate and independant judgments given by the court of common pleas, on one of which no error is aſſigned. Secondly, Upon the other point, as it is of great value to the parties, and as we differ from the opinion given in the court of common pleas, it was proper that we ſhould beſtow upon it all the conſideration we could. Whoever reads this record would, probably, upon the firſt bluſh of it, and without conſidering the queſtion with legal and technical knowledge, think it was the intention of the parties, that the payment of the ſeveral bills was, at all events, to be guaranteed by the perſons who entered into the bonds upon which the action is brought; and that if by any accident, after due care taken to enforce the payment of the bills, the bonds are ineffectual, it was *caſus omiſſus*. There are three bonds, the firſt of which I lay out of the caſe for the reaſon before given; and, indeed, it ſeems to me that the judgment given in the court of Common Pleas was the proper judgment to be given upon that part of the caſe. The other two bonds, mentioned in the ſecond and third counts, are the ſame as the firſt in point of effect; and it is enough to ſay, that, by theſe bonds, the obligors undertook to pay the ſeveral ſums of money, for which the reſpective bonds were given, if a certain thing were performed in India, namely, if the ſeveral bills mentioned in the conditions of thoſe bonds, were ſent *back to England duly proteſted for want of payment*. The ſubſequent parts of the record ſhew, that theſe bills did come back to England, not having been proteſted in India for want of payment, the reſpective parties on whom they were drawn, and who ought to have paid them, not being in India when the bills arrived there. It alſo appears upon the record, that, after the bills were returned to England, all the care that could be taken was taken to enforce the payment of them, but that payment could not be obtained. The queſtion therefore is, *Whether that which was done in this caſe can be ſubſtituted in lieu of that which the*

Campbell v. French and Hobſon, in Error, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 200.

parties to this contract undertook ſhould be done before the bonds were to be enforced? It muſt be remembered, that the plaintiff in error, who entered into theſe bonds, was not the original debtor; he was applied to, to come in and add his ſecurity to the ſecurity of the different bills; and when he conſented to enter into that ſecurity, he expreſsly ſtipulated as to the terms upon which he was to become reſponſible, and no one has a right to ſuperadd any condition to the condition which he entered into, or to alter it. The general law reſpecting conditions is extremely well ſettled in a vaſt variety of books and caſes; and, without detailing them, it is ſufficient to ſay, that they will be found in *Rolle's Abridgment*, and in *Coke* upon *Littleton*; and the uncontrolled reſult from them all is, that if the condition be an impoſſible condition, the bond becomes ſingle; but if the condition be only improbable, as in the inſtance put, if the pope of Rome ſhould come here to-morrow, yet that condition is a good condition, however improbable it might be. Now, taking that to be the ground on which we are to proceed, let us ſee what the parties to this contract ſtipulated ſhould be done, what might have been done, and what, in point of fact, was done. They expreſsly agreed, in terms, that *the ſeveral bills ſhould be ſent back from India proteſted, for want of payment*, before the bonds were to take effect. In order to ſhew that the conditions to thoſe bonds were impoſſible conditions, it was doubted, whether that proteſt, which the conditions of the bonds require to be made, could be made in point of law: but upon this point we are fortified with authorities to ſhew that this proteſt might have been made. *Marius* ſays (1), "a bill, payable at ſo many *days ſight, is to be accounted ſo many days next after the bill ſhall be accepted, or elſe proteſted for non-acceptance*, and not from the date of the bill, nor from the day that the ſame came to hand, or was privately exhibited to the party on whom it is drawn to be accepted, if he do not accept thereof; for the ſight muſt appear in a legal way, which is approved either by the parties underwriting the bill, accepting thereof, or by proteſt made for non-acceptance." Another caſe is to be found in 1 Lord *Raym.* 742; it is there an anonymous caſe; and it is ſaid, at the bottom, to have been from the relation of Mr. *Place*, who was a man of great learning, and the avowed author of *Watſon's* Clergyman's Law. "The cuſtom of London is, that if *B.* upon whom a bill of exchange is drawn, abſcond before the day of payment, the man to whom it is payable may proteſt it, to have better ſecurity for the payment, and to give notice to the drawer of the abſconding of *B.*; and after time of payment is incurred, then it ought to be proteſted for non-

(1) *Marius*, p. 19. edition 1656.

payment

payment the ſame day of payment or after it. But no proteſt for non-payment can be before the day that it is payable. Proved by merchants at Guildhall, *Trin.* 6 *W.* and *M.* before *Treby*, Chief Juſtice." This being the caſe, it appears to me, that the argument here is arrived at its concluſion, if we were warranted in taking the ground that I took before, namely, that it is not ſufficient to render a bond ſingle, that the condition is improbable, and that if the condition be not impoſſible, it muſt be complied with; for if ſo, that which was required by the plaintiff in error, when he entered into theſe bonds (even if capriciouſly required), ſhould have been complied with before the bonds can be put in force. The bills in queſtion were proteſted *for non-acceptance*, and might have been proteſted for non-payment in India. The plaintiff in error, who entered into the contract, impoſing theſe terms upon his contract, and ſubſcribing it with that limitation and that condition, had a right to impoſe thoſe terms; and if any perſon tell him that he acceded to other terms, he has a right to anſwer, "This is not my contract; *non hæc in fœdera veni*; do not impoſe upon me other conditions than thoſe I have impoſed upon myſelf by the contract I have entered into." If this caſe had been foreſeen, perhaps the condition would have been adapted to the caſe: but we are now conſtruing a ſtrict legal inſtrument, to which legal effect may be given. And after giving it the beſt conſideration we can, and with very great reſpect for the judges of the court of Common Pleas, from whoſe opinion we differ, we are of opinion, that the plaintiffs below are not entitled to recover on the two laſt counts in the declaration, and conſequently, that the judgment given in the Common Pleas, upon thoſe counts, muſt be reverſed.—Judgment reverſed.

Three days' grace are allowed on promiſſory-notes as well as on bills of exchange; for the 3 and 4 *An.* c. 9. puts them both on the ſame footing in all reſpects.—In an action on a promiſſory-note by the indorſee againſt the indorſer, the ſole queſtion, on the argument of a demurrer, was, "Whether or not three days' grace were allowed on promiſſory-notes as well as on bills of exchange?" PER LORD KENYON, Ch. J. It is extremely clear, that on *foreign* bills of exchange three days' grace are allowed; I think it is as little to be doubted, that they are alſo allowed on *inland* bills; for it has been ſettled, for more than half a century, that they are payable at the ſame time as *foreign* bills of exchange. Then it has been argued, that there is a ſubſtantial difference between bills of exchange and promiſſory-notes; and that there are reaſons why the acceptor of the one ſhould be allowed more time than the maker of the other: but, I confeſs, I ſee no difference whatever; they both make engagements of the ſame nature; and when the acceptor has accepted a bill, he

Brown *v.* Haraden, Hil. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 148.

is equally bound to be prepared to pay on the day appointed as the maker of the promiſſory-note. Then the ground, on which our judgment muſt proceed, is the ſtatute of *Anne*; ſince which, the holder of a promiſſory-note may declare upon it according to the form of the ſtatute, though not according to the cuſtom of merchants. The words of the preamble ought to decide the queſtion, which the common uſage of mankind has ſince put into a ſtate of repoſe. It recites, that promiſſory-notes were not aſſignable or indorſable within the cuſtom of merchants, and that the indorſee could not maintain any action upon them, within the cuſtom of merchants; "therefore, to the intent to encourage trade and commerce, which will be much advanced *if ſuch notes ſhall have the ſame effect as bills of exchange*, and ſhall be negotiated in like manner, &c. it is enacted, &c." The ſtruggle between the merchants and the courts of law before this ſtatute, was, Whether the party could declare on theſe notes according to the cuſtom of merchants? Lord *Holt* thought not: but this ſtatute, which was paſſed at the inſtance of the merchants, has made them that which they were not before; and they are now, with the aſſiſtance of the ſtatute, acted upon as if they had been within the cuſtom of merchants. The operative part of the ſtatute proceeds to ſay, that ſuch "notes ſhall be aſſignable and indorſable over *in the ſame manner as inland bills of exchange*;" that the holders may maintain actions on them *in ſuch manner as they might upon inland bills of exchange* againſt the makers, or againſt the indorſees, *in like manner as in caſes of inland bills of exchange*, &c. In ſhort, they were wholly to aſſume the ſhape of inland bills of exchange. In addition to theſe conſiderations, we are now told, that it has been the conſtant practice at the bank, and at the principal bankers, to make this allowance on promiſſory-notes. Then, if we were to make a deciſion in oppoſition to all this practice, it would be attended with the moſt ſerious conſequences; for theſe notes are circulated not only through this country, but alſo over ſeveral other countries in Europe: many of them have been diſcounted, and intereſt taken, on the ſuppoſition that three days' grace are allowed: but, if we were to determine that no ſuch allowance ought to have been made, all thoſe parties would be involved in the crime of uſury; and again, all holders of notes, who made no demand on the makers till the expiration of the three days, and who afterwards reſorted to the indorſers, will have been guilty of laches. ASHHURST, BULLER, and GROSE, Juſtices, delivered their opinions to the ſame effect.—Judgment for the defendant.

Smith v Kendall, Mic. Ter. 35 Geo. 3. B R. 6 *Ter. Rep.* 125.

So alſo in this caſe, where the queſtion, Whether three days' grace are allowed on promiſſory-notes, was again attempted to be conſidered. Lord KENYON ſaid, that he had made

made inquiries among different merchants reſpecting the practice in allowing the three days' grace, the reſult of which is, that the bank of England, and the merchants in London, allow the three days' grace on notes like the preſent. The opinion of merchants, indeed, would not govern this court in a queſtion of law, but I am glad to find that the practice of the commercial world coincides with the deciſion of a court of law. Therefore, I think that it would be dangerous now to ſhake that practice; which is warranted by a ſolemn deciſion of this court, not by any ſpeculative reaſoning upon the ſubject.

But if the ſeller of goods take notes or bills for them, without agreeing to run the riſk of the notes being paid, and the notes turn out to be worth nothing, this will not be conſidered as payment.—On the trial of an action of trover for ſome articles of plate, it was proved, that on the 2d of April, about ſix o'clock in the evening, *the plaintiff went to the defendant's ſhop, at Southampton, and agreed to purchaſe the goods in queſtion* of the defendant, a ſilverſmith, at a certain price; and wiſhing to have his arms engraved on them, the defendant ſent for one *Seed*, who uſually engraved for him, to engrave the arms, and who was directed by both parties to bring back the articles to the defendant, who was to pay for the engraving. *The plaintiff, at the time of the agreement, paid the price of the goods in notes of Meſſrs.* Shaw, *who kept a bank at Southampton.* Before this hour in the afternoon *Shaw*'s houſe was ſhut up for the day; and in conſequence of the failure of a houſe in London, *Staples* and Co. at which theſe notes were payable, the houſe of Meſſrs. *Shaw* never opened again; and *Staples* and Co. and Meſſrs. *Shaw* were afterwards declared bankrupts. *Seed*, having engraved the plate, brought it back on the next day (Sunday) to the defendant, who paid him for his work. On behalf of the defendant it was objected, that under theſe circumſtances the plaintiff was not intitled to recover, becauſe the goods had never been delivered to him or to any perſon for him, *Seed* being the ſervant of the defendant, and not of the plaintiff, and the plaintiff not having paid for the goods: but Mr. Bar. THOMSON, before whom the cauſe was tried, ſuffered the plaintiff to take a verdict for the amount of the goods, reſerving liberty to the defendant to move to ſet it aſide and to enter a nonſuit, if this court ſhould be of opinion that the plaintiff was not intitled to recover. A rule having been obtained on a former day for that purpoſe, it was made abſolute after cauſe ſhewn againſt it.—PER CUR. The law and juſtice of the caſe are clearly in favour of the defendant. If the defendant had agreed to take the notes as payment, and to run the riſk of their being

Owenſon v. Morſe, Mic. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 64.

paid, that would have been conſidered as payment, whether the notes had or had not been afterwards paid; but without ſuch agreement, the giving of ſuch notes is no payment (1). According to all the caſes that have been determined on the ſubject of ſtopping goods in tranſitu (2) theſe goods were only in tranſitu, for there had been no complete delivery to the plaintiff: there was no final delivery of the goods to the plaintiff, as long as they were in the hands of the engraver, who was employed by the defendant; they were at the moſt only in tranſitu, and the price not being afterwards paid, the defendant had a right to retain them.

Chamberlyn *v.* Delarive, Tr. Ter. 7 Geo. 3. C.B. 2 *Wilſ.* 353.

If a perſon take a draft upon another for payment of a debt, and hold it an unreaſonable time before he demands the money, and the perſon upon whom it is drawn, in the mean time becomes inſolvent, he cannot afterwards recover againſt the drawer.—In this caſe, the defendant being indebted to the plaintiff in 18*l.* for work and labour, gave him a draught upon one *Heddy*, whereby he deſired *Heddy* to pay to the plaintiff, a few days after date, 18*l.* for value received: and the plaintiff held the bill for four months, without applying for payment; *Heddy* afterwards became inſolvent, and the plaintiff then brought the action to recover the value of the work and labour done, BUT IT WAS ADJUDGED by the Court, on a motion for a new trial (the jury having found a verdict for the plaintiff, contrary to the direction of the judge), that the loſs ſhould fall on the plaintiff, for his neglect.

Bleſard *v.* Hirſt *et al.* Mic. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2670.

And if the perſon on whom a bill is drawn, refuſes to accept the ſame, the holder muſt give notice of ſuch refuſal, within a reaſonable time, to the indorſer from whom he received the ſame.—This was an action brought againſt the defendants, as indorſers of a bill of exchange, and the caſe, as reſerved on the trial at *niſi prius*, appeared to be as follows: The defendants indorſed a bill, drawn on a houſe in London, to the plaintiff, who ſent it to their correſpondents in town: it was received on the 21ſt of March, and preſented, on that or the next day, for acceptance; but *the houſe, upon which it was drawn, refuſed to accept.* It was afterwards, on the 22d of April, the day on which it became due, preſented and proteſted for non-payment: the drawer continued in credit till the 11th of April, but ſoon after a commiſſion of bankrupt iſſued againſt him. *No notice was given of the refuſal to accept the bill;* but, on the 29th of April, the plaintiff gave notice to the defendants, that the houſe in London had refuſed to pay the bill, and that it was returned with charges of proteſt: three days after this no-

(1) See *Puckford* v. *Maxwell*, *ante*, vol. i. p. 676.
(2) See p 38, *ante*.

tice,

tice, one of the defendants called on the plaintiff, at Bradford, on his way to Leeds, and ſaid, he would take up the bill as he returned; but, on his return, he ſaid, he was adviſed he was not bound to do it: there being a verdict for the plaintiff, ſubject to the opinion of the Court, Whether he was intitled to recover under the above circumſtances? THE QUESTION was, *Whether the plaintiff, the holder of the bill, could recover of the perſon from whom he received it, when he had thus neglected to give him notice of the refuſal to accept it?*—PER CUR. This man tendered the bill for acceptance, and it was refuſed, and he kept it three weeks without giving any notice of ſuch refuſal to accept. He ought to have given notice of this refuſal, and not to have concealed it; and, by not giving notice, has taken the riſk upon himſelf: the indorſer of the bill is impoſed upon: the perſon who neglected to give the notice ought to ſuffer firſt: the queſtion is not, *Whether he was obliged to preſent it for acceptance?* He has done ſo; and it was refuſed: there is no difference between an inland bill and a foreign one in this caſe; they are both now upon the ſame foot (*Heylyn* v. *Adamſon*, 2 *Burr.* 675.) —*Poſtea* to the defendants.

Goodall *et al* v. Dolley, Ea. Ter. 27 Geo. 3. B R. 1 *Ter. Rep.* 12.

And though a propoſal be made by the indorſer to pay the bill by inſtalments, without knowledge of the indorſee's laches, this is not a waiver of the want of notice.—This was an action by the indorſee of a bill of exchange againſt the indorſer. The bill, which was dated on the 4th of November, 1786, was drawn by one *Lutwych*, on *John Rutter*, in favour of the defendant, and payable ſixty-five days after date: the defendant indorſed it to the plaintiffs. *The bill was tendered for acceptance by the plaintiffs to* Rutter, *on the 8th of November, who refuſed to accept it.* The firſt advice given of this refuſal by the plaintiffs to the defendant, was by a letter, dated the 6th of January following, which only mentioned generally the return of the bill, without ſpecifying the time or circumſtance of the tender of the bill to *Rutter*, and his refuſal. The bill expired on the 11th of January; and, on the next day, the defendant made a propoſal to one of the plaintiffs to pay the bill by inſtalments.—HEATH, J. was of opinion, that as this propoſal was made under an ignorance of all the circumſtances of the caſe, which it was material for the defendant to know, he was diſcharged by the laches of the plaintiffs; and, in conſequence of that direction, the jury found a verdict for the defendant. A motion was afterwards made for a new trial, and cauſe ſhewn.—PER CUR. The caſe of *Bleſard* v. *Hirſt* goes the whole length of deciding the preſent. It was there determined, that *though it was not neceſſary that the holder ſhould preſent the bill for acceptance before it became due, yet if he do, he muſt give immediate notice to the perſon from whom he received the bill in*

caſe it is diſhonoured. Here ſuch notice was not given, and therefore the defendant was diſcharged. But then it is ſaid, that he made himſelf ſubſequently liable, by his propoſal to pay the bill by inſtalments, which amounted to an acknowledgment of the debt. That argument might as well have been urged in the caſe of *Bluſard* v. *Hirſt*, as the preſent, if it had been thought material; for there the indorſer *abſolutely promiſed* to pay the bill on his return from Leeds; but, on his being apprized that he was not bound by the law, he refuſed: and yet that was not held as a waiver of the want of notice. That indeed was a ſtronger caſe than the preſent, for here the defendant only made a *conditional offer* to pay by inſtalments, which being rejected, put matters in the ſame ſituation as if no offer had been made. The defendant then had a right to ſtand on the ſtrict rule of law; and by law he is not bound to pay.—Rule diſcharged.

Tindal *et al.* v. Brown, Ea. Ter. 26 Geo. 3. B. R. 2 *Ter. Rep.* 167.

If the holder give time to the acceptor of a bill, or drawer of a note, after it has been diſhonoured, the indorſer is diſcharged; and notice of a bill of exchange, or promiſſory-note, being diſhonoured, muſt come from the holder.—On the trial of an action brought by the indorſees of a promiſſory-note againſt the indorſer, the jury found a verdict for the plaintiffs. On a motion for a new trial, the facts appeared to be theſe: "On the 21ſt of Auguſt, 1784, the note in queſtion was made by one *Donaldſon* for 35*l.* payable ſix weeks after date; on the 5th of October, 1784, the day on which the note became due, allowing for the three days' grace, one *Howell* (the plaintiff's clerk) called on *Donaldſon*, at ten in the morning, and, not finding him at home, he left word that the note was due, and deſired *Donaldſon* would ſend for it at his maſter's, where it lay, and take it up; that on the next day, Wedneſday, the 6th of October, he called again on *Donaldſon*, who told him he would take it up that day within the banking hours, which were from nine to four o'clock; that the note not being taken up that day, he called again on *Donaldſon*, on Thurſday, the 7th, and not finding him at home, he was ſent to the defendant, *Brown*, to tender the note, who refuſed to pay it, ſaying, the plaintiffs had made it their own. *Donaldſon* proved at the trial, that immediately on his parting with *Howell*, on Wedneſday, the 6th, he went to *Brown*'s houſe, and not finding him at home, he left a meſſage with his wife that the note was due, that he (*Donaldſon*) could not pay it, and deſired that *Brown* would take it up, adding, that he would make it good to him. All the parties lived at Briſtol, within twenty minutes walk of each other. After argument, THE COURT delivered their opinion, thus: LORD MANSFIELD, Ch. J. On full conſideration, *I am now decidedly of opinion that there ought to be a new trial.* It is of great conſequence that this queſtion

ſhould

ſhould be ſettled. Certainty and diligence are of the utmoſt importance in mercantile tranſactions. It is extremely clear that the holder of a bill, when diſhonoured by the acceptor, muſt give reaſonable notice to the drawer or indorſer. *What is reaſonable notice is partly queſtion of fact, and partly a queſtion of law.* It may depend in ſome meaſure on facts; ſuch as the diſtance at which the parties live from each other, the courſe of the poſt, &c. But wherever a rule can be laid down with reſpect to this reaſonableneſs, that ſhould be decided by the court, and adhered to by every one for the ſake of certainty. I cannot form to myſelf an idea of the ground on which the jury went, in giving this verdict. Did they conceive the rule to be, that the holder might delay giving notice for two days? or, what other time did they mean to allow him? Here an earlier notice might certainly have been given, as all the parties lived within twenty minutes walk of each other. For the ſake of diligence and certainty, I am of opinion, that there ſhould be a new trial. WILLES, J. New credit was given to the maker on the 7th; the plaintiff's clerk went firſt to *Donaldſon* to demand the bill of him, and after that they ſent it to the defendant. As to the notice, I cannot conſider the notice given by the maker equal to that given by the indorſer. The plaintiffs have not acted with legal diligence. ASHHURST, J. It is of dangerous conſequence to lay it down as a general rule, that the jury ſhould judge of the reaſonableneſs of time. It ought to be ſettled as a queſtion of law. If the jury were to determine this queſtion in all caſes, it would be productive of endleſs uncertainty. *The next day at the moſt is as long as is neceſſary in a caſe circumſtanced like this.* If the parties live at a ſmall diſtance, this is ſufficient time; if at a greater, they ſhould write by the next poſt. *Notice* means ſomething more than *knowledge*; becauſe it is competent to the holder to give credit to the maker. It is not enough to ſay, that the maker does not intend to *pay, but that he* (the holder) *does not intend to give credit.* In the preſent caſe there is no notice: for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to reſort to the indorſer. BULLER, J. Whether the poſt goes out this or that day, at what time, &c. are matters of fact: but when thoſe facts are eſtabliſhed, it then becomes a queſtion of law on thoſe facts, what notice ſhall be reaſonable. As to giving time; the holder does it at his peril. And that circumſtance alone would be ſufficient to decide this caſe. *For in no caſe has it been determined that the indorſer is liable after the holder of the note has given time to the maker.* The purpoſe of giving notice is not merely that the indorſer ſhould know the note is not paid, for he is chargeable only in a ſecondary degree: but to render him liable, you muſt ſhew that the holder

holder looked to him for payment, and gave him notice that he did ſo. A caſe might eaſily be put, where the indorſer might have notice from the holder, and yet would not be liable; as if, in the preſent caſe, the holder had written a letter to the indorſer, containing the circumſtances which have been given in evidence, the indorſer would have been diſcharged; becauſe it would have amounted only to this, "the note made by *Donaldſon*, and indorſed by you, is not "paid, and I have given credit to *Donaldſon* till to-morrow." Though there is no preſcribed form of this kind of notice, yet it muſt import that the holder conſiders the indorſer as liable, and expects payment from him, that he may have his remedy over by an early application: then it becomes his buſineſs to take up the note. But notice of having given credit to the maker will diſcharge the indorſer. The notice by another perſon to the indorſer can never be ſufficient; but it muſt proceed from the holder himſelf. The rule for a new trial being made abſolute, this cauſe was tried a ſecond time, and there was contradictory evidence, whether the notice from the maker was on the 6th or the 7th, and the jury, which was a ſpecial one, found again for the plaintiffs. A new trial being moved for, on the ground that this was a verdict againſt law, and cauſe ſhewn, THE COURT, who referred to their former deciſion, added, that even if the application had been made to the defendant on the 6th, it would have been too late, *becauſe the plaintiffs had given credit to the drawer*; that though it was true, in general, that the court would refuſe to grant a new trial when the ſum in litigation was ſmall, yet that rule did not apply where a verdict had been given againſt law.—Rule abſolute (1).

Rogers v. Stevens Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 713.

But the objection ariſing from want of notice of non-acceptance of a bill of exchange from the holder to the drawer, is done away by ſhewing that the latter had no effects in the hands of the drawee at the time.—This was an action by the plaintiff, as payee of a bill of exchange, at forty days after ſight, for 87*l.* value received, for the uſe of Mr. *William Calvert*, Liverpool, drawn by the defendant from Newfoundland on the 1ſt of October, 1785, on Meſſrs. *Birbeck* and *Blake*, in London, who, on its being preſented for acceptance on the 1ſt of November, refuſed to accept it; in conſequence of which, it was firſt noted for non-acceptance, and afterwards proteſted for non-payment. *The defence ſet up was, want of a proteſt for non-acceptance* (2), *and notice to the*

(1) On the third trial a ſpecial verdict was found, containing the ſame facts, on which the Court gave judgment for the defendant; and that judgment was afterwards unanimouſly affirmed in the Exchequer Chamber. *Vide* 2 *Ter. Rep.* 186.

(2) The proteſt was not ſet out in the declaration, in the preſent caſe, which *Bower*, at the trial, preſſed as a ground for nonſuit; becauſe if the objection were not

the drawer, which was rebutted by ſhewing that he had no effects in the hands of the drawees, either then or afterwards. Upon which facts his Lordſhip ſtated, that he had been of opinion that the objection, ariſing from want of notice to the drawer, had been done away by ſhewing that he had had no effects in the hands of the drawees, and that, therefore, a proteſt for non-acceptance was unneceſſary in this caſe; and that there appeared, further, to have been a ſubſequent promiſe made by the defendant to the plaintiff to pay this bill; for, at a meeting between the plaintiff's agent and the defendant at Cheſter, upon the former's repreſenting to him that the bill had been diſhonoured, and preſſing him for payment, he ſaid, "*it muſt be paid.*" His Lordſhip, therefore, directed the jury to find a verdict for the plaintiff, which they did. A rule to ſhew cauſe why there ſhould not be a new trial, having been obtained, cauſe was ſhewn, AND PER LORD KENYON, Ch. J. In general it is true, that in the caſe of foreign bills of exchange, a proteſt for non-acceptance is neceſſary; and it is alſo true that, generally ſpeaking, notice of non-payment ſhould be given to the drawer, in order that he may withdraw his effects out of the hands of the drawee: but it has been long eſtabliſhed, that the want of effects in the hands of the perſon on whom the bill is drawn diſcharges the holder of the bill from the common formalities; becauſe the drawer muſt know that he had no right to draw on the drawee. To be ſure it would not be a ſufficient excuſe for the drawee to ſay that he had no effects belonging to the drawer in his hands: but, in this caſe, it was proved, that in point of fact, he had none. Then this does not differ from the ordinary caſe. ASHHURST, J. The law being now eſtabliſhed, that notice of non-acceptance of a bill of exchange to the drawer is not neceſſary, where the drawee has no effects belonging to the drawer in his hands; every perſon muſt be ſuppoſed to know the law. And, when the plaintiff found that the drawees of this bill had none of the defendant's effects in their hands, he knew that he was not bound by law to give notice of the non-acceptance. He was not bound to take cognizance of any private tranſaction between the drawer and a third perſon which did not appear on the face of the bill. At all events, the defendant's ſubſequent acknowledgment, "that the bill muſt be paid," amounts, in point of law, to a promiſe that it ſhall be paid; and does away the neceſſity of conſidering the queſtion relative to the want of notice. Therefore, there does not

not taken in that ſtage, the defendant could make no advantage of it in arreſt of judgment; upon the authority of *Salomons* v. *Staveley*, *B R. M.* 24 *G.* 3. *Dougl.* 659. n. Lord *Kenyon* admitted the objection; but on the other circumſtances thought it unneceſſary in this inſtance.

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ſeem to be any reaſon for granting a new trial. GROSE, J. of the ſame opinion.—Rule diſcharged.

De Berdt v. Atkinſon, Tr. Ter. 34 Geo. 3. C. B. 2 *Hen. Black* 336.

So, in this caſe, which was an action by the indorſee of a promiſſory-note made by one *Brown*, againſt the payee, who indorſed it. The facts which appeared at the trial were, that *the note was not preſented to the maker till the day after it became due*; that *notice of his refuſal to pay it was not given to the defendant, till five days after that refuſal*, but that the defendant gave no value for it, and lent his name merely to give credit to the note, well-knowing, at the time it was drawn and indorſed, that *Brown* was inſolvent: on this evidence, under the direction of the Lord Chief Juſtice, a verdict was found for the plaintiff. A rule having been granted to ſhew cauſe why there ſhould not be a new trial, and cauſe ſhewn; Lord Ch. J. EYRE, It is clear that the money was to be raiſed on the note, intirely on the credit of *Atkinſon: Brown* was known by all parties to be inſolvent, and *Atkinſon* to be in opulent circumſtances; the merits, therefore, as well as the ſtrict law of the caſe, are againſt the defendant. Admitting that there muſt be a demand of payment made on the drawer, here there was a demand. But it is objected, that the demand was not made in due time. But conſider on what ground, an early demand is in general required. It is, *becauſe if any delay takes place, the effects may be gone out of the hands of the acceptor, and if the holder chooſes to wait, he does it at his own riſque.* But apply this rule to the caſe of known inſolvency: What does it ſignify to the perſon who is liable in the ſecond ſtage, at what time the demand is made on the drawer, who was known to be inſolvent from the beginning? General rules are eſtabliſhed for general convenience; and I agree, that *if the drawer is not* known *to be inſolvent, the fact of inſolvency will not excuſe the want of an early demand:* but the fact of knowledge excludes all the preſumptions that would otherwiſe arife. Then as to notice, and the application for payment to the defendant, what did it ſignify to him, when that application was made; *it could make no difference to him whether it were made on one day or another, he meant to guarantee the payment of the note, and there was no poſſibility of any loſs happening to him from the want of notice.* In this inſtance, therefore, the general rule fails in its application. BULLER, J. The general rule has been long ſettled, but it is only applicable to the caſe of fair tranſactions, where the bill or note has been given for value in the ordinary courſe of trade. It is ſaid, that the inſolvency of the drawer does not take away the neceſſity of notice; that is true, where value has been given, but no further. Here it is plain that *Atkinſon* lent his name, merely to give credit to the note, and was not an indorſer in the common courſe of buſineſs. It is no anſwer

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to ſay that he received no benefit: he never meant to receive any. HEATH, J. and ROOKE, J. of the ſame opinion.—Rule diſcharged.

But where it is known that the defendant is only an indorſer, to guarantee the debt of the party who is *primâ facie* liable to pay, the indorſee cannot maintain an action againſt ſuch indorſer, without having uſed due diligence in preſenting the note as ſoon as it was due for payment, and in giving immediate notice of the non-payment.—This was aſſumpſit, by the indorſee againſt the indorſer of a promiſſory-note, which was made on the 3d of March, 1793, by *William* and *Samuel Green*, for 50*l.* payable to the defendant, at eighteen months, at the houſe of *Drury* and Co.; the defendant indorſed it to *Burton*, and he to the plaintiff.—The facts of the caſe were, "that the *Greens* being conſiderably indebted to "various creditors, and among the reſt to the plaintiff, it "was agreed, that their debts ſhould be paid by inſtalments, "the laſt of which, *Burton* and the defendant undertook to "guarantee; for which purpoſe, the note in queſtion was "indorſed (with others to other creditors) by them as a ſe-"curity for the debt due to the plaintiff. A little time be-"fore the note became due, the defendant, knowing that "*Drury* and Co. had no effects in their hands of the *Greens*, "directed them to refer the perſons who ſhould preſent the "notes at their houſe for payment, to him, and he would "pay them. Many of the notes were accordingly brought "to the defendant when they were due, and were paid. But "the note in queſtion, though due on the third of October, "1794, was not demanded at the houſe of *Drury* and Co. "till the ſixth of that month, on which day it was preſented "to the defendant, though the parties all lived near each "other. If it had been preſented to him when due, it would "have been paid, as *Burton* had lodged a ſufficient ſum of "money in his hands for that purpoſe, but which he paid "away, when he found the note did not come to him as he "expected." At the trial it was objected, that the plaintiff had been guilty of laches, as he had neither demanded payment of the note at the place where it was payable, in due time, nor given notice to the defendant of non-payment by *Drury* and Co. and therefore could not recover. But the Chief Juſtice was of opinion that, under the particular circumſtances of the caſe, the ſtrict rule of law might be diſpenſed with, for as the defendant knew, from the beginning of the tranſaction, that *Drury* and Co. at whoſe houſe the note was payable, had no effects of the *Greens'* in their hands, as he had undertaken to guarantee the payment of a debt by means of the note, and had provided money for that purpoſe, he could not be injured by the delay of the plaintiff, from the third to the ſixth of October; and with reſpect to the

Nicholſon v. Gouthit, Hil. Ter. 36 Geo. 3. C. B. 2 *Hen. Black.* 609.

the want of notice, his Lordſhip thought, that as the defendant had himſelf deſired *Drury* and Co. to ſent the notes to him for payment, he had either waived the neceſſity of notice, or at leaſt muſt be conſidered as having had notice by anticipation; and a verdict was found for the plaintiff. A rule having been obtained to ſhew cauſe, why the verdict ſhould not be ſet aſide and a nonſuit entered, and cauſe ſhewn. PER CURIAM, That the juſtice of this caſe is with the plaintiff, there can be no doubt. The defendant agreed to guarantee the payment of a debt by inſtalments; it was clear that the *Greens* were inſolvent, and the meaning of the parties was, that in that event the debt ſhould be paid by the defendant. The difficulty ariſes from the mode which they have choſen, in which the guarantee ſhall take by the indorſement of a note. The queſtion then is, Whether, when the guarantee is taken in this ſhape, all the legal conſequences do not follow ſo as to limit its generality? Upon conſideration, I cannot ſay that they do not follow, and *they require a demand on the maker, and notice to the indorſer within a reaſonable time.* Now, though there were both in this caſe, yet neither was in reaſonable time. The rule of law, therefore, muſt prevail, and that will diſcharge the defendant. When he applies to *Drury* and Co. and is appriſed that there are no effects in their hands, he ſays, "ſend the notes to me, and I will pay them." Now this ſeems to be the ſame as ſaying, "If the notes are preſented to you for payment, I will pay them." But this muſt be conſtrued to mean, that if they were duly preſented he would pay them. There is nothing to ſhew that he meant to pay them at whatever time they ſhould be preſented. The converſation between theſe parties ſeems to have been nothing more than an acknowledgment by *Gouthit*, that he was indorſee, and that if the notes were ſent to him in the regular courſe, they would be paid. If we could go beyond this, we might reach the juſtice of the caſe. But, perhaps, it is better to adhere to a rule, however ſtrict, than relax it. It ſounds harſh, that a known bankruptcy ſhould not be equivalent to a demand or notice, but the rule is too ſtrong to be diſpenſed with. HEATH, J. and ROOKE, J. agreed.—Rule abſolute.

Gale *v.* Walſh, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 239.

In an action againſt the drawer of a foreign bill of exchange, the queſtion was, Whether it was neceſſary to prove (1) a proteſt for non-acceptance: and *The Court*, upon

(1) *Vid. Bull. N. P.* 278. S. P. The doubt ſeems to have ariſen from a caſe of *Salomons* v. *Stavely*, *B. R. M.* 24 *Geo.* 3. *Dougl.* 683. *n.* 3d *Ed.* where, in an action on a foreign bill of exchange, the Court held, on the authority of the precedent in *Durſter* v. *Pierce*, *Lill. Entr.* 55. that the omitting to allege in the declaration on a foreign bill of exchange a proteſt of the bill, is only matter of form, and cannot be taken advantage of on a general demurrer.

a motion

a motion to enter a non-ſuit, thought the matter ſo clear, on the ground of the proteſt being part of the cuſtom of merchants in the caſe of a foreign bill, that they ſuggeſted to the counſel for the plaintiff, the expediency of making the rule abſolute in the firſt inſtance, to ſave unneceſſary expence; and the rule was then made abſolute. But, on a ſubſequent day, the counſel for the plaintiff wiſhed the rule to be opened again, intimating that it would appear, upon the judge's report, that the drawer had no effects in the hands of the drawee; and the rule was accordingly ſuſpended: but it afterwards appearing, that this idea was ill founded, the rule to enter the non-ſuit was made abſolute.

An acceptor of an inland bill of exchange, made payable *after ſight*, who refuſes payment on the third day of grace, is not liable to any charge for the noting of the bill.—This was an action by an indorſee of an inland bill of exchange, drawn for 20*l.* 7*s.* againſt the acceptor. The bill was dated the 4th of April, 1790, payable fourteen days after ſight; and being accepted on the 7th, conſequently became due, allowing the three days grace, on the 24th, which fell on a Saturday. There was a plea of non-aſſumpſit, as to the whole, except 20*l.* 7*s.* 6*d.* and as to that a plea of tender. On the 24th, the plaintiff having left the bill at *Lockhart*'s, his banker's, in Pall-Mall, one of *Lockhart*'s clerks called at the defendant's houſe with the bill, but the defendant not being at home, the clerk left word where the bill lay, that the defendant might ſend and take it up; which not being done before ſix o'clock, it was noted by another clerk at *Lockhart*'s, who was a notary. Between ſeven and eight o'clock in the evening, the ſame perſon who firſt went to the defendant's called on him again with the bill, in the character of the notary's clerk, when the defendant offered to pay the amount of the bill, but refuſed to pay half-a-crown more which was demanded for the notary. Evidence was given that it was uſual to pay 1*s.* and 6*d.* for noting and demanding in the city, and 2*s.* and 6*d.* on the weſt ſide of Temple-bar, where this tranſaction happened. And that by the cuſtom, the acceptor of a bill has, during the banking-hours, to diſcharge it in: but if it be not paid by that time, it may be noted: but as to what thoſe banking-hours were, no certainty appeared; they were different at different parts of the town. At all events, however, it was admitted, that the ſecond time the clerk called with the bill was after the banking hours. Lord KENYON was of opinion at the trial, that the tender of the amount of the bill, at any time on the ſame day on which it was payable, was ſufficient; under which direction, the jury found a verdict for the defendant. A rule *niſi* was obtained for ſetting aſide the verdict and granting a new trial, on the ground, that half-a crown more, the charge of noting, ought to have been

Leſley *v.* Mills, Hil. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 170.

been tendered. THE COURT, on granting the rule, ſaid, *they could not take notice of what were called banking hours*, but conſidered the main queſtion to be, Whether the acceptor had the whole day to pay the bill in; or, whether it became due on demand at any time on the laſt day?—Cauſe was afterwards ſhewn. Lord KENYON, Ch. J. The queſtion here is, On what day, and at what time, the defendant was bound to pay this bill? According to the nature of the contract, the acceptance was an undertaking to pay the bill on the laſt of the three days of grace. Now, unleſs there be ſomething in this caſe to diſtinguiſh it from other contracts, it muſt be governed by the ſame rules. In the caſe of mortgages, bonds, and a variety of other inſtruments, whereby parties oblige themſelves to the performance of certain duties, as to pay money within a certain time, we find the rule to be, without any exception, that the party bound has till the laſt moment of the day to deliver himſelf from the obligation by paying (1): therefore the law muſt be the ſame here as in other caſes. It may be ſaid, that there is a difference in the law, as applicable to contracts and forfeitures; but it is better that there ſhould be one general and invariable rule for all caſes, and adapted to the underſtanding of all men. Now, if a party is to perform a certain thing on a given day, in order to prevent his incurring the guilt of a crime, as for inſtance, a bankrupt to ſurrender, it is clear, that if he ſurrender on the laſt inſtant of the day, it is ſufficient. And it is the common practice for the commiſſioners to attend till twelve o'clock at night on ſuch occaſions, if the bankrupt do not ſurrender before. And in the caſe of bills of exchange, it cannot be ſaid, that due diligence is uſed if demand be made on the day after they become due. Therefore, it ſeems to me, that, in this caſe, the plaintiff was endeavouring to impoſe terms which are not warranted. But even if there be any difference between bills of exchange and other contracts in this reſpect, and that, for reaſons which have not been ſtated, the party has not the whole day to pay the former; the objections made by the defendant's counſel are deciſive. *There could be no proteſt of an inland bill of exchange before the ſtatute of* William; *and that ſtatute, only gives a proteſt upon bills payable at a certain number of days* after date, *whereas this is a bill payable fourteen days* after ſight, *upon which the ſtatute does not attach.* And even in caſes to which that ſtatute does apply, it ſays expreſsly, that the holder may proteſt the bill *after the expiration of three days* after the bill becomes due; then it is that the power to proteſt ariſes; but here, the plaintiff noted the bill (which is a preliminary ſtep to the

(1) *Hudſon* v. *Parton*, 1 *Rol. Rep.* 189. *Kabel* v. *Vaughan*, 1 *Saund.* 287. *Mar.* 222. *pl.* 166.; and *Salk.* 576.

proteſt)

proteſt) before that time. The acceptor, in this caſe, undoubtedly was obliged to go to the holder of the bill when it became due; and if he did not at that time tender the amount of the bill, the owner might have commenced an action againſt him without demanding payment: but in this caſe, the acceptor tendered the money within the time allowed him by the law. And if we were driven to the neceſſity of conſidering the amount of the tender under the ſtatute, in point of fact, there was a tender of 6*d.* which is the exact ſum given by the ſtatute in the caſe of proteſting inland bills of exchange. Therefore, in every view of this caſe, I am of opinion, that the defendant did every thing that the law required of him, and that the plaintiff is not entitled to recover. ASHHURST, J. agreed. BULLER, J. As to the event of this rule, I moſt thoroughly concur in opinion with the Court. *But I cannot refrain from expreſſing my diſſent to what has fallen from my Lord, reſpecting the time when the payment of bills of exchange may be enforced.* The rule, as to the time of paying rent, or any of the other caſes mentioned by my lord, cannot, I think, apply to this caſe. But one of the plaintiff's counſel has correctly ſtated the nature of the acceptor's undertaking, which is, to pay the bill, *on demand, on any part of the third day of grace*; and that rule is now ſo well eſtabliſhed, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree, that the proteſt muſt be made on the laſt day of grace: now that ſuppoſes a default in payment, for a proteſt cannot exiſt unleſs default be made. But if the party has till the laſt moment of the day to pay the bill, the proteſt cannot be made on that day. Therefore, the uſage on bills of exchange is eſtabliſhed; they are payable any time on the laſt day of grace on demand, provided that demand be made within reaſonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreaſonable hour: but, on the other hand, to ſay that the demand ſhould be poſtponed till midnight, would be to eſtabliſh a rule attended with miſchievous conſequences. If this caſe were to be governed by any analogy to the demand of rent, payment of the bill of exchange could not be demanded till ſun-ſet; and if ſo, the ſituation of bankers would be extremely hazardous; for they would then be obliged to ſend out their clerks at night with bills to a very conſiderable amount, all of which muſt be preſented within a ſhort ſpace of time, though to houſes in different parts of the town. However, this conſideration need not be further purſued for the determination of this caſe: for this rule muſt be diſcharged, in whatever view it is conſidered. Even if this had been a foreign bill of exchange, there would have been no pretence for the demand which the plaintiff

made. It was properly ſaid, by one of the witneſſes, that the fees of the notary are for *noting and demanding*. In making a proteſt, there are three things to be done; the noting, demanding, and drawing up the proteſt. The noting is unknown in the law, as diſtinguiſhed from the proteſt; it is merely a preliminary ſtep to the proteſt, and has grown into practice within theſe few years. But in this caſe, the notary's clerk made a note on the bill merely for his own convenience; only to ſave himſelf trouble, in the ſame manner as bankers' clerks frequently write on the bill, "Received the contents," even before they go out of their maſter's office; and which words are afterwards ſtruck out, if the bill be not paid. The next, and the material part, is the making of the demand: the party, making the demand, muſt have authority to receive the money; and in caſe that is refuſed, the drawing up of the proteſt is mere matter of form, but if the perſon, on whom the demand is made, be ready to pay the amount of the bill, he does all that the law requires of him. Therefore, if this had been the caſe of a foreign bill of exchange, the defendant would not have been liable to pay the fees of proteſting, becauſe he was ready to pay when the demand was made. It is material too to conſider by whom the demand was made in this caſe; I am not ſatisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill muſt be made by a notary public; to whom credit is given, becauſe he is a public officer. However, in this caſe there could be no proteſt at all: it is clear that, at common law, no proteſt was required on an inland bill of exchange; it is only made under the ſtatute of *William*, which does not apply to this caſe, for the reaſons already given. GROSE, J. agreed.—Rule diſcharged.

The Remedy of the Holder for Non-payment.

Biſhop v. Hayward, Mic. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 470.

The plaintiff declared on a promiſſory-note made by one *Collins*, payable to the plaintiff or order, and afterwards indorſed by him to the defendant, who afterwards re-indorſed it to the plaintiff again. After verdict for the plaintiff on the general iſſue, a motion was made in arreſt of judgment, upon the ground that nothing appeared to be due to the plaintiff on his own ſhewing; for the defendant would be intitled to recover back again the identical ſum from the plaintiff for which he had now obtained a verdict againſt the defendant: and therefore, as this would introduce a circuity of action, which the law does not permit, the declaration was bad upon the face of it. After cauſe ſhewn, PER CURIAM, It is an invariable

invariable rule, that every plaintiff muſt, on his own ſtating of the caſe, ſhew ſufficient to intitle him to recover judgment againſt the defendant. And it is a rule equally clear, that every inſtrument ought to be declared on according to its legal import. On the face of the declaration, he has ſtated the note, as a legal exiſting note, and the indorſements as legal exiſting indorſements; we are, therefore, bound to conſider them to be ſo. Then the caſe ſtands thus; that he, the plaintiff, being the original indorſer of the note, calls on the defendant, who appears on the record to be a ſubſequent indorſee. And nothing can be clearer in law than, that an indorſee may reſort to either of the preceding indorſers for payment: whereas, the preſent action is an attempt to reverſe this. I admit, that a caſe might happen in which the plaintiff might have ſtated, that he was ſubſtantially entitled to recover on this note, *e. g.* that his own name was originally uſed for form only, and that it was underſtood, by all the parties to the inſtrument, that the note, though nominally made payable to the plaintiff, was ſubſtantially to be paid to the defendant: but if ſuch were the caſe, the note ſhould have been declared on according to its legal import; as was held in *Minet* v. *Gibſon* (1). A name may be omitted in the declaration, if the legal operation of the inſtrument requires it. But, in this caſe, the plaintiff has ſtated facts ſubverſive of his title: and, on a motion in arreſt of judgment, we are bound to look at the title which the plaintiff himſelf has ſtated, beyond which, no preſumption can be admitted. The caſes, where preſumption has been allowed, are, where the plaintiff has ſtated a caſe defective in form, not where he has ſhewn a title defective in itſelf. The caſe commonly put of a preſumption after verdict, is where a feoffment is pleaded without livery; there a livery is implied as making a part of the feoffment. But if the title be defective on the face of it, the Court cannot ſuſtain the judgment.—Judgment arreſted.

It is ſettled, that if a bill of exchange is not accepted on preſentment, an action on the bill will lie immediately againſt the drawer, although the time of payment is not come: and the reaſon is this, that what the drawer had undertaken has not been performed, the drawee not having given him the credit, which was the ground of the contract. Milford v. Mayor, Hil. Ter. 19 Geo. 3. B R. 1 *Doug.* 55.

The coſts of a declaration againſt the drawer, are not chargeable on an indorſer, who is ſued, till the appearance-day of the return.—The indorſer of a bill, obtained a rule *niſi* to ſtay proceedings, on payment of the debt and coſts of the writ.—The caſe was: that, on *Saturday*, the 10th of November, the defendant was ſerved with proceſs: on Monday the 12th, payment was tendered; but the attorney ſaid, Golding v. Grace, Hil. Ter. 11 Geo. 3. C. B. 2 *Black.* 749.

(1) *Ante*, p. 360.

he was drawing declarations againſt the drawer and indorſer, and muſt alſo be paid for them; and it was agreed, that if the declaration was to be paid for, the plaintiff's attorney was entitled to be paid for both. BUT THE COURT held, that though a declaration may be delivered *de bene eſſe*, on the return-day, and it ſhall be good for many purpoſes; yet, being in favour of the plaintiff to expedite his cauſe, it cannot be delivered ſo as to charge the defendant with paying for the declaration, till the appearance-day, which was November 15th, for the four days of grace are allowed to the defendant to make an end of the cauſe, by payment of the debt or otherwiſe. And if this practice were to be countenanced, an attorney might delay the ſervice of the writ till the night before the return, and charge the defendant with the coſts of the declaration, as well as the proceſs.—Rule abſolute.

Smith *v.* Woodcock, and the ſame *v.* Dudley, Ea. Ter. 32 Geo. 3. B. R 4 *Ter. Rep.* 691.

If ſeparate actions be brought againſt the acceptor and indorſers of a bill, the Court will ſtay proceedings againſt any of the indorſers, on payment of the bill and coſts of that action; but not againſt the acceptor, without payment of coſts in all the actions.—The firſt of theſe was, an action by the holder againſt the drawer of a bill; the ſecond, againſt one of the indorſers. There was alſo another action pending, by the ſame plaintiff, againſt another indorſer; and a fourth action againſt the acceptor, who had refuſed payment. A rule *niſi* was obtained, on behalf of *Woodcock* and *Dudley*, why, upon payment of the amount of the bill, and the coſts of theſe two actions, all proceedings ſhould not be ſtaid againſt them. The plaintiff inſiſted, that the coſts of the other actions ſhould alſo have been paid. But PER CUR. That is only neceſſary, when the application for ſtaying proceedings comes from the acceptor, who is the original defaulter, and againſt whom all the coſts occaſioned by his default may be recovered.—Rule abſolute.

Hayling *v.* Mullhall, Mic. Ter. 19 Geo. 3. C.B. 2 *Black.* 1235.

The holder of a bill of exchange may ſue a ſubſequent indorſee, notwithſtanding he has ineffectually taken in execution the body of a prior indorſer, and afterwards ſet him at liberty.—A bill was indorſed by *Sheridan* to *Boon*, and by him to the plaintiff: he ſued *Boon*, and took him in execution, but diſcharged him upon a letter of licence: he then ſued *Sheridan*, for whom the defendant became bail; and upon this action, it was inſiſted, that the debt was ſatisfied by the impriſonment of *Boon*. SED PER CUR. The bill-holder has a right to ſue all the indorſers till the bill is ſatisfied: each indorſer is independent of the reſt: the law ſo highly regards the liberty of the ſubject, that the taking his body in execution by *ca. ſa.* is, with reſpect to him, a full ſatisfaction of the debt, but it only operates as a diſcharge to the identical perſon ſo impriſoned: it does not diſcharge even his goods

after

after his death; by the ſtatute of *Jac.* 1. the remedy ſtill remains in force (after his death or diſcharge) againſt every other indorſer, notwithſtanding this ineffective *ca. ſa.* in like manner as if the plaintiff had ſued out an unproductive *fi. fa.* againſt *Boon*, elſe two ſecurities would not be better than one. —Rule to ſtay proceedings on payment of debt and coſts.

Macdonald v. Bovington, Tr. Ter. 32 Geo. 3. C. B. R. 4 *Ter. Rep.* 825.

The acceptor of a bill having been charged in execution, at the ſuit of the holder, and afterwards diſcharged under the Inſolvent Act, does not exonerate the drawer.—The plaintiff drew a bill of exchange for 20*l.* on the defendant, which the latter accepted; and which afterwards got into the hands of *Thompſon*; who recovered againſt the defendant, as acceptor, and charged him in execution. The defendant having obtained his diſcharge under the Lords' Act, in that ſuit, *Thompſon* then ſued this plaintiff as drawer, and recovered the amount of the bill; on which the plaintiff ſued the defendant, on his acceptance, and charged him in execution. It was contended, on a rule to diſcharge the defendant out of cuſtody, that he had ſatisfied the debt by being charged in execution at the ſuit of *Thompſon*, and that he was not liable to be ſued again for the ſame ſum. SED PER LORD KENYON, Ch. J. Nothing can be clearer than that this was not a ſatisfaction of the debt as between theſe parties, though it was as to *Thompſon*. It was a mere formal ſatisfaction, even to the holder, not like actual payment; and when this plaintiff was obliged to pay the bill, a new cauſe of action aroſe againſt the defendant, which he might enforce without regard to what paſſed in the former action. BULLER, J. The conſequence of the defendant's not being liable would be this, that, becauſe the drawer was obliged to pay the holder of the bill, the acceptor would be diſcharged without paying either.—Rule diſcharged.

Johnſon v. Kenion, Ea. Ter. 5 Geo. 3. C. B. 2 *Wilſ.* 262.

It has been held that, although an indorſer may have paid part of the money, the indorſee may, nevertheleſs, recover the whole ſum in the bill againſt the drawer.—The defendant drew a bill of exchange for 1000*l.*; in favour of *Benſon*, or order, and *Benſon* indorſed it over to the plaintiff: *Benſon* paid the plaintiff 232*l.* notwithſtanding which, he took a verdict againſt the defendant for the whole 1000*l.*; and upon a rule *niſi*, for a new trial, upon this ground, THE COURT, after cauſe ſhewn, denied the new trial. LD. CH. J. PRATT, Theſe contracts are, in their nature, negotiable bills, paſſing through the hands of divers perſons; and though there are many indorſements on the bill, yet there is but one ſecurity for one ſum of money, and he who has the poſſeſſion of the bill may bring his action; where there are many indorſers, the indorſees have a right of action in ſucceſſion; but there is but one right of action, under the bill, againſt one perſon at one and the ſame time: the bill being in one in-

dorſee's hands, the indorſer pays a part, and the objection is, that this ought to be conſidered as a payment for the drawer; but I think it is otherwiſe, becauſe the indorſer is no ſervant, nor is agent to the drawer. If *Benſon* had paid the whole 1000*l.* to the plaintiff, and *Benſon*'s name had not been ſtruck out, and *an action had been brought in the plaintiff's name*, will you ſay the action will not lie? The bill is a ſecurity for every indorſer, as *ceſtui que truſt*; it is plain, that the plaintiff has a right to recover the whole money; and when he receives it, he will have received 232*l.* of *Benſon*'s money. The defendant has no reaſon to complain. BATHURST, J. You cannot ſplit the bill, ſo as to ſubject the party to different actions. GOULD, J. When the defendant has paid the 1000*l.* there is an end of the contract: when the drawer of a bill has paid part, you may indorſe it over for the reſidue, otherwiſe not, becauſe it would ſubject him to a variety of actions (1).

Brown v. Searles, Mic. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 88.

But it has been, in another caſe, determined, that if the indorſee of a bill of exchange receive part of the contents *from the drawer*, he cannot recover more than the reſidue from the acceptor.—This was aſſumpſit by the indorſee of a bill of exchange againſt the acceptor: the bill was drawn for 95*l.* 18*s.* by one *Seymour*, on the defendant, payable to his own order; by him indorſed to the plaintiff, and accepted by the defendant, after it became due. *Seymour*, the drawer, paid the plaintiff 60*l.* 10*s.* as part of the contents; the defendant paid the reſidue, with intereſt, into court, and pleaded the general iſſue: the plaintiff, however, proceeded, and after a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for him, he contended, that the acceptance having made the defendant liable for the whole, and a perſonal contract not being diviſible, he was intitled to recover, and to ſtand as a truſtee for the drawer; BUT THE COURT held otherwiſe. LORD LOUGHBOROUGH, When a bill of exchange is drawn, the drawer orders the acceptor to pay ſo much of his money to a third perſon; but if he anticipates the acceptor, and pays the money himſelf, he thereby releaſes the acceptor from his undertaking; ſo that, if the acceptor were to pay the bill, after notice given him, that the drawer had already paid it, an action would lie for the drawer againſt the acceptor, to recover back the money ſo paid. Great miſchief would enſue on accommodation bills, if, after a bill had been taken up by the drawer, the acceptor ſhould be liable to be called upon for payment. GOULD, J. The doctrine contended for would go the length

(1) Mr. Juſtice WILSON, in the following caſe of *Brown* v. *Searles*, 1 *Hen. Black.* 90. conſidered the above report as very inaccurate, and was much inclined to doubt the authority.

of

of proving, that the holder of a bill having received the whole money from the drawer, might recover it again from the acceptor. WILSON, J. In *Johnſon* v. *Kennion*, *Gould*, J. ſaid, that where the defendant had paid the amount of the bill, there is an end of the contract: now, in this caſe, the drawer having paid part, and the acceptor the reſidue, the contract was at an end, the acceptor being the agent of the drawer: there alſo, *Gould*, J. ſaid, where the drawer of a bill has paid part, you may indorſe it over for the reſidue; but that is for the protection of the indorſee: here the plaintiff knew how much was due; no ſuch ſpecial indorſement was neceſſary.—Rule refuſed.

So in this caſe, which was an action againſt the acceptor, upon a bill for 300*l.* the plaintiff took a verdict for the whole ſum: the defendant filed a bill againſt him in the Exchequer; and he admitted in his anſwer, that he had previouſly received 180*l.* from the drawer: this *(inter alia)* was offered as a ground for a new trial; and, after cauſe ſhewn, LORD MANSFIELD ſaid, "The verdict is certainly taken for 180*l.* "more than was due; there was no admiſſion of this pay- "ment at the trial, which was very wrong, and has been "the occaſion of filing a bill in the Exchequer, therefore "there ought to be a deduction of the money received, and "a proportionable part of the intereſt, *together with all the* "*coſts* in the Exchequer," and though the court diſcharged the rule for a new trial (1), they made the plaintiffs remit the 180*l.* with intereſt (2) upon it, from the time it was paid, and pay the coſts of the bill, and anſwer, in the Exchequer.

Pierſon v. Dunlop, Hil. Ter. 17 Geo. 3. B.R. *Cowp.* 571.

If a foreign bill of exchange be returned diſhonoured, the drawer is liable for the whole amount of the *re-exchange*.—A bill was drawn in London upon Paris, and negociated through Holland: before it became due the French Government prohibited the payment of any bill drawn in England; in conſequence of which, it was diſhonoured, and ſent back through the different hands by which it had before been negociated, to London: the *re-exchange* between Paris and Holland raiſed the bill from 603*l.* 19*s.* 10*d.* to 913*l.* 4*s.* 3*d.* which the plaintiff (the payee) paid; and upon an action brought by him againſt the drawer, he recovered for the whole ſum. Afterwards a new trial was moved for, upon the ground that the defendant was not liable for the loſs on the re-exchange.—LD. CH. J. EYRE, I ſee no diſtinction between this caſe and the common one of a bill being refuſed payment. The drawer muſt pay for all the conſequences of the non-payment, and the loſs on the re-exchange is part of the damages ariſing from the contract not

Melliſh *et al.* v. Simeon, Mic. Ter. 35 Geo. 3. C.B. 2 *Hen. Black.* 378.

(1) See p. 373, *ſupra*

(2) For the rule as to computing intereſt, ſee *Robinſon* v. *Bland*, vol. I. p. 313.

being performed. BULLER, J. The drawer of a bill undertakes that the bill shall be paid when due: if it be not paid, it is not neceſſary for the holder to inquire for what reaſon it is not paid; and, if the holder has been guilty of no default, the drawer is anſwerable for the amount of the bill; and if he is liable for the bill, he muſt alſo be liable for the re-exchange, which is a conſequence of the bill not being paid. HEATH, J. He who undertakes for the act of another, undertakes that it ſhall be done at all events. Rule refuſed.

Auriol *et al. v.* Thomas, Tr. Ter 27 Geo. 3. B R. 2 *Ter. Rep.* 52.

The charge of 10*s.* per pagoda on a bill returned proteſted from India is not exceſſive, though it was taken in payment here at the rate of 6*s.* 6*d.* per pagoda.—On a motion to ſet aſide a writ of inquiry for exceſſive damages, it appeared that the plaintiffs were the indorſees of a bill of exchange drawn here by *G. Campbell*, for 2,800 ſtar pagodas, payable to the defendant, or order, and directed to *G. Macbry*, eſq. at Madras: *the plaintiffs diſcounted the bill, giving the then current price of the exchange*, which was 6*s.* 6*d.* per pagoda: they ſent it to Madras, from whence it was returned to England, proteſted for non-acceptance and alſo for non-payment; on which the plaintiffs demanded and recovered at the rate of 10*s.* per pagoda, and 5*l.* per cent from the expiration of thirty days after notice to the defendant of its being returned. On ſhewing cauſe, it appeared, that the uſage, as well as the particular agreement of the defendant, had been proved before the jury, to charge at the rate of 10*s.* per pagoda, for bills returned from India proteſted, and 5*l.* per cent after thirty days notice to the defendant of non-payment, which included all incidental charges.—BULLER, J. In the caſe of *Benſon* v. *Parry*, at Hereford, ſummer aſſizes, 1780, this Court, on a motion for a new trial, were unanimouſly of opinion, that extra-charges might be allowed, though they amounted to more than 5*l.* per cent, if they were fair and reaſonable, and not as a colour for uſury. This doctrine was again recognized in two *niſi prius* caſes (1), ſo that it is now clearly ſettled, that the party is intitled to take not only 5*l.* per cent for legal intereſt, but alſo a reaſonable ſum for remitting and other neceſſary incidental expences. Here it is admitted, that the conſtant courſe with reſpect to bills returned proteſted from India has been to allow at the rate of 10*s.* per pagoda, which includes intereſt, exchange, and

(1) One was, *Winch qui tam* v. *Fenn, Sitt. after H.* 1786. *B. R.* COR. BULLER, J. Where, on the trial of an action for uſury, it appeared, that the defendant, a country banker, uſed to diſcount bills in London for various correſpondents at Sudbury, taking 5*l.* per cent for the time the bills had to run; and alſo 5*s.* per cent on the groſs ſum, without any reference to the time which the bill had to run; and under the judge's direction, there was a verdict for the defendant.

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all other charges. There cannot, therefore, be any colour for ſaying that this tranſaction is uſurious. GROSE, J. The line which has been taken is, that if the ſum charged be not a colour or a ſcreen for uſury, but is only fair and reaſonable, it ought to be allowed.—Rule diſcharged.

In debt on a bond, dated Fort William, Bengal, March 14th, 1787, in the penalty of 4,470*l.* 2*s.* 2*d.* of lawful money of Great-Britain, it appeared, that the defendant, and one *W. C.* and *D. S.* were jointly and ſeverally bound to the plaintiff, *John Orr*, captain in the military ſervice of the Eaſt-India Company, on their Madras eſtabliſhment; and the condition was [after reciting "that *W. C.* had received from the plaintiff 6,017 ſtar pagodas of lawful money of Madras, *for which he was to have obtained and given to the ſaid plaintiff bills of exchange, to be drawn by the right honourable the governor in council of Fort William, in Bengal, aforeſaid, upon the honourable court of directors of the ſaid united company of merchants of England; which bills he had not obtained or given, but, inſtead thereof, had granted two ſets of his own private bills* upon Meſſrs. *Baillie, Pocock, and Co.* payable to the order of the ſaid plaintiff, for 2,044*l.* 3*s.* 4*d. payable three hundred and ſixty-five days after ſight* thereof, and the other for 190*l.* 18*s.* 9*d.* payable four months after ſight thereof; and, *that to ſecure the due acceptance and payment of ſuch bills,* they had undertaken to become bound, that in the event of the ſaid bills *being proteſted for non-acceptance and non-payment,* that they *would, upon the producing of each ſuch bill, with its proteſt,* well and truly pay to the ſaid plaintiff, or his order, if demanded in England, the full amount of ſuch bills ſo proteſted, together with *intereſt thereupon, of* 5*l. per centum per annum, from the day of the date of ſuch bills, up to the day of ſuch payment 'by way of penalty'*"], that the aforeſaid bills *ſhould be duly and faithfully accepted and paid, according to the tenor thereof reſpectively.*——At the trial, a verdict was found for the plaintiff, on both the iſſues; and an order of *niſi prius* being made, "that, with the conſent of all parties, a verdict ſhould be found for the plaintiff, for the ſum of 1,459*l.* 13*s.* and 40*s.* coſts; ſubject to the opinion of the court, whether he ought to recover that ſum, *or only* the ſum of 1,275*l.* 16*s.* 3*d.* &c. The queſtion was, WHETHER *intereſt on the bills was to be charged from the day of the date, or from the day when they became due?*—LORD LOUGHBOROUGH pronounced the unanimous opinion of the Court, as follows: it was argued, that the verdict ought to go to the full extent, becauſe by agreement of the parties the damages were liquidated, and that this was not in the nature of a common penalty, but the damages being aſcertained, neither a court of law nor of equity would relieve. But I do

Orr v. Churchill, Ea. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 227.

do not go on the denomination given by the inſtrument, for whatever that may be; in this caſe *there could not, by any poſſibility, have been an agreement for liquidated damages; which can only be, where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard againſt the performance of acts, which, if done, would alſo be injurious.* In ſuch caſes, an eſtimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foreſee the conſequences of a breach of the engagement, and ſtipulate accordingly. *But where the queſtion is concerning the non-payment of money in circumſtances like the preſent, the law having by poſitive rules fixed the rate of intereſt, has bounded the meaſure of damages: otherwiſe the law might be eluded by the parties.* It may often, indeed, happen that the damages ſuſtained by a party contracting, by the non-payment of money at the time agreed on, may, by the particular arrangement of his affairs, be greater than the compenſation recovered, by computing the intereſt: but where money has a real rate of intereſt and value, the other party is not to be compelled to pay more than the law has declared to be ſuch rate and value. For theſe reaſons, therefore, we think that value muſt be calculated from the times when the bills became due: that the verdict muſt, therefore, be reduced, and entered for the leſſer ſum.

Ruſſel *et al. v.* Hankey *et al.* Mic. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 12.

A banker in London, if he give up a bill to the acceptor upon receiving a check upon a banker for the amount, although it turn out that ſuch check is diſhonoured, is not liable as for negligence.—At the trial of this cauſe, which was a ſpecial action on the caſe, the facts were ſtated to be theſe: that the defendants were bankers in London, in correſpondence with the plaintiffs, their cuſtomers in the country; that the bills in queſtion, which had been indorſed to the plaintiffs, in the courſe of negociation had been tranſmitted by them to the defendants, in order to obtain payment from the acceptor, who reſided in London, and to carry the amount to the account of the plaintiffs; that the defendants accordingly tendered the bills to the acceptor for payment, when he gave them a check upon a banker in London for the amount, upon the receipt of which check they delivered up to the acceptor the bills in queſtion. It turned out that the check was diſhonoured, the perſon on whom it was drawn having no account with the drawer. Upon theſe facts, which were not diſputed, the plaintiffs contended that the defendants had been guilty of negligence in giving up the bills for the check they had received in payment, without previouſly inquiring whether or not the check would be honoured.—Lord Kenyon was clearly of opinion, that the defendants had only done what was uſual in the ordinary courſe of the trade

trade and buſineſs of bankers, and therefore, that they ought not to be anſwerable for the event, and the plaintiffs were nonſuited. It was afterwards moved to ſet aſide the nonſuit, BUT PER CUR. We dare not even grant a rule to ſhew cauſe, as it would be putting the whole trade of London in ſuſpenſe pending it. There is no ground to impute negligence to the defendants.—Rule refuſed.

Pleadings.

A promiſſory-note, payable on a contingency, cannot be declared on as a promiſſory-note within the ſtatute 3 and 4 *Ann.* c. 9.—This action was brought in the court of Common Pleas: the firſt count of the declaration alleged, that the defendant (below) in the life-time of *A. Fancourt*, the late wife of the plaintiff (below), on the 27th of July, 1786, *made and ſigned his certain note in writing, commonly called a promiſſory-note*, and thereby promiſed to pay to the ſaid *A. Fancourt*, then being the plaintiff's wife, the ſum of 10*l.* "*out of his, the ſaid defendant's, money that ſhould ariſe from his reverſion of* 43*l. when ſold.*" and delivered the ſaid note to the ſaid *A. F.* whereby, &c. *and by force of the ſtatute in ſuch caſe made and provided, the ſaid defendant became liable*, &c. concluding with an averment, that the ſaid reverſion of the ſaid 43*l.* was ſold before the ſuing forth of the original writ, &c. The defendant ſuffered judgment to go by default; and a general judgment was entered up on the whole declaration. A writ of error was then brought; and the plaintiff in error aſſigned for error, that there was a general judgment on all the counts in the declaration, *the firſt of which was founded on a ſuppoſed promiſſory-note, as a note within the ſtatute, whereas it was not a note within the ſtatute, but a contingent note*; and uncertain whether or not it would ever become payable, and was therefore void in law; and that it did not appear to be given for value received, &c.—LORD KENYON, Ch. J. The queſtion in this caſe is not, whether the plaintiff in error, who may have promiſed, for a valuable conſideration, to pay to the defendant a certain ſum of money on an event, which has ſince happened, is or is not bound to perform that promiſe? If this promiſe were made on a conſideration, there is no doubt but that an action might be maintained on it, as on a ſpecial agreement: but the queſtion now before the court is, Whether or not the note ſet forth upon the record can be declared on as a negotiable ſecurity, under the ſtatute 3 and 4 *Anne*, c. 9.? The object of that act was to put promiſſory-notes on the ſame footing with bills of exchange, in every reſpect. It would perplex the commercial tranſactions of mankind, if paper ſecurities of this kind were iſſued

Carlos *v.* Fancourt, in Error, Hil. Ter. 34 Geo. 3 B.R. 5 *Ter. Rep.* 482.

iſſued out into the world incumbered with conditions and contingencies; and if the perſons to whom they were offered in negociation were obliged to inquire when theſe uncertain events would probably be reduced to a certainty. It has been admitted, in the argument, that if this were a bill of exchange the declaration could not be ſupported: many caſes, indeed, were cited by the counſel on the other ſide, to prove that poſition, to which may be added another in 2 Lord *Raymond*, 1361. where it was decided, that a bill which was not payable at all events, could not be conſidered as a bill of exchange: and this admiſſion by the counſel for the defendant in error is deciſive of this caſe; for there is no difference in this reſpect between promiſſory-notes and bills of exchange; they both ſtand *in pari ratione*. If we were to render this point in the leaſt doubtful, we ſhould ſhake the foundation of that which has been conſidered as clear law ever ſince the time of Lord *Holt*. I am, therefore, clearly of opinion, that this note cannot be declared upon as a negotiable inſtrument; at the ſame time I have no doubt but that an action might be framed on it as on a ſpecial agreement. The juſtice of the caſe is certainly with the defendant in error: but we muſt not tranſgreſs the legal limits of the law, in order to decide according to conſcience and equity. We need have no reluctance in reverſing the judgment of the Common Pleas, becauſe as this was a judgment by default, that court had no opportunity of exerciſing their judgment upon the queſtion. ASHHURST, J. Before the ſtatute of *Anne*, promiſſory-notes were not aſſignable as choſes in action, nor could actions have been brought on them, becauſe the conſiderations do not appear on them; and it was to anſwer the purpoſes of commerce that thoſe notes were put by the ſtatute on the ſame footing with bills of exchange. Then they cannot reſt on a better footing than bills of exchange, but muſt ſtand or fall on the ſame rules by which bills of exchange are governed. Certainty is a great object in commercial inſtruments; and unleſs they carry their own validity on the face of them, they are not negotiable; on that ground, bills of exchange, which are only payable on a contingency, are not negotiable, becauſe it does not appear on the face of them, whether or not they will ever be paid. The ſame rule, then, that governs bills of exchange in this reſpect, muſt alſo govern promiſſory-notes. And, therefore, though this might have been declared on as a ſpecial agreement, ſtating the conſideration for the promiſe, and the ſale of the reverſion of 43*l.* yet this action cannot be maintained. GROSE, J. If this had been a bill of exchange, the declaration drawn on it as on a bill within the cuſtom of merchants, would have been bad, becauſe the money was only to be paid on a contingency. Then, if the plaintiff below had

had declared on this as on a ſpecial contract, he ſhould have ſhewn not only that there was a conſideration for the promiſe, but alſo that the reverſion was ſold for at leaſt 10*l.*; whereas, here it is merely averred, that the reverſion was ſold, without ſaying for how much. In whatever way, therefore, this queſtion is conſidered, the declaration cannot be ſupported.—Judgment reverſed.

Churchill v. Gardner, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 596.

It is not neceſſary in a declaration on a bill of exchange, to aver that the maker *delivered* it: it is ſufficient to ſtate that he *made* it.—This was an action on a bill of exchange by the payee, againſt one of the acceptors. The declaration ſtated, that *W. Bavin*, on, &c. *made his certain bill of exchange* in writing, dated, &c. directed to the defendant, and *J. Gough*, requeſting them to pay to the plaintiff, or order, 19*l.* 9*s.* 4*d.* which bill *the defendant and J. Gough* accepted, &c. by reaſon whereof, and according to the cuſtom and law of merchants, the defendant and *J. Gough* became jointly liable to pay to the plaintiff the ſaid ſum, &c. and being ſo liable, *the defendant*, in conſideration thereof, on, &c. undertook, &c. To this the defendant demurred ſpecially, and ſhewed for cauſe, that it is not alleged in the declaration, nor does it thereby appear, that *Bavin delivered* the ſaid bill of exchange to the plaintiff, &c. The plaintiff joined in demurrer.—THE COURT were clearly of opinion that there was no foundation for the objection; for that *the delivery* of the bill, by *Bavin*, to the payee, was included in the allegation "*that Bavin* made the bill:" that if the maker did not intend to put the bill in circulation when he made it, it would be open to the defendant to make that defence on the plea of the general iſſue. And, they ſaid, that this mode of declaring was warranted by many precedents.—They alſo hinted a ſtrong opinion that there was no foundation for another objection which was taken, viz. that it was ſtated, that the defendant and another accepted the bill, and thereby became jointly liable; therefore both ought to have been ſued: but that, if it had any weight at all, which they doubted, it ſhould either have been pleaded in abatement, or pointed out as a ſpecial cauſe of demurrer. However the defendant had leave to withdraw his demurrer and plead.

Ruſhton v. Aſpinall, Tr. Ter. 21 Geo. 3. B.R. 2 *Doug.* 679.

In an action in the court of the County Palatine of Lancaſter, by the indorſee of a bill payable three months after date, againſt the indorſer, the declaration ſtated, that the bill, after the making thereof, to wit, on the ſame day and year aforeſaid (referring to the day the bill bore date), was preſented for acceptance and accepted; yet the drawer, although afterwards, to wit, on the ſame day and year aforeſaid, requeſted, did not pay; of which, the drawer, the payee, and firſt indorſer, and the acceptor had notice; by reaſon whereof the defendant became liable to pay, and being ſo liable,

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on the ſame day and year promiſed to pay: there was a general verdict for the plaintiff, and judgment being entered, the record was removed into this court by writ of error, and two objections were inſiſted upon; 1ſt, that the declaration did not allege a demand on the acceptor; 2dly, that it did not ſtate notice, to the defendant, of the acceptor's refuſal to pay. The anſwer was, that, after verdict, it muſt be preſumed, that theſe facts were proved at the trial.—PER CUR. Our wiſhes ſtrongly incline us to ſupport the judgment: but on looking into the caſes, we find the rule to be, that where the plaintiff has ſtated his title, or ground of action, defectively, or inaccurately (becauſe, to intitle him to recover, all circumſtances, neceſſary in form or ſubſtance, to complete the title, ſo imperfectly ſtated, muſt be proved), it is a fair preſumption, after a verdict, that they were proved: but that where the plaintiff totally omits to ſtate his title, or cauſe of action, it need not be proved at the trial, and, therefore, there is no room for preſumption. In the preſent caſe it was not requiſite for the plaintiff to prove either the demand on the acceptor, or the notice to the defendant, becauſe they are neither laid in the declaration, nor are they circumſtances neceſſary to any of the facts charged: if they were to be preſumed to have been proved, no proof at the trial can make good a declaration which contains no ground of action on the face of it; the promiſe alleged to have been made by the defendant is an inference of law, and the declaration does not contain promiſes, from which ſuch an inference can be drawn: Lord *Mansfield*, in *Avery* v. *Hoole*, *Ea. Ter.* 18 *Geo.* 3. ſaid, "a verdict will not mend the "matter where the giſt of the caſe is not laid in the declara-"tion, but it will cure ambiguity;" and there is a ſtrong caſe in 2 *Salkeld*, 662. of an action for keeping a malicious bull, where the *ſcienter* having been omitted in the declaration, it was held bad after verdict; therefore, we are all of opinion, that there ſhould be judgment for the plaintiff in error.—Judgment reverſed.

Salomons v. Stavely, Mic. Ter 24 Geo. 3. B. R. 2 *Doug.* 683. (n. † 144.)

In this caſe the Court held, on the authority of the precedent, in *Dunſter* v. *Pierce*, *Lill. Ent.* 55. that the neglect to allege a proteſt in an action on a foreign bill, was matter of form only, and could not be taken advantage of on a general demurrer.

Evans v. Weaver, Ea. Ter. 37 Geo. 3. C. B. 3 *Pull* et *Boſan.* 20.

This was an action on a promiſſory-note for 40*l.* in which kind of action the general rule is, that the defendant cannot change the venue.—PER CUR. The defendant only ſwears that he has a good defence, and that all his witneſſes live at Ludlow; but he does not ſtate what are the grounds of his defence, nor whether he has one, two, or three witneſſes, or how many. If he had a number of witneſſes all living there, and he were to ſtate that on his affidavit, and

ſhew

ſhew that a ſerious inconvenience would ariſe from bringing them up, it might induce the court to deviate from the general rule. But if the defendant ſhould have one witneſs only, the court would hardly change the venue on account of that one. It might be more expenſive to the plaintiff to carry down his witneſſes to Ludlow, than for the defendant to bring up his to London. It will be eaſy to ſtate the circumſtances on an affidavit.

Afterwards, a ſupplemental affidavit was produced, ſtating that the defence on which the defendant intended to rely, was a ſet-off for money paid, lent, had, and received, and account ſtated; that he had three witneſſes living at Ludlow, all of whom were eſſential to eſtabliſh his defence; that it would be neceſſary to prove a judgment for 4*l.* 5*s.* in the town-court of Ludlow (which, however, the plaintiff offered to admit), and that this application was not made for the purpoſe of delay: on which the rule was made abſolute, the defendant conſenting to allow judgment to be entered up as of Trinity Term, in caſe of a verdict for the plaintiff at the aſſizes.

Kearſlake *et al.* *v.* Morgan, Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 513.

Plea to aſſumpſit that the defendant (who was the payee of a promiſſory-note) indorſed it to the plaintiff "for and on account of" the ſaid debt, is a good plea.—Aſſumpſit for goods ſold and delivered, money lent, &c.: pleas; 1ſt, the general iſſue; 2d, that as to 4*l.* 14*s.* 6*d.* parcel, &c. the plaintiffs, on, &c. at, &c. took, accepted, and received, in full ſatisfaction and diſcharge thereof, and of a certain other ſum, to wit, 5*l.* 5*s.* 6*d.* paid by the plaintiffs to the defendant, a certain promiſſory-note before that time made by one *W. Pierce*, according to the form of the ſtatute, &c. for paying to the defendant, or his order, at a certain time in the ſaid note mentioned, and elapſed before the commencement of this ſuit, the ſum of 10*l.* and indorſed by the defendant to the plaintiffs, &c. with a verification, &c.; 3d. that as to the ſaid ſum of 4*l.* 14*s.* 6*d.* the ſaid *W. Pierce*, before the commencement of this ſuit, at, &c. made his certain note in writing, according to the form of the ſtatute, &c. and then and there delivered the ſame to the defendant, by which ſaid note the ſaid *W. Pierce* promiſed to pay to the defendant, or his order, at a certain time in the ſaid note mentioned, and elapſed before the commencement of this ſuit, the ſum of 10*l.*; that the defendant afterwards, and before the time appointed by the ſaid note for the payment of the ſaid ſum of money therein mentioned, to wit, on, &c. at, &c. *for and on account of the ſaid ſum* of 4*l.* 14*s.* 6*d.* and of a certain other ſum of 5*l.* 5*s.* 6*d.* paid by the plaintiffs to the defendant, made his certain indorſement in writing upon the ſaid note, and then and there delivered the ſaid note with the ſaid indorſement thereon to the plaintiffs; by which ſaid indorſement and delivery the defendant appointed the contents

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of the ſaid note to be paid to the plaintiffs; and, that *the plaintiffs then and there accepted and received the note for and on account of* the ſaid ſeveral ſums of 4*l.* 14*s.* 6*d.* and 5*l.* 5*s.* 6*d.*; to wit, at, &c. with a verification. The plaintiffs replied to the ſecond plea, that they did not take, accept, or receive, the ſaid promiſſory-note in the plea mentioned, in full ſatisfaction and diſcharge of the ſaid ſum of 4*l.* 14*s.* 6*d.* and 5*l.* 5*s.* 6*d.* in the plea mentioned, in manner and form, &c.: and they demurred generally to the third plea.—THE COURT, after argument, being of opinion, that the plea was good, recommended it to the plaintiffs to withdraw their demurrer, and reply to it; to which it was agreed; whereupon leave was given to the plaintiffs to amend.

Evidence.

Elmes *v.* Wills, Tr. Ter. 28 Geo. 3. C. B. 1 *Hen Black.* 84.

On the trial of this action, which was brought by the plaintiff, as indorſee of a bill of exchange, againſt the defendant, as the drawer, it appeared in evidence, that the plaintiff and defendant had mutual dealings together, and had applied to one *Rawnſley* to ſettle their accounts, who had accordingly adjuſted all matters in diſpute, except the bill on which the action was brought: this, the defendant ſaid, he could *prove he had paid:* upon which it was agreed, that the bills ſhould be depoſited in the hands of *Rawnſley*, and if the defendant *brought proof of the payment within a month*, the bill ſhould be delivered up to him, if not, *he promiſed to pay it to the plaintiff.* No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it. The counſel for the defendant offered to give evidence, that the *original debt was paid*, for which the bill was given, and that the defendant could not *within the month* find the witneſs by whom it might have been proved according to the agreement, he having abſconded to avoid an arreſt.—BUT GOULD, J. was of opinion that the plaintiff had a right to prove the ſpecial promiſe of the defendant, under the general count of *inſimul computaſſent*, on the authority of *Buller's Niſi Prius*, p. 139, and that promiſe not being performed, was intituled to recover, the defendant not being at liberty to bring evidence in excuſe for his non-performance, where the undertaking was peremptory; that ſuch an undertaking was upon ſufficient conſideration, he cited the caſe of *Amie* v. *Andrews*, 1 *Mod.* 166. and *Knight* v. *Ruſhworth*, *Cro. Eliz.* 469. BUT, afterwards, on a motion for a new trial, THE REST OF THE COURT were of opinion, that though this was a new promiſe on a ſpecial agreement, and though under a general count of *inſimul*

inſimul computaſſent, ſuch a promiſe might be given in evidence, yet, as in the preſent inſtance, it was to pay an old debt, the condition not being performed, it was to be conſidered only as evidence of the debt, and the effect of it was, to ſhew that the plaintiff had *primâ facie* only, a right to recover. The defendant, therefore, ought to have been admitted, to prove that the debt was diſcharged; becauſe, by ſo doing, he would avoid the promiſe, by ſhewing there was no conſideration for it.—Rule abſolute for a new trial.

Buckland *v.* Tankard, Eaſ. Ter. 34 Geo. 3. B. R. 5 *Ter. Rep.* 578.

This was an action by the indorſee of a bill of exchange againſt the acceptor. The bill was drawn by one *Gregſon*, payable to his own order, and indorſed by him in blank. On the part of the defendant, *Gregſon* was called as a witneſs, in order to prove that the plaintiff had no property in the bill; but that he, *Gregſon*, had delivered it to him merely for the purpoſe of enabling him to get payment of it from the acceptor, and not with intent to convey any intereſt to him; for that, in truth, he had not paid any conſideration for the bill. And the witneſs being aſked, Whether he now claimed any intereſt in the bill, and anſwering in the affirmative, upon the ground above ſtated, Lord *Kenyon* rejected him, as being an intereſted witneſs; on which, the plaintiff recovered a verdict. The witneſs, when called, produced a releaſe from the defendant. A rule *niſi* for ſetting aſide the verdict for the plaintiff, on the ground, that *Gregſon*'s teſtimony ought to have been received, was diſcharged, after cauſe ſhewn.—Lord KENYON, Ch. J. The whole queſtion turns on this, Whether the witneſs's ſituation would or would not be bettered by the event of the verdict in this caſe? I am ſtill of opinion, that it would; for if the plaintiff ſhould ſucceed, *Gregſon* would be put to much-greater difficulties to get back the money, than if the plaintiff ſhould be foiled by means of his teſtimony: and therefore, on the ground of intereſt, I think the witneſs was properly rejected. GROSE, J. Beſides, it may admit of a queſtion, How far a man, who has ſet his name to a negotiable inſtrument, and thereby given it currency, can be called as a witneſs (1) to diſprove the holder's right of action on it? Lord KENYON added, that he had often over-ruled objections of that ſort in ſimilar caſes, conſidering ſuch a rule as calculated to conceal the truth. But, on the ground of intereſt in this caſe, he thought the objection to the witneſs's competency valid.

Diggliſh *v.* Wethenby, Hil. Ter. 11 Geo. 3. C. B. 2 *Black.* 747.

On the trial of this action, which was brought by the plaintiff againſt the defendant, as drawer of three ſeveral bills of exchange, there was no proof offered, that any notice had been given to the drawer of the non-payment, or that

(1) Vide *Walton* v. *Shelly*, 2 Ter. Rep 296.

the acceptor was insolvent, or had absconded: and DE GREY, Ch. J. nonsuited the plaintiff.

Anon. Hil. Ter. 11 Geo. 3. C. B 3 *Wils.* 155. Upon a judgment by default, in an action upon a promissory-note, or a bill of exchange, the sum due thereon is admitted, and need not be proved upon the execution of a writ of inquiry.—This case is also reported in 2 *Black.* 748. under the names of *Snowden* v. *Thomas*.

Green v. Hearne, Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 301. In an action on a bill of exchange, against the defendant as acceptor, the defendant suffered judgment to go by default; and at the execution of the writ of inquiry, *the bill of exchange was produced, but it did not appear to have been accepted*; and no other evidence was produced. The jury having given a verdict to the amount of the bill, a rule was obtained to shew cause why the judgment, and the writ of inquiry executed thereon, should not be set aside; the former, on an affidavit of merits, namely, that in fact the defendant had not accepted, and on the ground of negligence in the defendant's attorney; the latter, for insufficient proof. After cause shewn, the rule was discharged.—PER CUR. When a defendant suffers judgment to go by default, he admits the cause of action. And thus far, an action on a bill of exchange, and an action for money had and received, are alike: but beyond that, there is no similarity. For, in the latter, the defendant only admits something to be due; and, as the demand is uncertain, the plaintiff must prove the debt before the jury. But, in the former, as the bill of exchange is set out on the record, the defendant, by suffering judgment to go by default, admits, that he is liable to the amount of it: here, then, the defendant has admitted, that he did accept the particular bill of exchange set out in the declaration; and the only reason for producing it to the jury, on executing the writ of inquiry, is, to see whether or not any part of it has been paid.

Smith v. Chester, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 654. Indorsee of a bill of exchange against the acceptor. It appeared at the trial, before *Buller*, J. at the last sittings at Westminster, that when the bill was accepted, there were several indorsements on it. But *the plaintiff, not being able to prove the hand-writing of the first indorser, was nonsuited.* It was moved to set aside this nonsuit, on the ground that, *as these indorsements were on the bill at the time of the acceptance*, they must be taken to have been admitted by the drawer, and he could not afterwards dispute them. ASHHURST, J. The law is otherwise settled. And if it were not so, there would be no difference, in this respect, between bills payable to order, and those payable to bearer. And it would open a door to great fraud. BULLER, J. This point was much considered, in a late case (1), before this Court, when they were perfectly clear, that an indorsee of a bill of exchange,

(1) Vide *Tatlock* v. *Harris*, *Vere* v. *Lewis*, & *Minet* v. *Gibson*, supra.

in an action againſt the acceptor, was obliged to prove the hand-writing of the firſt indorſer; for when a bill is preſented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from diſputing; and it is on that account that an acceptor is liable, even though the bill be forged. GROSE, J. This matter appears extremely clear; for a bill of exchange is no payment to the perſon in whoſe favour it is drawn, unleſs it is indorſed by him.—Rule refuſed.

And now, where there is judgment by default, in an action on a promiſſory-note or bill of exchange, the Courts of *B. R.* and *C. B.* will refer it to the proper officer, to aſcertain the damages and coſts, and calculate intereſt, without a writ of inquiry.

In this action, which was on a promiſſory-note, the defendant ſuffered judgment to go by default; and a rule to ſhew cauſe why it ſhould not be referred to one of the prothonotaries, to aſcertain the damages and coſts, and calculate intereſt on the note, without a writ of inquiry, having been granted, it was now made abſolute, no cauſe being ſhewn. Raſhleigh *v.* Salmon, Tr. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 352.

So in this caſe, which was aſſumpſit on a bill of exchange, where a like rule to ſhew cauſe had been granted. On ſhewing cauſe, it was contended, that the Court could not diſpenſe with a writ of inquiry, in an action of damages; and it was urged, that the principle was, that the intervention of a jury was neceſſary in all caſes, where the debt really due did not appear upon the face of the declaration. But the Court ſaid, that as it would be the means of ſaving expence to the parties, as the amount of the bill appeared on the face of it, and the intereſt might be exactly calculated, they thought it right to make the rule abſolute. Andrews *v.* Blake, Mic. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 529.

So in this caſe, which was aſſumpſit on a promiſſory-note. Judgment by default. A rule was granted, to ſhew cauſe why it ſhould not be referred to one of the prothonotaries, to aſcertain the principal, intereſt, and coſts, due to the plaintiff, without a writ of inquiry. PER CURIAM (after cauſe ſhewn), As the practice is clear, in actions of debt; there ſeems to be no good reaſon why it ſhould not alſo prevail in thoſe actions of *aſſumpſit*, where the demand is preciſely aſcertained. In 3 *Wilſ.* 62. on a judgment by default in treſpaſs, *Wilmot*, Ch. J. had gone ſo far as to hold, that the Court might, if they pleaſed, themſelves aſſeſs damages (1). In the preſent caſe, if there were any fact which it was neceſſary for a jury to determine, it ought to have been ſtated by affidavit. But as no ſuch fact appeared, as the ſum was defined on the face of the note, and as the intereſt was capa- Longman *et al. v.* Fenn, Hil. Ter. 31 Geo. 3. C. B. 1 *Hen. Black.* 541.

(1) On which point, ſee Year Books 14 *Hen.* 4. 9. 3 *Hen.* 6. 10. 1 *Rol. Abr.* 573. *Yelv.* 152. *Goodwin* v. *Welſhe*, 1 *Brownl.* 214. *S. C.* and 2 *Wilſ.* 373. *Hewit* and others v. *Mantell.*

ble of exact computation by the prothonotary, it was highly reasonable to save the parties the expence of a writ of inquiry. HEATH, J. mentioned 3 *Leon.* 213. where the plaintiff, in replevin, was non-suited, it was holden, that the Court might assess damages without a writ of inquiry, "because "they are not in respect of any local matter, but accrued to "the avowant for the delay in the non-payment of the rent: "contrary, where judgment is given for the plaintiff, there "the Court shall not assess damages, for he ought to recover "for the taking of his cattle, of which the judges cannot "take notice; and the damages may be greater or less, ac-"cording to the value of the cattle, and the circumstances of "taking and delaying them.—Rule discharged.

Shepherd *v.* Charter, Ea. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 275.

So, in the Court of King's Bench, where the defendant having suffered judgment to go by default, in an action brought on a bill of exchange, and the plaintiff had obtained a rule to shew cause why it should not be referred to the master to see what was due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry. Cause having been shewn, the rule was made absolute. Lord KENYON, Ch. J. In such cases, as the present, it is extremely convenient to do what was done in the court of Common Pleas; as the quantum of damages depends on figures, they may be ascertained as well before the master as a jury. And this is not a new practice; for the last case in the Common Pleas refers to old authorities. GROSE, J. said, that he knew that the judges in the Common Pleas gave the case before them great consideration, before they referred the question to one of the prothonotaries.—Rule absolute.

Maunsell *v.* Lord Massareene, Mic. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 87.

But where the defendant suffered judgment by default, in an action on a bill of exchange for 200*l.* Irish money, and the plaintiff moved to refer it to the master, to see what was due for principal, interest, and costs: this was opposed, on the ground that this was foreign money, the value of which could only be ascertained by a jury: AND THE COURT discharged the rule.

Price *v.* Neale, Mic. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1354. 1 *Black.* 390.

An actual acceptance is evidence that the acceptor admits the hand-writing of the drawer, and he is thereby precluded from afterwards denying it, though the bill be forged, if such bill come to the hands of an innocent indorsee, for a valuable consideration.—This was an action on the case, for money had and received to the plaintiff's use. At the trial, it was proved, that "a bill of exchange for 40*l.* was drawn in the "name of one *Sutton*, upon the plaintiff, payable six weeks "after date to one *Ruding*;" that this bill was negotiated, and after passing through several hands, was at last *indorsed to the defendant*, for a valuable consideration. When the bill became

became due, the plaintiff, having notice of it (1), ſent to the defendant, and took it up: afterwards, "another bill was "drawn upon the plaintiff, in the name of the ſaid *Sutton*, "in favour of *Ruding*, for 40*l.* payable ſix weeks after "date." This bill was, in like manner, negotiated, and being *preſented for acceptance*, the plaintiff duly accepted it, by writing on it "Accepted, *John Price.*" This bill being *ſo accepted*, was afterwards indorſed to the defendant, for a valuable conſideration, and left at his bankers for payment, *and was paid by the plaintiff, and taken up* when due: both theſe bills were forged by one *Lee*, who was afterwards hanged for the forgery: the defendant acted innocently, and *bonâ fide*, without the leaſt privity or ſuſpicion of the ſaid forgeries, or of either of them, and paid the whole value of thoſe bills. —The jury found a verdict for the plaintiff, ſubject to the opinion of the Court, upon this queſtion, viz. WHETHER the plaintiff, under the circumſtances of this caſe, can recover back from the defendant the money he paid on the ſaid bills, or either of them? —Lord MANSFIELD, This is an action for money had and received to the plaintiff's uſe; in which action, the plaintiff cannot recover the money, unleſs it be againſt conſcience, in the defendant, to retain it: and great liberality is always allowed in this ſort of action. But it never can be thought unconſcientious in the defendant to retain this money, when he has once received it upon a bill of exchange, indorſed to him for a fair and valuable conſideration, which he had *bonâ fide* paid without the leaſt privity or ſuſpicion of forgery: here was no fraud nor wrong: nobody knows the hand-writing of the drawer, but the plaintiff. It was incumbent upon the plaintiff to be ſatisfied "that the bill, drawn upon him, was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to enquire into it. The plaintiff made no objection to the bills, at the time of paying them; therefore, whatever neglect there was, was on his ſide; but if there was no neglect in the plaintiff, yet there is no reaſon to throw off the loſs from one innocent man upon another innocent man.—PER CUR. Poſtea to the defendant.

A defendant may ſet up an illegal conſideration againſt an action on a note of hand.—In an action on a note of hand, on the trial, the defendant gave in evidence, that the note was obtained upon a ſmuggling conſideration; on which, the jury found a verdict for him. On a motion for a new trial, a rule to ſhew cauſe was granted; and the queſtion being afterwards compromiſed between the parties, Lord MANSFIELD took it up again *mero motu*; and declared, that it was the clear opinion of the whole Court, that on Guichard *v.* Roberts, Mic. Ter. 4 Geo. 3. B.R. 1 *Black.* 445.

(1) This bill had not been accepted.

this action an illegal conſideration might clearly be ſet up as a defence; and they did not ſee why it might not be done on an action of debt on bond; for every creditor ought, in juſtice, to prove the conſideration on which his contract is founded; and though the law allows bonds and notes to be *primâ facie*, evidence of a good conſideration, without proving it on the part of the plaintiff; yet it ought not to preclude the defendant from ſhewing, that the conſideration is, in fact, a bad one.

Brown v. Turner, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 630.

So, in an action, brought by the indorſee of a bill of exchange againſt the acceptor. On the trial, the facts appeared to be theſe: "The defendant employed one *Pritchard*, a broker, to tranſact ſome buſineſs for him in ſtock-jobbing in the ſtock called the omnium, who paid the differences for him, and then drew the bill in queſtion, on the defendant, for the amount of thoſe differences, which the defendant accepted; afterwards, and after the bill became due, *Pritchard* indorſed the bill to the plaintiff for a prior debt. Two queſtions were made, 1ſt, Whether omnium was one of the "public ſtocks or ſecurities within the ſtat. 7 *Geo.* 2. c. 8. (1) the ſcrip receipts not being then in the market, though the loan had been voted in the Houſe of Commons? 2dly, Whether the illegality of the original tranſaction vitiated this bill, the plaintiff having taken it after it became due, and conſequently not being entitled to recover on it if *Pritchard* could not? Lord *Kenyon* being of opinion againſt the plaintiff, on both the points, a verdict was taken for the defendant. And upon a motion for a new trial, THE COURT were clearly of opinion, on the conſtruction of the act of parliament, and on the authority of *Steers* v. *Laſhley* (2), that the plaintiff was not entitled to recover.—Rule refuſed.

Shaw v. Everett, Hil. Ter. 38 Geo. 3. C.B. 1 *Pul. et Boſan.* 222.

But to aſſumpſit on a bill of exchange, the Court will not allow a defendant to plead the general iſſue, and that the bill was given on a ſtock-jobbing tranſaction, contrary to 7 *Geo.* 2. c. 8. for any thing which goes to impeach the conſideration of the note, may be given under the general iſſue.

Jordaine v. Laſhbrooke *et al.* Ea. Ter. 28 Geo. 3. B.R. 7 *Ter. Rep.* 601.

And in an action, by an indorſee of a bill of exchange againſt the acceptor, the latter may call the payee as a witneſs, to prove that the bill was void in its creation.—This was an action againſt the defendants, as acceptors of the following bill of exchange: "Hamburgh, 30th of December, 1796, for 100*l.* At three uſances, pay this, my firſt bill of

(1) By this act, all contracts, upon which any premium ſhall have been given or paid, for liberty to put upon, or to deliver, receive, accept, or refuſe *any ſtock or joint ſtock, or other public ſecurities whatever*; and alſo, all wagers and contracts, in the nature of wagers, relating to the price or value of ſtocks or ſecurities, ſhall be null and void, &c.

(2) *Ante*, vol. i. p. 278.

exchange,

exchange, to the order of Meſſrs. *J. Thynne* and Co. 100*l.* ſterling, value in account, and place it to account of *G. W.* as adviſed by *David Hinr Meijer.* To Meſſrs. *T. Laſh-brooke* and ſon, London;" which was accepted by the defendants, and indorſed by *Thynne* and Co. The declaration alſo contained the common money counts. At the trial, *Thynne* was called by the defendants to prove, that the bill, though dated at Hamburgh, was, in fact, drawn in London, in which caſe it could not be received in evidence, it not being ſtamped. On the part of the plaintiff, it was objected, that it was not competent to the defendants, who had accepted the bill, to produce any evidence to ſhew that the bill was void in its creation; and if it were, that *Thynne*, the payee and indorſer, was not a competent witneſs to prove that fact. Lord *Kenyon* overruled the objection. The jury found, that the bill was drawn in London, and at firſt gave a verdict for the defendants; but by Lord *Kenyon*'s advice, they afterwards found a verdict for the plaintiff, ſubject to the opinion of this Court, on the above point; and the plaintiff took a verdict on the money counts only. Afterwards, a rule was obtained, calling on the defendants to ſhew cauſe why there ſhould not be a new trial, on the ground, that the evidence given, on the part of the defendants, was inadmiſſible. This rule was moved for with a view of enabling the plaintiff to recover on the bill: and at the ſame time, there was a croſs-motion, to enter a nonſuit, on the ground, that if the evidence, given by the defendants, were properly received, the plaintiff was not entitled to recover, inaſmuch as there were no evidence whatever, on the part of the plaintiff, but the bill of exchange. Both rules came on together, and were argued at length, and with great ability. Lord KENYON, Ch. J. The queſtion for our conſideration is, Whether it was proved, by competent evidence, that the bill, which profeſſed to be a foreign bill, and to have been drawn at Hamburgh, was really drawn in England? I have always underſtood the rule to be, that where a witneſs is infamous, and his record of conviction is produced, or where he is intereſted in the event of the cauſe, he cannot be received: but to carry the rule beyond that, would be extending it farther than policy, morality, or the intereſt of the public require. The rule contended for, by the plaintiff, is this, that "however infamouſly you (the defendant) have been uſed, whatever fraud may have been committed on you, whatever may be the rights of other perſons, if I (the plaintiff), the party to the fraud, can get on the inſtrument, the name of the perſon who may be the only witneſs to the tranſaction, I will ſtand intrenched within the forms of law, and impoſe ſilence on that only witneſs, though he be a perſon of unimpeachable character, and not intereſted in the cauſe." But

I cannot conceive on what ground such a propoſition can be eſtabliſhed. It is contradicted by every hour's experience; it would tend to ſhew, that a party to an inſtrument ſhall not be permitted to conteſt the validity of it in a court of law, not only by his own evidence, but by any evidence whatever. But, in actions brought on bills of exchange and notes of hand, it is permitted to the defendant to ſhew, that the bill or note was given on an uſurious or a gaming conſideration; that is proved by every day's experience. Then the general propoſition is not true. This is one of the moſt important queſtions that can be diſcuſſed; on the rules of evidence depend thoſe facts, which are introduced in every caſe, and therefore, it is of the utmoſt importance to preſerve thoſe rules. It has been argued, that the defendant is eſtopped in this caſe: but eſtoppels are odious, and ought not to be extended farther than the law has already carried them; the word "eſtoppel" does not apply to ſuch a caſe as the preſent. When the drawee accepts a bill, he admits, that the bill was ſigned by the perſon by whom it profeſſes to have been made; but he does not thereby admit, that the holder of the bill is in a condition to enforce payment of it. The caſe of inſtrumentary witneſſes cannot, in my opinion, be diſtinguiſhed from the preſent; and if not, there is abundant authority in ſupport of my opinion. Sir *J. Jekyll* permitted the ſubſcribing witneſſes to a will to give evidence to impeach the will, and the ſame thing was done in *Lowe* v. *Jolliffe* (1). It was then contended, by the plaintiff, in this caſe, that policy required that the evidence, offered by the defendant, ſhould be excluded: but it appears to me, that there is at leaſt as much policy in admitting it; for the conſequence of admitting ſuch evidence may be only to diſappoint a remedy in a civil action, while the conſequence of excluding it will be to encourage fraud, and to authoriſe the perſon who has committed it, to rely on his own fraud in a court of juſtice. Therefore I retain the opinion expreſſed at *niſi prius*, that it was competent to the defendant to give the evidence offered by him; and there being no other evidence but the bill, on the part of the plaintiff, I think he cannot recover in this action. ASHHURST, J. differed in opinion from his lordſhip. In queſtions of this kind, which are of ſuch daily occurrence as the rules of evidence are, it is much to be wiſhed, that general rules ſhould be laid down, which would be a polar ſtar to ſteer by, and would be applicable in their principle to all caſes: for if each caſe is to depend merely on the ſuppoſable bias that the exiſting circumſtances, under diſcuſſion, might be likely to produce upon the mind of the witneſs adduced, it is ſo vague and fanciful a criterion as can

(1) 1 *Bl. Rep.* 365.

never

never be a guide in other caſes that may happen, and has occaſioned the numberleſs contrarieties of determination that appear in our books. It ſeems to me, that there is no ſubject in which ſuch general principles ſeems to be more wanted than in what concerns the paper currency of this kingdom. The great ſource of the flouriſhing ſtate of this kingdom is its trade and commerce; and paper currency, guarded by proper regulations and reſtrictions, is the life of commerce: and I cannot but think, that it might be very detrimental to the commerce of this kingdom, and to paper credit, if men, after they have put their names upon a bill of exchange, and by that means, as far as in them lay, given it a credit and a currency in the world, ſhould be permitted to annul their own act, to practiſe a fraud upon the world, and to give the lie to what they have atteſted, and thereby overturn their own ſecurity. Theſe inſtruments are, in their nature, meant for public circulation, and to paſs from hand to hand; and every man who puts his name upon them, pledges his faith to the public that all the circumſtances appearing on the face of them are true. And if any rule or principle has been laid down by a court of competent juriſdiction, that may give a greater ſecurity to, and confidence in this ſpecies of ſecurities, I ſhall be ſorry to ſhake ſuch authority. The authority that I allude to, is the caſe of *Walton* v. *Shelley*, 1 Ter. Rep. 296 (1). The general principle of the determination was, that no perſon is a competent witneſs to impeach a ſecurity which he himſelf has given, or given a ſanction to. The maxim of the civil law, upon which Lord *Mansfield*, in part, grounded his opinion, viz. *quod nemo allegans ſuam turpitudinem ſit audiendus*, ſeems to carry great weight in it in all caſes: but in regard to theſe inſtruments, which are meant for public circulation, and which are taken entirely upon the credit of the names that appear upon them, it ſeems more peculiarly unfit that they ſhould be admitted to impeach their own ſecurities, and appear as witneſſes againſt the man who took the inſtrument upon the faith of their atteſtation. But it has been argued, that it would alſo be deſtructive to the public revenue if ſuch witneſſes were not to be allowed to ſhew a fraud committed upon it, and that it would hold out a temptation to ſuch frauds. It would certainly be matter of regret, if ſuch a conſequence were to enſue: but it is to be remembered, that at the time when the above-mentioned caſe was decided, and which determined what the law then was, this ſtamp duty was not impoſed; and the ſubſequent act, impoſing a ſtamp duty on bills of exchange, could never have been intended to operate as a re-

(1) Lord *Kenyon* ſeemed to deny the extent of the authority of this caſe. See that caſe under the title Evidence.

peal

peal of any general law of evidence before eſtabliſhed, and therefore cannot fairly be brought into the diſcuſſion. But if it were neceſſary to ſay any thing upon that topic, it ſeems to me not to follow as a neceſſary conſequence that, becauſe a man ſhall not be permitted to break his faith with the public, and deſtroy that inſtrument which he had pledged his name to ſupport, he ſhall not, therefore, be a competent witneſs for the crown on an indictment for a conſpiracy to defraud the public revenue, or on any other remedy that the crown might take for the recovery of the duty. This is no breach of public faith, and the party might be fully competent to prove the fact, becauſe ſuch evidence would be given *diverſo intuitu*; as in an action for an aſſault, the party cannot be a witneſs for himſelf, but he may be a witneſs on an indictment for the ſame aſſault which is at the ſuit of the crown. This ſeems to obviate the argument founded on the ſuppoſed detriment which might ariſe to the public revenue from admitting the objection to the competency of the witneſs in this caſe. On the whole, I am of opinion, that the witneſs was not competent to be received. GROSE, J. (agreed with Lord *Kenyon*), The firſt queſtion ariſes on the ſtatute 31 *Geo.* 3. c. 25. ſ. 2. and 19. *Sect.* 2. enacts, "That "for every piece of paper, upon which *any* bill of exchange "ſhall be written, where the ſum payable thereby ſhall "amount to 40*s.* there ſhall be charged a ſtamp duty of 3*d.*; "where it ſhall exceed 30*l.*—6*d.*; and if it exceed 100*l.*— "1*s.* 6*d.*" *Sect.* 19. ſays, that "No bill of exchange, liable "to the duties by this act impoſed, ſhall be pleaded or given "in evidence in any court, or admitted in any court to be "good, uſeful, or available in law or equity, unleſs the paper "on which it is written, ſhall be ſtamped with a lawful "ſtamp." In this caſe, a bill of exchange for more than 40*s.* was offered in evidence, which, under this clauſe, ought to have been ſtamped, but which had no ſtamp. The objection was made; to which it is anſwered, that a bill of exchange, in the ſtatute, means a bill of exchange drawn in England, and that this imports to be drawn at Hamburgh, and, therefore, need not be ſtamped. I do not know that this reaſoning is quite correct; but for my preſent purpoſe it is not neceſſary to diſpute it. I mean, by this, that ſome argument may be neceſſary to ſhew, that the mere writing Hamburgh, or any other foreign place on a bill of exchange, is even *primâ facie* evidence upon this ſtatute, to ſhew that it was drawn there. I will ſuppoſe, however, that it was: at the ſame time, it will be admitted, that, at moſt, it is but *primâ facie* evidence; for if it be concluſive, there is an end of the ſtatute and its proviſion, as then, every bill of exchange and promiſſory-note would be dated from ſome foreign place, and, upon that ground, be exempt from having a

ſtamp,

ſtamp. If it be not concluſive evidence, the defendant avers and offers to prove, that it was drawn in England, and not at Hamburgh. The plaintiff objects, that it is not competent for the defendant to aver or prove this fact, for that by this acceptance of the bill, he admits all that is contained on the face of it to be true, *i. e.* that it was drawn at Hamburgh, by the perſon whoſe name appears as drawer, of which, the acceptor had notice, payable to the payee; and, therefore, that it need not be ſtamped. If that be ſo, the clauſes in the ſtamp act become nugatory; for if the defendant, becauſe he is acceptor, may not be heard to ſay this, neither can the drawer, nor the indorſers; neither can the drawer or indorſer of a promiſſory-note; and ſo ſuch a determination would be, to a certain degree, a repeal of the ſtatute. But that can never be law: on the contrary, it ſeems to me, that when the legiſlature enacts that every bill of exchange ſhall be ſtamped, and that no bill of exchange ſhall be pleaded or given in evidence that is not ſtamped, it neceſſarily authoriſes the parties concerned, and calls upon courts of juſtice, where it is offered in evidence, to inquire whether it be ſuch a bill as ought to be ſtamped, and to hear evidence, by legal competent witneſſes, to prove that it ought, let the objection be made by whatever perſon it may be, be his name upon the bill or not. The very purpoſe of the clauſe is to make it the intereſt of every perſon concerned in the negociation of the bill to object and to compel the Court to hear and inquire into the ground and validity of the objection; otherwiſe it would have been ſufficient to have inflicted a penalty on the parties to the fraud on the revenue, as is done in the 17th ſection. Therefore, it ſeems to me, that this is a good defence in the mouth of the defendant; and that the Court, if called upon, are bound to inquire into the fact, whether it were, in the words of the ſtatute, "written upon ſtamped paper?"—If they be, the next queſtion is, 2dly, *Can a man, whoſe name is on the bill, be a witneſs for that purpoſe?* There is no objection to his competence, on the ground of intereſt or other diſability, ſuch as conviction of any infamous crime, &c. The ſingle objection made is, that he is a payee and indorſer. If, upon this ground alone, he is determined to be incompetent, we ſhall almoſt as effectually repeal the ſtatute as if we had ſaid, that the objection ſhall not be made by this defendant; inaſmuch as the perſons whoſe names are upon a bill will, in many, nay in moſt caſes (and, if once determined that they are inadmiſſible witneſſes, probably in all), when a fraud is intended on the revenue, be the only perſons let into the ſecret, and enabled to give evidence of it. Before the caſe of *Walton* v. *Shelley*, I never read of this ground of incompetence; the ground is, that a man ſhall not diſcloſe any fact that may invalidate an inſtrument which he has

ſigned.

ſigned. And why may he not diſcloſe a fact which, if true, it is his duty to the public to diſcloſe? Becauſe, it is ſaid, he has given currency to the bill, by putting his name upon it, and he ſhall not be permitted to impeach his own title. If he has ſo done, he has done a very illegal and improper act, and committed a fraud upon the public: if, by his aſſiſtance, the law has been violated, and the revenue defrauded, he owes to the public, by way of retribution, a diſcloſure of the circumſtances and the parties, that the ſcheme to rob the revenue may be fruſtrated, by preventing the parties to it recovering that upon the bill which it was intended, by the legiſlature, they ſhould not recover, as a puniſhment for violating the law, and as a ſecurity for carrying the act of parliament into execution. But it is ſaid, he ſhall not impeach his own title. If that were true, in the common caſes of property, I ſhould ſay, that upon this act of parliament, this caſe muſt be a neceſſary exception from the rule: but the caſe of *Title* v. *Grevett*, in 2 Lord *Ray.* 1008. is, in point to ſhew, that a man may be a witneſs to impeach his own title; for it was there ruled, that a man who conveys lands, may be a witneſs to prove that he had no title, becauſe that is ſwearing againſt himſelf; but he is not compellable to give ſuch evidence. But it is ſaid, *homo allegans turpitudinem ſuam non eſt audiendus.* This, as a maxim applied to parties in a cauſe, may, in ſome caſes, be true; but there, if both are *participes criminis*, the rule applies *potior eſt conditio defendentis.* A man ſhall not ſuſtain an action upon a ground which proves him guilty of a breach of the law. So a man ſhall not recover money due upon an illegal conſideration, ſuch as uſury, gaming, ſmuggling, or the like. But this rule does not extend to ſhut the mouths of witneſſes guilty of criminal actions; if it did, witneſſes daily received in courts of juſtice, and whom the policy of the law invites to come forward, muſt be rejected; ſuch as accomplices and others concerned in illegal tranſactions. This claſs of men, as I ſaid before, the policy of the law invites to diſcloſe all they know, leaving their credit to the wiſdom and diſcretion of a jury. In the caſe of the king v. *Atwood* and *Robins*, who were indicted for a robbery at the ſummer aſſizes for Somerſetſhire, 1787, before *Buller*, J. the priſoners were convicted on the teſtimony of an accomplice, unconfirmed by any other witneſs, as to their identity; and the conviction was afterwards holden good by the judges. And this was not new law, nor founded upon a new principle; for in 1 *Hale*, 303, 304, and 305, there are different inſtances of convictions on the evidence of accomplices; one in 1672, of a conviction of *Hyde* and others, of a robbery on the highway, on the teſtimony of one who was a party in the robbery, but not indicted. The caſes, cited for the defendant, ſhew clearly

what

what the policy of the law is, and that a man's guilt in the tranſaction diſcloſed, if he be not rendered infamous by conviction, and, on that account, incompetent, is not an objection to his teſtimony. That ſuch evidence may affect paper currency is true; but that objection ought not to alter the rules of law. A man who takes a bill, muſt know from whom he takes it; and if this determination will make men more cautious and prudent, and thereby prevent their falling into ſnares of this ſort, it will be of uſe. In the preſent caſe, let the plaintiff reſort to his indorſer, to recover back the conſideration he gave for the bill. And if eventually ſome puniſhment ſhould fall on either of the perſons who were the firſt parties to the tranſaction, the object of the law will be attained; and men will take care how they receive an unſtamped bill, and inquire whence it came and where it was drawn. Upon theſe grounds, I think that the plaintiff is not entitled to recover. LAWRENCE, J. The caſe of *Walton* v. *Shelley* is, undoubtedly a caſe of great authority: but it was admitted, in the courſe of the argument, that no ſuch determination is to be found earlier than that caſe; therefore, it muſt depend on its being ſupported by the general principles and rules of law applicable to the admiſſibility of witneſſes. Now, I find no rule leſs comprehenſive than this, that *all perſons are admiſſible witneſſes, who have the uſe of their reaſon, and ſuch religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by intereſt.* What credit will be due to them, will depend on a great variety of circumſtances, and muſt be decided on by the jury; and I am not aware of any caſe, ſolemnly decided, except that of *Walton* v. *Shelley*, in which, a witneſs has been rejected as incompetent, but upon the ground of ſome exception, which may be claſſed under one or other of theſe heads. Under none of theſe claſſes does the witneſs, in this caſe, fall; and the conſtant practice of examining accomplices, and what has been done in other caſes alluded to (that of a witneſs to a forged will, who has obtained probate), ſhew, that the mere circumſtance of a man's repreſenting himſelf as having done things inconſiſtent with common honeſty, is not ſufficient to reject his teſtimony, however it may weaken and impeach it. Nor is there any diſtinction with reſpect to negotiable ſecurities, when the point, to be conſidered, is the *competency* of the witneſs; for, ſuppoſing what he has done, in putting ſuch inſtruments into circulation, to be ever ſo great a fraud, and ever ſo miſchievous, he ſtill is a witneſs unconvicted of any crime, and without intereſt, and not more devoid of principle than many who have been mentioned as being conſtantly admitted. Whether a defendant ſhall be allowed to ſet up ſuch a defence, is quite another conſideration than whether the

the witneſs be competent. If the matter may be proved by a witneſs, not a party to the bill, how can a defendant, not eſtopped to make ſuch defence, be deprived of the teſtimony of a witneſs, called to eſtabliſh a defence which the law allows, who is neither intereſted nor infamous? It certainly is of conſequence, to prevent men hanging out falſe colours; but this rule muſt be applied to the parties in the cauſe, or you may prejudice men who have not hung out ſuch colours. As to the ſecond point, there is a diſtinction between negotiable and other ſecurities. Where the queſtion ariſes between the immediate parties to any inſtrument, or thoſe who ſtand in their place, as is the caſe where the inſtrument is not negotiable, the rule is, that in *pari delicto potior eſt conditio poſſidentis*; and perſons are continually allowed *foam allegare turpitudinem*, as in caſes of ſimony, compounding felony, ſale of offices, &c.; and poſſibly, that maxim may, in our law, be confined to the caſes of plaintiffs making demands *ex turpi cauſâ*, and to ſuch caſes of defence in which innocent perſons may be prejudiced. In the caſe of negotiable ſecurities, the general rule, moſt undoubtedly, is, that the *bonâ fide* holder of a note or bill has nothing to do with the tranſaction between the original parties: but this rule has its exceptions; uſury, gaming, infancy, may all be ſet up. It cannot be denied, but that allowing this defence may have its miſchiefs and inconveniences, and tend much to weakening the credit of notes; but, on the other hand, if it be not allowed, the proviſions of a ſtatute, on which a conſiderable part of the revenue depends, would be entirely eluded; and it is better that a private miſchief ſhould happen to ſome individuals, than a public loſs. The defendant, in this caſe, has no merits; to him it muſt be the ſame thing, whether the bill was drawn in one place or another; and were it not on account of the public diſadvantages, it would (I think) be very queſtionable, whether the acceptor of a bill of exchange ſhould be allowed to ſay, that a bill, of which, by the acceptance, he has admitted that he was adviſed, was not drawn at the place where it purports to have been drawn. An acceptor is only prevented controverting the hand-writing of the drawer from the miſchievous conſequences of men giving credit by their acceptances, and then controverting that which muſt be ſuppoſed to be in their knowledge; and this applies to every fact which the acceptance admits. But, in this caſe, the queſtion is to be decided by conſidering which of two evils is to be ſubmitted to. Whether the indorſer or drawer can ſet up any defence to an action on this bill, I do not feel it neceſſary to ſay: but, I think, no great miſchief is to be apprehended from the poſſibility of dating bills abroad, when drawn here, in order to defraud; for if that purpoſe were clearly eſtabliſhed, I think the parties to ſuch a fraud would

would run a riſk which few men are hardy enough to venture on.—PER CUR. The rule for a new trial diſcharged. The rule to enter a nonſuit abſolute.

Bonds. *See Title* **Action** (*Debt*) *in Vol.* I.

Bribery.

An action for bribery will lie, though the party bribed does not vote according to the bribe.—This was an action on the ſtat. 2 *Geo.* 2. c. 24. for the prevention of bribery and corruption, in the election of members to ſerve in parliament; there were five counts in the declaration; the firſt for a corrupt GIFT; the ſecond for a corrupt LOAN; the jury found a general verdict for the plaintiff, and he entered it up on the firſt count: viz. for corrupting one *Moor*, by giving him 5*l.* 10*s.* to vote for Lord *Villiers* and Sir *Robert Burdett*. A new trial was moved for, on a ſuggeſtion, 1ſt, that the perſon bribed did not vote for the candidate in whoſe behalf the bribe was given: 2dly, that *Moor* gave a note for the money which he received, which, it was agreed, ſhould be deſtroyed, in caſe he voted as deſired; and a counter-note was given for that purpoſe; and that, therefore, this was a loan, and the verdict ought to have been entered on the ſecond count.—PER CUR. The firſt objection has been already ſolemnly determined: "*Buſh* and *Rawlins*, Tr. Ter. "29 *Geo.* 2. B. R. which was an action for corrupting one "*Harvey*, by giving him 21*l. to forbear giving his vote* for "Mr. *Morton:* it appeared that *he did vote* for Mr. *Morton*, "notwithſtanding the bribe: there was a verdict for the "plaintiff; and, afterwards, a motion for a new trial: the "point was twice argued; and the Court were of opinion "this was within the ſtatute, and cited *Phillips* and *Fowler*, "Ea. Ter. 7 *Geo.* 2. C. B." and undoubtedly the offence of the corrupter is complete; whether the party bribed ſhall afterwards perform his promiſe or break it; as if one bribes a juror, and he afterwards gives a right verdict, that will not exculpate the offender: as to the 2d objection, that the verdict is taken on a wrong count; the evidence does ſupport the firſt count, for this is a *gift*; the note, and all the reſt, is mere *evaſion*, *colour*, *diſguiſe*, and *device*, to evade the law: but, if it were not ſo, the verdict was given generally for the plaintiff. If, by miſtake, it has been entered upon a count not proved, inſtead of the count which was proved, that is no reaſon for a new trial; the blunder has not injured the defendant; the court ought rather to rectify the miſtake,

Sulſton v. Norton, Mic. Ter. 2 Geo. 3. B. R. 3 *Burr.* 1234. 1 *Black.* 317.

miſtake, by ordering the verdict to be entered upon the right count, agreeable to the evidence, and conſequently the true ground upon which the jury found for the plaintiff.—Rule diſcharged.

Rex v. Pitt, Rex v. Mead, Tr. Ter. 2 Geo. 3. B. R. 3 *Burr.* 1335. 1 *Black.* 380.

Bribery at parliamentary elections is ſtill puniſhable at the common law.—The defendants were convicted on *an information at common law*, for bribery, at the general election at Ilcheſter. *Pitt* being the bribing agent, and *Mead*, the voter, bribed, and being brought up this term for the judgment of the court, a doubt was ſtarted from the bench, what judgment the court could, or ought to give upon the preſent proſecution; it being within the time limited for a proſecution under the ſtatute, viz. the two years, eſtabliſhed by 2 *Geo.* 2. c. 24. "which "inflicts a penalty of 500*l.* to be recovered by any common "informer; and likewiſe enacts, that, after judgment had a- "gainſt the defendant; or his being ANY OTHERWISE LAWFULLY CONVICTED of bribery, &c. in elections, he ſhall "for ever be diſabled to vote in any election to parliament, "and alſo to hold any office or franchiſe in any city, borough, "town corporate, or cinque port;" whereupon the Court directed it to be argued at the bar, which it accordingly was. Afterwards LORD MANSFIELD delivered the reſolution of the Court: he premiſed, that wherever a practice, which is wrong or unreaſonable, has happened to have been introduced for want of a ſufficient advertence to the conſequence of it, the beſt way is to ſet it right immediately, as ſoon as the inconvenience is obſerved, if former caſes be not affected by the retroſpect. Bribery at elections for members of parliament, muſt undoubtedly have been a crime at common law; and, conſequently, puniſhable by indictment, or information: and the ſtat. 2 *Geo.* 2. c. 24. has introduced a very ſevere penalty, in order to inforce the laws then already in being; and becauſe they had not been ſufficient to prevent the evil. It is true, that ſome informations at common law have, ſince the commencement of this act, been applied for, and granted within the two years; but, it now appears, upon looking into the matter, that the granting ſuch informations at the ſuit of a proſecutor, ſubſequent to the making of this act of parliament, was a point never litigated or argued, or particularly conſidered: the caſe of *Spinage*, in the borough of Abingdon, Ea. Ter. 17 *Geo.* 2. B. R. very likely was apprehended to be a precedent for it; but that was bribery in the election of a mayor, an offence for which there was no extraordinary remedy provided by ſtatute. In ſuch informations as are carried on by private proſecutors, the coſts ſtand upon a very different foot from the coſts given to thoſe who ſue upon this ſtatute; this act gives the perſon who recovers the penalty full coſts of ſuit. This crime certainly ſtill remains a crime at common law; the legiſlature never meant

meant to take away the common law crime, but to add a penal action, and it is proper it ſhould remain ſo, to prevent a colluſion; that this offence, which is of deep malignity, may be proſecuted at the ſuit of the king, for the public benefit: the ſtatute remedy being only recoverable at the ſuit of a private informer; this appears by the words "*or being* "*any otherwiſe lawfully convicted thereof*;" and we are all of us clear, that it ſtill remains a crime at the common law; and the preſent conviction, upon an information granted by the court, is juſt the ſame as if the defendants had been convicted upon indictment: but this caſe has raiſed a great doubt in our minds upon the propriety of granting informations within the two years; and, as at preſent adviſed, we all think that, IN GENERAL, *The Court ought never to interpoſe by information.* After judgment for the penalty, they certainly would not interpoſe to grant a ſecond proſecution in an extraordinary way, by information: by parity of reaſon, it ought not to be granted while the perſon is liable to ſuch judgment: if there is evidence to convict, there is evidence to ſupport the action of a common informer: there may poſſibly be particular caſes, founded on particular reaſons, where it may be right to grant informations before the time limited, for commencing the proſecution, is expired; but The Court, for the future, will exert their diſcretion only upon very particular circumſtances, and when the caſe is well conſidered. THE COURT, in this caſe, conſidering that the defendants were ſtill liable to the puniſhments inflicted by the act, ordered the defendant *Pitt* to be impriſoned ſix months, and the defendant *Mead* three months.

In this caſe, the defendant having been convicted of bribery at an election for members to parliament, The Court, at the inſtance of the defendant (no oppoſition being made on the behalf of the proſecution), adjourned the paſſing of ſentence from Michaelmas Term until the firſt day of Eaſter Term following, becauſe the two years for ſuing under the ſtatute would expire in the intermediate month of March; and they took the defendant's own recognizance [only in 100*l.* for his appearance]. The defendant appearing in Eaſter Term, The Court committed him; and (the time for bringing the penal action being elapſed) they ſentenced him to pay a fine of 200*l.* and be impriſoned for two months, and until the fine be paid.

Rex *v.* Heydon, Mic. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1359. and Ea. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1389.

In an action on the ſtatute, it is not neceſſary to ſtate, and prove, all the parties for whom the bribe was given; nor that thoſe parties were candidates; nor the voter's right of voting.—This was an action, on the ſtatute of bribery, for corrupting three voters at the Ilcheſter election: verdict for the plaintiff, with 1,500*l.* damages, ſubject to the report of

Coombe q. t. *v.* Pitt, Mic. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1586. 1 *Black.* 523.

Wilmot, J. who tried the cauſe. It was now moved, "that the verdict might be entered up for the defendant," reſerving liberty to move either for a new trial, or in arreſt of judgment. The defendant's counſel relied on three objections: 1ſt, that the plaintiff had given no evidence to ſhew that the perſons bribed, or attempted to be bribed, were voters (*i. e.* had a right to vote at the time of the offence being committed); 2dly, that it did not appear by any evidence given "that Lord *Egmont* (who was charged to be a candidate, and for whom theſe perſons were to give their votes) was then declared a candidate; 3dly, that the charge was for bribing, or attempting to bribe, them to vote for Mr. *Lockyer*, and the Earl of *Egmont*, by name, whereas the evidence went no farther than to prove that the bribe was given, or offered, to induce them to vote for Mr. *Lockyer* and his friend (generally, and without naming either Lord *Egmont* or any other friend in particular), ſo that there was variance between the charge in the declaration and the evidence brought in proof of it; and the evidence was not ſufficient to ſupport the charge.—LORD MANSFIELD, In penal actions the material fact muſt be charged; and, in fact, muſt be proved in ſuch a manner, that all thoſe conſequences will follow a verdict, which ought to attend it: but aggravations, and all circumſtances that do not vary the offence, are out of the caſe, as to the neceſſity of proving them. A man who has given money to another for his vote, ſhall not be admitted to ſay, that ſuch other perſon had no right to vote; here, however, it appears, that this perſon had a right to vote, and did vote: as to the ſecond objection, *candidate* is a vague term; no certain idea is fixed, by law, to it: but *Lockyer* was certainly a candidate; and this was a bribe to induce *White* to vote for him and his friend: as to the third objection, the bribing to vote for one, or both, or either, of theſe perſons, is criminal, within the act; and, if proved, is ſufficient, and here it was proved that the bribe was given to vote for *Lockyer*. WILMOT, J. As to the firſt objection, the giving *White* the bribe for his vote, admits his having a right to vote, and it was proved that he did poll; as to the two other objections, there is no real variance between the *material* and *ſubſtantial* charge and the evidence: the material and ſubſtantial charge is, bribing this man "to vote for *Lockyer*, and another, at the election:" the material offence is, bribing to give a vote for *Lockyer:* and it is pointed out ſo certainly, that it might be pleaded in bar to any other action brought for the offence of bribing at this election. YATES, J. A right to vote is admitted by bribing him to give his vote, and as he did actually vote, it is a preſumption of his having a right to vote: but *it is totally immaterial* "*whether he has a*

right

right to vote or not," becauſe the act of parliament 2 *Geo.* 2. c. 24. ſ. 7. ſays, " that if any perſon who hath, *or claimeth* " *to have,* any right to vote, &c. ſhall take, &c. or if any " perſon, &c. ſhall, by, &c. corrupt or procure, &c." and this man certainly *claimed* a right to vote, and did vote: as to the 2d objection, ſuch a traverſe as has been mentioned " that the defendant did not give, or offer, the bribe, while theſe perſons were candidates," would have been bad, becauſe it would not apply to the material offence: as to the 3d objection: *id certum eſt quod certum reddi poteſt:* The Earl of *Egmont* was known, at the time of election, to be the other candidate; the offence deſcribed by the ſtatute is, " corrupting, or procuring, any perſon or perſons, to give his or " their vote or votes, *in any election of any member or members* " to ſerve in parliament:" and the crime and the penalty are the ſame, whether the bribe be given *to vote for one, or to vote for both:* this is not ſo tied down by the particular deſcription that a recovery in this action could not be pleaded, in bar to another action, for bribing at this election: for it might be ſo pleaded in bar: and the fact might be identified to be the ſame by proper averments.—PER CUR. Rule diſcharged, and verdict for plaintiff to ſtand.

So in this caſe, which was an action upon the ſtatute againſt bribery; there being a verdict for the plaintiff, ſubject to the opinion of the Court; the objection taken by the defendant was, that the averment, or allegation, in the declaration, " that the perſon corrupted had a right to vote," was material and ſubſtantial, and ought to be proved.—PER CUR. (after argument), We are of opinion, that it is not neceſſary in this caſe to allege in the declaration, or to prove, that the parties bribed had a right to vote; that the giving money to a man for his vote, and the ſtanding by the preſiding officer at the election and giving his vote, which is received and not objected to, or controverted, is concluſive evidence againſt the defendant; and that, as againſt him, it is the moſt deciſive and beſt evidence that can be: the caſe of *Coombe* v. *Pitt,* governs this caſe: as to the caſe mentioned, of criminal converſation, to be ſure, if a defendant ſay in jeſt, or in looſe rambling talk, that he had lain with the plaintiff's wife, that would not be ſufficient alone to convict him in that action; but if it were proved, that the defendant had ſeriouſly or ſolemnly recognized, that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving the marriage. We think that the proof that theſe two perſons voted at the election, and their votes not then diſputed, or controverted, is evidence of their having a right to vote, proper to be left to a jury; although it be not concluſive evidence of their right to vote.—Judgment for the plaintiff.

Rigg v. Curgenevn, Hil. Ter. 9 Geo 3. C. B. 2 *Wils.* 395.

Dickſon v. Fiſher, Mic. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2267. 1 *Black.* 664.

In an action for bribery at the election for Colcheſter, there was a verdict for the plaintiff on this ſpecial caſe.—The precept had been directed to *the Mayor and Commonalty of Colcheſter*; but the words [*and Commonalty*] were ſtruck through with a pen, and the plaintiff gave it (that is, the precept) in evidence, diſ-annexed, and ſeparate from the writ and indenture of return; though it was originally annexed to, and returned with, the writ and indenture to the ſheriff, but not filed with the ſame in the Crown-office; the defendant offered, but was not permitted, to give parol evidence to prove that the words [and Commonalty] were in the precept, and not obliterated when the ſame was delivered to the Mayor, and returned by him. The queſtions ſtated for the opinion of the Court were, FIRST, Whether the inſtrument above ſtated, and given in evidence, proved the declaration? viz. that the precept iſſued, directed to the Mayor of Colcheſter: SECONDLY, Whether the above parol evidence ought to have been admitted for the defendant?—PER CUR. Theſe precepts ought to be directed to the returning officer; the plaintiff ſearches the office, and finds it, with this alteration, or correction: theſe words were put in by miſtake; they are, therefore, ſtruck out: they would be ſurpluſage if they ſtood there: it is the ſame as if they had never been in: being found in the proper office thus obliterated, it ſhall be intended to have been always right, and therefore proved the declaration; as to the *ſecond point*, they held that parol evidence ought not to be admitted to vitiate the record, and prove it to have been wrong; though it might have been admitted in order to prove it right.—*Poſtea* to the plaintiff.

Grey v. Smithyes *et al.* Hil. Ter. 9 Geo. 3. B. R. 4 *Burr.* 2273.

The time of delivering the precept to the returning officer, need not to be proved, in an action againſt a third perſon, for bribery at a parliamentary election.—This was an action on the ſtatute 7 and 8 *W.* 3. c. 25. "for the further regu-"lating elections of members to ſerve in parliament, and "for the preventing irregular proceedings of ſheriffs and "other officers, in the electing and returning ſuch members." The declaration ſtated the writ for the election, and the delivery of it to the ſheriff; and that the ſheriff, by virtue of it, made a precept to the Mayor of Colcheſter, who was the proper officer, and delivered it to him; and that the Mayor indorſed the day of his receipt thereof in his preſence; and forthwith cauſed public notice to be given of the time and place of election; and proceeded to election thereupon within four days after his receipt of the precept, &c. On the precept being produced, it appeared, that it was delivered to the Mayor, *in the preſence of two* SUBSCRIBING witneſſes, who atteſted ſuch delivery of it to him: but this proof was not offered to be made by either of themſelves, but by a third perſon. The objection to this evidence was "That the

"*proof*

" *proof offered*, of his delivery of the precept to the Mayor, " was *not by the evidence of* EITHER *of thoſe two ſubſcribing* " *witneſſes*, but by another perſon." And *upon this* objection the plaintiff was nonſuited. Afterwards a motion was made for a new trial, and cauſe ſhewn.—THE COURT took time to adviſe, and Lord MANSFIELD hinted, that the atteſtation of the witneſſes relates to the *time* of the precept's being delivered to the returning officer. But the *time* of ſuch delivery is not, in *this* caſe, neceſſary to be proved. AFTERWARDS, LORD MANSFIELD delivered the opinion of the Court. The latter part of Mr. Juſtice BATHURST's report was, " That " as neither of the perſons who atteſted the indorſement of " the day the Mayor received it was called, he thought " there ſhould be a nonſuit againſt the plaintiff." Upon this, the counſel acquieſced, and proceeded no farther. But that was only decency: by which they ought not to ſuffer. It is always decent for the counſel to acquieſce in the opinion of the judge at the trial: but it is not reaſonable that the parties ſhould be bound down by it, if that opinion be wrong. The queſtion was, " Whether the delivery of the " precept to the Mayor was neceſſary to be authenticated *by* " the witneſſes who had *ſubſcribed* their names in atteſtation " of ſuch delivery?" WE ALL think, that if it had been the caſe of the *Mayor himſelf*, ſuch an atteſtation of the *time* of the delivery of the precept to him, and of his indorſing it in the preſence of the perſon who delivered it to him, might be material: and the rule, " of the *inſtrumental* witneſſes " being the proper witneſſes to prove a fact which they have " atteſted (as being the beſt and propereſt)," may hold, as far as relates to the defence of the Mayor himſelf, in caſe of his being put to juſtify his own conduct. But the *preſent* caſe is *not* the caſe of the Mayor himſelf: it is on a *collateral* queſtion, and concerns a THIRD *perſon*, to whom the indorſement made by the Mayor is *immaterial*. The clauſe in the act of 7 and 8 *W.* 3. c. 25. (1) inflicts a *penalty* on the Mayor's *omitting* to indorſe the day of receiving the precept: and it is material to *him*. But this *third* perſon cannot know *when* it was indorſed, *how* it was indorſed, or *when* it was *atteſted*. Therefore *this difficulty* of proving theſe circumſtances *ought not* to be laid on a *third* perſon. A proof of the corporation's right to chooſe members; and of the precept's *iſſuing*, as declared upon; and of the delivery of it to the returning officer; and of the going to an election thereupon; might be enough for the plaintiff in this action, to make: and it does not appear that he would have been deficient in making all proper proof. But all *further* proof

(1) *Vid.* ſect. 6.

that he could have made, was *ſtopt* by this opinion of the judge holding the neceſſity of proving this delivery of the precept to the mayor, BY *the inſtrumental witneſſes who atteſted* the delivery, or by one of them. Therefore, WE are ALL of opinion, that the nonſuit was too early in the cauſe; and that there ought to be a new trial.

Sutton *v.* Biſhop, Hil. Ter. 9 Geo. 3. B. R. 4 *Burr.* 2283. 1 *Black. Reſt.* 665.

An offender on the ſtatute for bribery in parliamentary elections, diſcovering another ſo as to be convicted, and not having been before that time himſelf convicted, ſhall be indemnified and diſcharged of all penalties and diſabilities. —This was an action of debt, brought againſt Biſhop, for the 500*l.* penalty, upon the 7th clauſe of the ſtatute of 2 *Geo.* 2. c. 24. "for preventing bribery." To which action the defendant had pleaded "*nil debet*;" and a verdict had been obtained againſt him by the plaintiff, but not fairly and regularly, as the defendant alleged; who, therefore, moved to ſet it aſide. The caſe was in ſubſtance this: The defendant *Biſhop* received a bribe of five guineas from one *James Earle*. He determined to diſcover *Earle*, in order to indemnify himſelf, purſuant to the 7th clauſe of this ſtatute, whereby it is enacted, "that if any perſon offending againſt this act, within the "ſpace of twelve months next after ſuch election as aforeſaid, *diſcover* any other perſon or perſons offending againſt "this act, *ſo that* ſuch perſon or perſons ſo diſcovered be "thereupon *convicted*, ſuch perſon ſo diſcovering, and not "having been *before that time* convicted of any offence "againſt this act, ſhall be indemnified and diſcharged from "all penalties and diſabilities which he ſhall then have incurred by any offence againſt this act." Accordingly, the now defendant, *Biſhop*, made this diſcovery of *Earle*, upon the very day of the tranſaction, to Mr. *Gray*, an attorney, who was a commiſſioner to take affidavits; and at the ſame time made an affidavit of the fact, before Mr. *Gray*. This was done upon the 16th of March: and an action was thereupon brought by one *Bingley*, againſt this *James Earle*. The writ againſt *Earle*, at the ſuit of *Bingley*, was ſerved upon *Earle* within three days, viz. on the 19th of March. Two months after this, the preſent action was brought by the preſent plaintiff, *Sutton*, againſt *Biſhop*, the receiver of the bribe, who had two months before made the abovementioned diſcovery. The proceſs againſt *Biſhop*, at the ſuit of *Sutton*, was ſerved upon *Biſhop*, on the 18th of May. Both theſe cauſes (of *Bingley* v. *Earle*, and *Sutton* v. *Biſhop*,) were ſet down for trial on the ſame day; and were actually tried within half an hour of each other: but the cauſe of *Sutton* v. *Biſhop* ſtanding firſt, and as firſt entered upon the judge's paper of cauſes, he would not invert the order in which they ſtood upon his paper, by trying the other cauſe (of *Bingley* v. *Earle*) firſt, though that action was firſt commenced.

The

The conſequence was, that *Sutton* got a verdict againſt *Biſhop:* for *Biſhop* could not ſhew that he had made a diſcovery of another perſon ſo as to be thereupon *convicted*. *Bingley*, on the other hand, got a *verdict againſt Earle*, upon the *evidence* of *Biſhop*. But this verdict came too late to avail *Biſhop* in his *own* cauſe at the ſuit of *Sutton:* for a verdict had already been given againſt him; which, as his counſel inſiſted, could not have happened, if his cauſe had been tried firſt, as it ought to have been. On this matter two queſtions aroſe; 1ſt, Whether the defendant, *Biſhop*, was *intitled to avail himſelf* of the protection of the ſeventh clauſe of the act above recited? 2dly, in *what mode* he could avail himſelf of it, ſuppoſing him intitled to it?—THE COURT held, that, in this caſe, the defendant, *Biſhop*, was to be deemed the diſcoverer. His application to Mr. *Gray*, and making an affidavit of the fact, was the firſt and original diſcovery. The action was brought thereupon againſt *Earle*; and *Earle* was convicted upon the evidence of *Biſhop*. The other witneſſes were only ſupporters of his diſcovery. The clauſe in queſtion ſpeaks of the diſcoverer, in the ſingular number. The proſecutor could not be evidence for himſelf. If no one but the proſecutor could be conſidered as the diſcoverer, the clauſe would be ineffectual. They held, that the words "ſuch "perſons ſo diſcovering, and not having been before *that* "*time* convicted of any offence againſt this act," clearly relate to the *time of the original diſcovery:* and, therefore, *Biſhop*'s having been himſelf convicted before he gave evidence againſt *Earle* in the cauſe laſt tried, is no objection at all. The grammar of the ſentence requires this conſtruction. The original diſcovery is the true merit. If the offender ſubſtitutes another in his place, ſo as to be convicted, that intitles him to be himſelf indemnified and diſcharged. If another perſon inſtitutes a proſecution, grounded upon ſuch diſcovery, the diſcoverer is only a witneſs in that cauſe; he has no power over the conduct of it: but when a conviction of the perſon diſcovered is obtained, the end is then anſwered, and the diſcovery is then rendered complete and perfect. It was made a queſtion in the argument of this caſe, "What ſhall *amount* to a *conviction*, within the ſenſe of "this clauſe?" It was ſaid "that a *verdict alone* was *not* a "conviction." And they held, that in *civil* actions, a verdict is nothing without a judgment. This is a civil action; an action, of debt, for a penalty: "*nil debet*" is pleaded. The defendant is not convicted of the debt till judgment. Therefore they were of opinion, that it ought to be *completed by a judgment*. But they were alſo of opinion, that after it ſhould be ſo completed it would *relate back* to the time of the original diſcovery. And they thought that *Bingley* ought to be at liberty to enter up his judgment; in order to intitle

Biſhop to his indemnity, or, at leaſt, not to ſtrip him of it. They thought, alſo, that *Sutton* ſhould complete his judgment; but that his proceeding upon it ſhould be ſtayed. They thought, upon the whole, that *Biſhop* was *intitled to ſome relief:* but in *what mode* he ſhould receive it, was not eaſy to determine. The verdict obtained againſt him could not be ſet aſide for *irregularity*; becauſe it was *not* irregular. There was no pretence to *arreſt the judgment*; becauſe nothing appears upon *the face of the record* to juſtify it: and the Court ought not to arreſt judgments upon matters not appearing upon the face of the record; but are to judge upon the record itſelf, that their ſucceſſors may know the grounds of their judgment. An *audita querela*, it was agreed, would be a proper method, and the moſt unexceptionable one, and was the old legal remedy: but as it had been long diſuſed, and would be expenſive, they choſe to do it, if it might be ſo done, in a *ſummary* way, as being more eaſy and leſs expenſive. At length they were of opinion, that it might be done by a *ſpecial rule*, particularizing the circumſtances of the caſe, and upon their ſtaying the execution of *Sutton*'s judgment againſt *Biſhop*. This rule, they ſaid, would be a record of the Court: and the ſpecial reaſons of making it would appear in it, and be upon record. For the preſent, they diſcharged a rule at this time ſubſiſting, "for "ſtaying the *entering up* the judgments in the reſpective croſs "cauſes:" but they made a rule "that all *proceedings* upon "both theſe judgments ſhould be *ſtayed till further* order." And they propoſed to make, afterwards, a ſpecial rule to the effect that has been above mentioned.

Curgenven *v.* Cuming, Mic. Ter. 10 Geo. 3. B. R. 4 *Burr.* 2504.

But the bribery-act of 2 *Geo.* 2. c. 24. reſpecting parliamentary elections, does not make the plaintiff the diſcoverer. In an action of debt brought upon the ſtatute of 2 *Geo.* 2. c. 24. againſt bribery at elections: a verdict was found for the plaintiff, ſubject to the opinion of the Court, upon the following caſe: The defendant proved a copy of a judgment in the court of Common Pleas, of Hilary, 9 *Geo.* 3. between the ſaid *Penhallow Cuming*, plaintiff, and one *John Sibley*, defendant; by which judgment it appeared, that the ſaid *Cuming* had obtained a judgment againſt *Sibley*, for 100*l.* upon the ſaid ſtatute of 2 *Geo.* 2. c. 24. againſt bribery at elections. The queſtion was "Whether the ſaid defendant, "*Cuming*, is a diſcoverer indemnified under the ſaid act of "2 *Geo.* 2. ſo as to be diſcharged from the penalties and diſ-"abilities incurred by the offences mentioned in the declara-"tion in this cauſe?" Lord MANSFIELD obſerved, that the Court had not ſaid, nor would ſay, "That a plaintiff *can-*"*not* be the diſcoverer:" but the act of parliament does not *make* him ſo, or *conſider* him as the diſcoverer. Here is no evidence "that the plaintiff *was* the diſcoverer." And

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another perſon muſt have been the *witneſs:* for the plaintiff could not be the witneſs himſelf. It is not to be preſumed, *without* any evidence at all of it, "that the plaintiff in the "action was the diſcoverer." ASTON, J. owned he had ſome difficulty, whether this act of parliament ought not to receive the ſame conſtruction as the acts relating to coiners, horſe-ſtealers, &c. (In which opinion Lord MANSFIELD acquieſced; and added, that it meant to encourage offenders to diſcover each other.) Here, it is not ſtated, *who* was the firſt diſcoverer: therefore the caſe is not completely ſtated. Lord MANSFIELD ſaid, he had no notion that the act meant to conſider the plaintiff as *concluſively* the diſcoverer. It is impoſſible to give an opinion upon this queſtion, without conſidering him in that light: for the verdict is given for the plaintiff. ASTON, J. doubted whether it would not be the better method to move for a new trial. And YATES, J. ſaid, there was *no other* method. The producing the record does not prove "that the plaintiff is *concluſively* the diſco-"verer." This ſtands as if it had been pleaded and demurred to. We cannot give judgment for the defendant. But, here, the evidence was not carried on: it is only *primâ facie* evidence. THE COURT were of opinion, That there ought to be a *new trial.* The counſel agreed that it ſhould go down again to trial, without payment of coſts.

In an action of debt, to recover certain penalties againſt the defendant, upon the ſtat. 2 *Geo.* 2. c. 24. for corrupting and procuring certain perſons (voters) to give their votes in the election of members for the borough of Mitchell, in the county of Cornwall; the defendant pleaded *nil debet*; the cauſe was tried, and a verdict found for the plaintiff. It was afterwards moved, on the behalf of the defendant, that judgment upon the *poſtea* might be ſtayed, upon affidavits that the defendant did, within the ſpace of twelve months next after the ſaid election (by making an affidavit), diſcover one *Cary*, who had offended againſt the ſaid act, by receiving and taking money to give his vote at the ſaid election; who was convicted in an action at the ſuit of one *Luke* (as appears by the *poſtea* and judgment thereon now in court), upon the ſingle teſtimony of the now defendant, *Curgenven*, who made the diſcovery, and ſwore he ſaw the bribe given to, and received by, *Cary*, to give his vote at the ſaid election: on ſhewing cauſe againſt the rule, it was contended, that the Court ought not to interfere, to determine this matter upon a motion, but leave *Curgenven* to his remedy, if he had any, by an *audita querela*; and it was further inſiſted, that he ought to have pleaded the ſtatute, and the matter of his diſcharge, ſpecially, that the plaintiff might have replied to it. —PER CUR. We are all of opinion, that this is not a caſe

Pugh v. Curgenven, Mic. Ter. 10 Geo. 3. C. B. 3 *Wilſ.* 35.

wherein

wherein we ought to interpoſe at all, upon a motion. If the defendant has the law on his ſide, he may take his remedy in ſome other way, as he ſhall be adviſed.—Rule diſcharged.

Sibley *v.* Cuming, Mic. Ter. 4 *Burr.* 2464.

In an action of debt on the ſtatute of 2 *Geo.* 2. c. 24, for preventing bribery, the defendant pleaded *nil debet:* on the trial, a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe: The defendant proved a copy of a *judgment* in the court of Common Pleas, of Hil. Ter. 9 *Geo.* 3. between the ſaid *Penhallow Cuming*, eſq. plaintiff, and the ſaid *John Sibley*, defendant: by which it appears, "that the defendant was convicted for bribing "*Richard Beard* and *John Crews.*" He alſo proved a *capias ad reſpondendum*, iſſued in the ſame cauſe on the 20th of December, 1768, teſted the 28th of November, 1768. The ſaid *Richard Beard* gave evidence, That he was a witneſs for the plaintiff in the *ſaid cauſe*, Cuming *againſt* Sibley; and proved at the trial, "that *Sibley* gave him three guineas for his vote;" and further gave evidence, in *this* cauſe, "that "ſaid *Cuming*'s *ſervant* came to him in January laſt, and "deſired him to *come to his maſter's houſe:* that *before* the ſaid "time, he had made *no* diſcovery of the bribery: that "Mr. *Philips*, an attorney, *examined him* about it; and *he* "*made an affidavit of the ſaid bribery:* but he did not then *ſee* "Mr. *Cuming.*" *Nicholas Philips* gave evidence, "that he "was a commiſſioner for taking affidavits, both in the court "of Common Pleas and King's Bench; that in January "laſt, he received a letter from Mr. *Cuming*, deſiring him "to come to his houſe: and he went accordingly; that "Mr. *Cuming* then deſired him to take the *affidavits* of ſeve-"ral perſons, and (amongſt the reſt) of ſaid *Richard Beard* "and *John Crews*, with regard to the bribery-money diſtri-"buted by *Sibly* to the voters at Tregony, at the laſt election; "that he accordingly *took the ſaid affidavits*, for the *purpoſe*, "as he believes, of ſettling the declaration in the ſaid cauſe, "*Cuming* v. *Sibly.*" THE QUESTION was, "Whether "CUMING is a DISCOVERER, under the act of parliament; "ſo as to be *diſcharged* from the penalties and diſabilities "incurred by the offences mentioned in the declaration in "this cauſe?" And, on behalf of the plaintiff, it was objected: 1ſt, that this matter ought not to have been admitted to be given *in evidence:* it ought to have been *pleaded:* 2dly, that the defendant was *not* the diſcoverer.—LORD MANSFIELD, I give no opinion now, on the *firſt* point; but on the *ſecond:* it does not follow that the proſecutor muſt be the diſcoverer; he ſets up another perſon to bring the action. The act of parliament meant to turn the actors of bribery againſt each other. The man that *tells* it, is the diſcoverer: the plaintiff, in the action brought in the Common Pleas, by *Cuming* v. *Sibley*, was only the perſon

ſon who *adviſed* or perſuaded the other to diſcover. In the caſe of *Sutton* v. *Biſhop*, the *witneſs*, *Biſhop*, was the diſcoverer. So, here, *Beard* was the diſcoverer. But if it be conſidered as doubtful upon the evidence, who was the diſcoverer, the jury have found it againſt *Cuming*. YATES, J. As to the *firſt* point, gave no determinate opinion. Yet he inclined to think that this was not matter of ſubſtance, neceſſary to be ſpecially pleaded. It ſeemed to him rather matter of inducement. And where it is matter of inducement, it may be given in evidence, upon the general iſſue; though not where it is matter of ſubſtance. Now, this ſeemed, he ſaid, to be more of the nature of inducement. He thought, the defendant was no object of this law. He ſaid, a *proviſo* in the *ſame* act of parliament, and the matter provided in it, may be given in evidence, on the general iſſue. And he ſpecified the caſe of an action againſt a parſon for merchandizing, contrary to *Hen.* 1. c. 113. which has a proviſo for the neceſſaries to maintain his houſehold. Now here is a proviſo in this act of 2 *Geo.* 2. which, in effect, ſays, that a perſon who has been a diſcoverer ſhall not be an object of this law (1). The defendant has pleaded *nil debet*. The judgment will *relate back* (2) to the time of the diſcovery. The defendant maintains the iſſue, by ſhewing that he does not owe the money. I think, the diſcoverer is not an object of the act. As to the *ſecond point*; he held, that the defendant cannot, *here*, be conſidered as the *diſcoverer*. He has, indeed, ſhewn "that he was *not*; but that *Beard* was: for, "he could not have *known* what the fact was, *unleſs* Beard "*had diſcovered it.*" ASTON, J. If it had been a *diſtinct* act of parliament, it ought to have been pleaded: but here is a *ſubſtantive* clauſe (in nature indeed of a proviſo) for indemnity, in the *ſame* act of parliament. And if this had been pleaded, it would not have been ſufficient: for, it would not have appeared upon the plea, "that he was the diſcoverer." *Beard* was clearly the diſcoverer; and *he* was the perſon intitled to the exemption: therefore, the plea would not have been ſufficient; becauſe it would not have ſhewn that the defendant was thereby exempted. WILLES, J. who tried the cauſe, atteſted that the caſe meant to conſider the facts, in the ſame manner as if they had been ſpecially found. He gave no opinion upon the firſt point. As to the ſecond, he was clear in concurring with the reſt of the court. *Beard* was certainly the *firſt* diſcoverer; and ought to have the benefit of it. The defendant is not intitled to the benefit of the exemption. LORD MANSFIELD now ſaid (upon the firſt point) that he thought this matter *might* be given in evidence.—PER CUR. *Poſtea* to the plaintiff.

(1) Vide p. 470, *ſupra*.

(2) Vide p. 471, *ſupra*.

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Davy v. Baker, Mic. Ter. 20 Geo. 3. B. R. 4 *Burr.* 2471.

In an action upon the ſtatute of 2 *Geo.* 2. c. 24, for preventing bribery: the 7th ſection whereof enacts, That if any perſon ſhall aſk, receive, or take, any money or other reward, he ſhall forfeit 500*l.* and be diſabled to vote at any election. Upon *nil debet* being pleaded, a verdict was found for the plaintiff. And it was afterwards moved in arreſt of judgment, on an objection, that the charge was too looſe and general: it being only, "that the defendant did receive a *gift or* "reward;" without ſpecifying *what* he received or took, as a reward; whether *money*, or what *particular ſpecies* of reward. PER CURIAM, This declaration is bad: and being upon a criminal charge, it ought to have been laid with ſufficient certainty, ſo as to be pleadable in bar of another action. Criminal charges muſt be laid with certainty: and if they are not, exception may be taken, in arreſt of judgment, after a verdict. The being after a verdict makes no difference: it is not too late. Mr. Juſtice ASTON and Mr. Juſtice WILLES were ſilent.—Judgment arreſted.

Cuming v. Sibly, Mic. Ter. 30 Geo. 3. B. R. 4 *Burr.* 2489.

No damages are recoverable for detention of the debt, in an action on the bribery-act.—In error, upon a judgment in *C. B.* in an action of debt, upon the bribery-act, it was ſaid, that a verdict had been given for the plaintiff, for 1000*l. and* 1*s. damages*: beſides coſts. And the error objected was, "that the plaintiff is not intitled to *damages:* no damages for "detention of the debt can be given in a *popular* action (1)." Lord MANSFIELD, There are no *damages* to be given in theſe popular actions. This *ſtatute* gives coſts, indeed: but here, the damages and coſts are blended together. Where the plaintiff below brings a writ of error, we may not only reverſe what is wrong, but give judgment for what is right. Where the defendant below brings a writ of error, we only reverſe ſuch wrong part of the judgment as he complains of. YATES, J. The plaintiff has no right to the debt, till *after* conviction. Therefore, he can have no right to damages for the detention of it: and as the coſts and damages are incorporated, the judgment muſt be reverſed as to both damages and coſts.—Judgment reverſed both as to the damages and coſts, and affirmed as to the debt.

Pettie v. White, Hil. Ter. 20 Geo. 3. B. R. 3 *Wm. Rep.* 5.

The plaintiff, in an action for bribery, on the 2 *Geo.* 2. c. 24. is bound to proceed without *wilful delay*.—This was an action of debt, for bribery, in the year 1780, on the 2 *Geo.* 2. c. 24. The declaration was delivered in May, 1782, to which the general iſſue was pleaded, in trinity term, 1782; in which term, the plaintiff gave notice of trial for the next ſummer aſſizes: but the record was not carried down to trial till the ſummer aſſizes 1788, when it was tried before *Buller*, J. at Sarum, and a verdict given for the plaintiff for two penalties. A rule was obtained to ſhew cauſe, either why

(1) The caſe of *Frederick* v. *Lockyer*, in vol. i. p. 424.

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the verdict ſhould not be ſet aſide and a new trial granted, or why all further proceedings ſhould not be ſtayed. This motion was founded on the 11th ſection of the 2 *Geo.* 2. c. 24. which provides, "that no perſon ſhall be made liable "to any incapacity, diſability, forfeiture, or penalty, by that "act impoſed, unleſs proſecution be commenced within two "years after ſuch incapacity, &c. ſhall be incurred; *or, in "caſe of a proſecution, the ſame be carried on without wilful "delay.*" Lord KENYON, Ch. J. In ordinary caſes, a perſon who has had an opportunity of making a defence at the trial, which he neglects to do, is not intitled to a new trial in order to let him into that defence. Then it has been ſaid, that this is an application to the favour of the Court: but it is not; it is an application to the ſound diſcretion of the Court; which diſcretion muſt be guided by the fair conſtruction of the act of parliament, on which the motion is founded. If it were a matter of mere arbitrary favour, I ſhould have no great inclination to grant it to a man who has violated the laws of his country, by committing bribery in the manner in which the defendant has done. The queſtion ariſes on the eleventh ſection of the 2 *Geo.* 2. c. 24. which provides, that no perſon ſhall be liable to any incapacity, penalty, &c. unleſs proſecution be commenced within two years; *or in caſe of a proſecution, the ſame be carried on without wilful delay.* Now, the firſt part of this clauſe has received an explanation by the 9 *Geo.* 2. c. 38. as far as it goes: but, at the ſame time, that it explains part of that clauſe in favour of the party proſecuted, it does not deprive him of the advantage of that defence, which was introduced in the ſecond branch of that proviſo. Then, What are the facts of this caſe? It is ſtated, that the offence was committed in September, 1780; the cauſe commenced in May, 1782; and in Trinity term notice of trial was given for the then next ſummer aſſizes; yet, in point of fact, it was not then tried: and the next ſtep taken by the plaintiff, was not until *after a ſuſpenſion of ſix years*, during all which time, it was competent to the plaintiff to have brought the defendant to judgment. Now, this is *primâ facie* a wilful delay; at leaſt, till it is anſwered. But it has been ſaid, that if this objection had been made at the trial, the plaintiff might have rebutted it, by ſhewing how the delay aroſe: but he might equally have accounted for that delay now. Some anſwer ſhould have been diſcloſed by the plaintiff now, as that the defendant was abroad, which might have been a reaſon for ſuſpending the operation of the law till his return, from the riſk of the unneceſſary expence in caſe the defendant was not forthcoming, if judgment were obtained againſt him. But no explanation of that ſort has been attempted; and the fact remains uncontradicted, and totally unexplained. There

cannot

cannot be a ſtronger inſtance of wilful neglect than this. And, indeed, this ſeems to be a wiſe proviſion in the law; for it ought not to be permitted to parties to keep proſecutions in their power, to be moulded for particular purpoſes. If a man proſecute for the ſake of juſtice, it ſhould be done immediately. The public are intereſted in proſecutions of this kind; for, beyond the penalty incurred, diſabilities, of a public nature, attach on a defendant: he is diſabled from voting for members of parliament, and of holding any corporate office. A doubt has been ſuggeſted at the bar, as to the manner in which the defendant ſhall take advantage of this delay. I ſhould be deſirous, that my opinion ſhould not be concluſive on the parties, if there were any mode by which our judgment could be reviewed in a court of error: but I do not ſee how that can be effected (1). I am clear, that we ſhould not permit the plaintiff to proceed to judgment and execution; and unleſs ſome method can be pointed out, by which this queſtion can be put in a courſe of reviſion, by a ſuperior tribunal, I muſt reſt ſatisfied with ſaying, that, after conſidering the act of parliament, I am of opinion, that that branch of the rule, for ſtaying the proceedings, muſt be made abſolute. ASHHURST, J. concurred. BULLER, J. What is meant by wilful delay, in carrying on a ſuit in a court of law, neceſſarily depends on the practice of that court in which it is commenced. The legiſlature has thought fit to leave it to the diſcretion of the Court to judge, according to the practice of the court, whether there be any wilful delay or not. And I am of opinion, that if this objection had been made at the trial, it could not have been entered into there. Suppoſe this action had been tried by a judge of any other court, he could not have been ſuppoſed to be cognizant of the practice of this court, upon which this queſtion turns. But the matter now ſuggeſted is irrelevant to the iſſue; for, on the plea *nil debet*, no matter could be given in evidence which aroſe after it was pleaded: it is totally out of the iſſue; and, therefore, not the ſubject of inquiry at the trial. Then, there is no other way of taking advantage of the proviſo in this act of parliament, but by an application to the Court. Such an application might, indeed, have been made before; but I cannot ſay that it comes too late now.

(1) In Trin. term, 30 *Geo.* 3. it was moved, that the rule of court, made in this caſe, for ſtaying the proceedings, ſhould be entered on the record, in order that the plaintiff might bring a writ of error: but the Court ſaid, they had conſidered the queſtion at the time, and were then of opinion, that there was no way of putting the queſtion on the record. Lord *Kenyon* ſaid, there were other analogous caſes where error could not be brought, as on an amendment in caſe of a repleader, or on refuſal of a *mandamus*; *vid. Sutton* v. *Biſhop*, in p. 472, *ſupra*, where the Court ordered a ſpecial rule to be drawn up, and entered of record.

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In mere matters of practice, delay is an answer to any objection of irregularity: but it cannot extend to a case like the present, where the legislature has said, that if one party be guilty of a wilful delay, the other party shall not be punished; so that this application may be made any time before judgment. Then, the only question is, In what mode this shall be done? There is nothing in the act to enable the Court to give judgment for the defendant; and I doubt, therefore, whether we can do it: if we did, the costs must follow; but that we are not authorised to do by the act. This is not like the case put, of an action for usury: that is an action given to a common informer, and no debt arises till the process be sued out; so that, unless the writ be sued out within two years, no debt exists; and the defendant may take advantage of it on the plea of *nil debet*. But in *assumpsit*, where the debt exists, although six years have elapsed since the promise, the defendant must plead the statute of limitations, if he wish to take advantage of the plaintiff's delay. There is this distinction between those two cases: in the one, no debt arises unless the action be commenced within two years, and therefore it is evidence on the general issue; but, in the other, the defence cannot be taken advantage of unless it be pleaded. The case of a replevin bond, which has been mentioned, bears no analogy to the present. It has never been decided what "delay" means in that statute: nor is it necessary; for in replevin, both parties are actors, and either may carry on the proceedings; so that, as the defendant has the same remedy that the plaintiff has, the question cannot arise.—Grose, J. also concurred, and said (*inter alia*), Whoever looks at this act of parliament must see that the legislature has anxiously endeavoured to encourage speedy prosecutions; for which purpose, *wilful delay* is provided against. The legislature, by this, meant, that persons shall not pretend to prosecute, who did not intend to prosecute *with effect*. The terrors of prosecutions, on this act, hanging over the head of a party accused, pending a general election, may be extremely dangerous; and they may be converted to improper purposes; and the policy of the statute would be entirely defeated, if no advantage could be taken of delay. The statute does not mean *perverse delay*; but every delay which the plaintiff cannot account for to the satisfaction of the Court in which the action is commenced. If the Court see, that the action might have been prosecuted in a more speedy manner, and no reason is assigned for it, such a plaintiff is, undoubtedly, guilty of wilful delay. Such is the present case; and, I think, this must be taken to be wilful delay within the statute.—The plaintiff, having been guilty of that delay, has done that which is contrary to the statute, and for which the legislature has said he shall not recover. If he were to recover, these

disabilities

disabilities would attach on the defendant, which the act of parliament says, shall not under these circumstances. I consider it not as a matter of favour, but of justice and of law, that the plaintiff shall not recover: to prevent which, we may interpose, as was done in *Sutton* v. *Bishop*, by making a rule to stay further proceedings.—Therefore, that part of the rule for a new trial was discharged; and the other, for staying the proceedings, was made absolute, and without the defendant's paying the costs of the trial.

Bridges.

Rex v. the Inhabitants of the West Riding of Yorkshire, Ea. Ter. 10 Geo. 3. B R 5 *Burr.* 2594. 2 *Black.* 685.

If a bridge, built by a county, be of utility to it, the county ought to repair; but if built by a private person, and he has the benefit of it, he ought to repair.—This was an indictment for not repairing Glusburne-bridge. The defendants pleaded a plea of *non debent reparare*; because, they say, that there was a certain ancient public *foot*-bridge over Glusburne-Beck, and that the inhabitants of the township of Glusburne *took down* the said *foot*-bridge, and *in lieu and stead thereof*, and *in the place where* the said *foot*-bridge had been erected and stood, did *erect and set up* the said bridge, in the said *indictment* specified, for horses and carriages; and that the inhabitants of the *township of Glusburne*, from time immemorial, till the time of taking down the said *foot*-bridge, had repaired the same; and from the time of erecting the new bridge, had repaired and ought to repair the same: and they traverse the right of the inhabitants of the West Riding "to repair:" and upon that traverse issue was joined. On the trial of this cause, it appeared in evidence, that "There was an *ancient* FOOT-"*bridge* over Glusburne-Beck; and a *ford for horses*, and "*another for carriages*. That the *inhabitants* of Glusburne "had *always repaired* the said *foot*-bridge. In the year 1743, "the inhabitants of Glusburne, being desirous of having a "*bridge for* CARTS and CARRIAGES over the said stream, "did apply for assistance to the general quarter-sessions, "which ordered, 'The treasurer to advance the sum of 10*l.* "as a GRATUITY out of the county stock, *to enable the in-*"*habitants to build* a bridge over Glusburne-Ford." By a subsequent order of sessions, reciting, that the execution of the above order had been suspended; it was then ordered, that the *treasurer should pay the* 10*l.* provided that nothing therein should extend *to charge the inhabitants of the riding, in time to come*, with the *reparation* of the intended bridge. In pursuance of the said order, the sum of ten pounds was paid. The inhabitants of Glusburne *did build a bridge for carts, carriages, and horses*, and foot passengers; and *pulled down*

down the *ancient foot-bridge*, and *ſold the materials* thereof, and received the money for the ſame: which bridge, ſo built, was of *public utility*, and *uſed conſtantly afterwards by all perſons* paſſing that road, till the ſame was *taken away by a flood*. The *ancient* bridge ſtood *about ſixty yards below* the ſaid *new* bridge, in the ſame highway. The ſaid road was made a *turnpike* road in 1755; and about 1766, the ſum of ſix ſhillings was paid, for a *repair* done to the *new* bridge, *out of the tolls* ariſing from the roads: whereupon, the defendants were found guilty; ſubject to the opinion of this Court, on the following queſtion: "Whether the inhabitants of the Weſt-"Riding are *obliged to rebuild* the ſaid new bridge?" THE COURT were all clear, that the Riding was obliged to repair the new bridge. ASTON, J. obſerved, That this new bridge was not built in the ſame *place* where the foot-bridge ſtood; but at the diſtance of more than ſixty yards above it. The inhabitants of the *county* are of common right bound to repair all public bridges; becauſe they are for the *benefit of the county*. By *Magna Charta* (1), no town or freeman ſhall be deſtrained to *make* bridges, &c. except thoſe who were anciently and of right uſed to make them in the time of King *Henry* the ſecond (2). The inhabitants of Gluſburne were not bound to *build* this new bridge for carts and carriages; nor are they obliged to repair more than they were before bound to repair: and they never were bound to repair a bridge for carts, carriages, and horſes. What they were bound, by preſcription, to repair, was only a foot-bridge. They have built a quite different bridge, in a different place. This new bridge is for the common benefit and utility of the county: and the ſeſſions approved of it, and contributed towards it. The caſe in 1 *Ro. Abr.* 368. title "Bridges," *pl.* 2. about a mill erected for a perſon's own benefit, is a different caſe. That caſe is, that "If a man erects a mill for "his *own profit*, and makes a new cut for the water to come "to it, and makes a new bridge over it, and the ſubjects uſed "to go over this as over a common bridge; this bridge "ought to be repaired by him who has the mill, and *not* by "the county; becauſe he erected it for his *own benefit*."—There, the private emolument continued to the perſon who erected it: and it was not reaſonable for him to make the county contribute to it, whilſt the private benefit continued to himſelf. But this bridge for horſes, carts, and carriages, was for the common benefit, uſe, and utility of the county in general; and, therefore, is within the rule, "That if a man "builds a bridge, and it becomes *uſeful to the county in general*, "the *county ſhall repair* it." The common law, therefore, attached upon this bridge; and the county ought to repair it.

(1) V. c. 15. (2) V. 2 *Inſt.* 29.

It appears, that the quarter-ſeſſions approved of it, and even contributed to it. WILLES, J. concurred. BLACKSTONE, J. alſo concurred, and ſaid, This new bridge is ſixty yards diſtant from the place where the old one ſtood. He likewiſe took notice, that *Magna Charta*, c. 15. does not apply to this caſe. The words are: "*Nulla villa nec liber homo diſtringatur* facere *pontes*, &c.:" it ſays nothing about *repairing* them. In the caſe cited from *Roll*'s Abridgment (1), the perſon who erected the mill, and made the bridge, continued to receive his original *private* benefit. Here, the benefit and utility were to the *public:* it was conſtantly uſed by every one who went that road. Lord MANSFIELD, The riding ought to repair it, undoubtedly.—Judgment for the crown.

The King *v.* the Inhabitants of the County of Cumberland, Hil. Ter. 35 Geo. 3. B R. 6 *Ter. Rep.* 194.

And it ſeems, that thoſe who are bound to repair a bridge are bound to widen it, if the exigencies of the public require it. And an indictment for not repairing a county bridge may be removed by the proſecutor, notwithſtanding the ſtat. 1 *Ann.* c. 18. ſ. 5.—This was an indictment, found at the aſſizes, againſt the defendants, ſtating, that Blennerhaſſet-bridge was a public bridge, over the river Ellen, uſed for carriages, &c. and that it was too narrow, and the battlements not of ſufficient height, &c.; and charging, that the defendants ought to repair it, and make it ſecure. The indictment was returned into this court in Hiliary term, 32 *Geo.* 3. in obedience to a writ of *certiorari*, iſſued at the inſtance of the proſecutor; and the defendants, having pleaded the general iſſue, were tried at the ſummer aſſizes, 1792, for the county of Cumberland, when a verdict was found for the king. In Michaelmas term, 1792, the defendants obtained a rule for a new trial; which, on ſhewing cauſe, in the following term, was diſcharged. On that argument, a queſtion was diſcuſſed reſpecting *the liability of the inhabitants of a county to widen a bridge, which was not of ſufficient width to anſwer the preſent exigencies of the public.* PER LORD KENYON, Ch. J. The cauſe was arrived at that ſtage, when, though no poſitive opinion was given by us (2), the Court ſtrongly intimated, that if a bridge, uſed for carriages, though formerly adequate to the purpoſes intended, were not now of ſufficient width to meet the public exigencies, owing to the increaſed width of carriages, the burthen of widening it muſt be borne by thoſe who are bound to repair the bridge. And upon that queſtion, there cannot be entertained much doubt: but this is not now

(1) 1 *Rol. Abr.* 368. pl. 2.

(2) The rule for a new trial was moved for, on the ground, that the defendants were not bound by law to widen the bridge, and on the ſuppoſition that there was no evidence to ſhew that the bridge was, in other reſpects, out of repair; but, on the report of the learned judge, it appeared, that there was evidence of the bridge being out of repair; and, therefore, the rule for a new trial was diſcharged. The Court ſaying, that at all events the defendants muſt be found guilty on a ſecond trial.

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the queſtion to be decided. The queſtion now, for the conſideration of the Court, and which aroſe upon a motion made by the proſecutors, that a fine of 350*l.* might be impoſed on the defendants, and paid to *W. Lawſon*, to be laid out in repairing the bridge, is, *Whether or not an indictment of this kind can be removed by certiorari?* In order to ſhew that it cannot, the defendants relied on the ſtat. 1 *Ann.* c. 18. ſ. 5. by which it is enacted, "that all matters concerning the repairing and mending of the bridges and highways, herein-before mentioned, ſhall be determined in the county where they lie, and not elſewhere; and that no preſentment or indictment for not repairing ſuch bridges, or the highways at the end of ſuch bridges, ſhall be removed by *certiorari* out of the ſaid county into any other court." The proſecutor contended, that this clauſe was intended only to prevent the defendants removing ſuch preſentments or indictments, and not to take away the *certiorari* from the proſecutor. The words of this act of parliament are very general: but if, in the conſtruction, we were to read them in their full extent, it would introduce a ſoleciſm in the law; for it muſt be remembered, that in theſe caſes, the defendants are the inhabitants of the county, and if the indictment cannot be removed by *certiorari*, and a ſuggeſtion entered on the record, that the inhabitants of the county are intereſted, in order to have the trial elſewhere, the indictment muſt be tried by the very perſons who are parties in the cauſe. This, I believe, would be an anomalous caſe in the law of England. However, this queſtion does not reſt on that general obſervation. If this were *res integra*, we ſhould conſider, whether the extenſive words of this ſtatute ought not to be narrowed in their conſtruction, in order to arrive at that point which is the object of all laws, the attainment of juſtice. Now, in ſupport of the conſtruction contended for by the proſecutor, that the ſtatute does not prevent the removal of this indictment, many inſtances have been furniſhed, by the officers of the crown-office, of informations and indictments for the non-repair of bridges having been removed by writs of *certiorari* applied for by the proſecutors. Of the firſt ſort, ſee the King *v.* the inhabitants of the county of Wilts, *E.* 2 *Ann.* 6 *Mod.* 191, 307. *Salk.* 350. *R.* v. the Inhabitants of the county of Middleſex, *Hil.* 4 *Ann.* *R.* v. the Inhabitants of the city of Norwich, *E.* 2 *Geo.* 1. *R.* v. the Inhabitants of the county of Norfolk, *Mich.* 8 *Geo.* 1. *R.* v. the Inhabitants of the county of Surrey, *E.* 9 *Geo.* 1. And *R.* v. the Inhabitants of the county of Stafford, *Mic.* 6 *Geo.* 2. Of the other claſs of caſes of *indictments*, removed here by *certiorari*, at the inſtance of the proſecutor, ſee *R.* v. the Inhabitants of the county of Lancaſter, *E.* 3 *Ann.* *R.* v. the Inhabitants of the Weſt Riding of Yorkſhire, *E.* 8 *Geo.* 35. *Burr.* 2594.; *R.* v. the ſame de-

fendants, *Tr.* 27 *Geo.* 3. *R.* v. the Inhabitants of the county of Glamorgan, in the ſame term; *R.* v. the ſame defendants, *Hil.* 28 *Geo.* 3. *R.* v. the Inhabitants of the county of Somerſet, *Mic.* 29 *Geo.* 3. *R.* v. the Inhabitants of the county of Lancaſter, *E.* 30 *Geo.* 3. *R.* v. the Inhabitants of the county of Cheſter, *Mich.* 32 *Geo.* 3.; *R.* v. the ſame defendants in the ſame term. And it is to be obſerved, that ſome of theſe caſes happened ſoon after the paſſing of the ſtatute of *Anne*, and while it muſt have been in the recollection of thoſe who attended in the courts. Among the book caſes, cited by the proſecutor's counſel, was that of *R.* v. *Farewell*, 2 *Stra.* 1209: there, the proſecutor took out a *certiorari*, and the defendant moved to quaſh it, becauſe there was no affidavit according to the ſtat. 5 *W.* and *M.* c. 11. nor any recognizance according to that; and the former ſtat. 13 and 14 *Car.* 2. c. 6.; 22 *Car.* 2. c. 12.; and 3 *W.* and *M.* c. 12. "But the Court, on conſidering thoſe acts, held, that they related only to *certioraris* applied for by defendants, and not one *pro rege*, as that was. And many precedents were ſhewn of *certioraris* for a proſecutor, taken out in the manner this was; and the *certiorari* was allowed." The words of the ſtatutes, there referred to, are as large as thoſe of the ſtatute of *Anne*, upon which this queſtion ariſes; and yet the Court held, in that caſe, that they only extended to defendants; and that a proſecutor, who removed the indictment, was not bound to comply with thoſe conditions which the ſeveral ſtatutes ſeemed to require from every perſon removing an indictment by *certiorari*. This caſe has been recognized in ſubſequent caſes, particularly in that of *R.* v. *Bodenham*, reported in *Cowp.* 78. which was an indictment on the ſtat. 13 *Geo.* 3. c. 78. for a nuiſance in a highway (1). Therefore, on the authority of all theſe caſes, whatever might have been our opinion of it, had it been *res integra*, [though, in forming an opinion, for the firſt time, on the ſubject, we ſhould have been anxious, for reaſons of ſubſtantial juſtice, to have controlled the extenſive operation of the general words of the ſtatute of *Anne*], we are of opinion, that the *certiorari* was properly iſſued, and that the rule for impoſing the fine muſt be made abſolute.

The King v. the Juſtices of Glamorganſhire, Tr. Ter. 33 Geo. 3. B. R. 5 *Term Rep.* 279.

The juſtices at ſeſſions may appoint a committee of magiſtrates, to inſpect the ſtate of a county bridge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace, on behalf of the county; and the ſix days' notice, required by 13 *Geo.* 2. c. 18. ſ. 5. before any application for a *certiorari* to remove proceedings by juſtices of the peace, muſt be given before making the motion for a rule to ſhew cauſe, why ſuch *certiorari* ſhould not be granted.

(1) See the title HIGHWAYS.

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—On a rule for a *certiorari*, to remove certain orders of the juſtices at the ſeſſions, touching the repairing and rebuilding of a county bridge, the following facts were diſcloſed by affidavits: the old bridge was preſented, as being in a ruinous ſtate, at the Eaſter Seſſions, in April, 1792; when the *ſeſſions appointed a committee, of twelve magiſtrates, to inſpect the ſtate of the bridge, impowering them to make any contract either for the repairing the old, or rebuilding a new, bridge, as they ſhould judge moſt proper, and directing that an agreement for either of thoſe purpoſes ſhould be reduced to writing, and executed by the clerk of the peace on behalf of the county and the contractor:* in June, 1792, the committee, having examined ſeveral plans, adopted one propoſed by *Parry*, for rebuilding; and, on the 9th of July, at another meeting of the committee, they directed the clerk of the peace to prepare a contract with *Parry* for execution, and to requeſt *Parry* to attend at the next meeting. In the interval between this and the ſubſequent meeting, the committee reported to the ſeſſions in July, that they were in treaty with *Parry* for the rebuilding of the bridge, when the ſeſſions authoriſed them to proceed, and to direct the clerk of the peace to contract for building the ſame. On the 21ſt of July the committee authoriſed the clerk of the peace to make the contract with *Parry*. On the 24th of September, 1792, articles of covenant were entered into between *Parry* and the clerk of the peace. And, at the Michaelmas ſeſſions, in October laſt, that court, after confirming all the former reſolutions of the committee, ordered the clerk of the peace to perform the ſeveral directions of the committee, relative to *Parry*. It alſo appeared, that the new bridge was not built preciſely on the ſcite of the old one, but that it varied for ſeveral yards from the former poſition. The *certiorari* was applied for in order that the proceedings might be quaſhed on two grounds: FIRST, *becauſe the juſtices at the ſeſſions could not delegate their authority to juſtices out of ſeſſions*; and, SECONDLY, *that the ſeſſions themſelves had no authority to build the new bridge on a different foundation from the old one.* In ſhewing cauſe againſt the rule for the *certiorari*, it was objected, that the requiſitions of the ſtatutes 5 *Geo.* 2. c. 19. and 13 *Geo.* 2. c. 18. had not been complied with. The 5 *Geo.* 2. c. 19. ſ. 2. enacts, that no *certiorari* ſhall be iſſued to remove any orders of juſtices, unleſs the party proſecuting ſuch *certiorari*, before the allowance thereof, ſhall enter into a recognizance, with ſufficient ſureties, in 50*l.* with condition to proſecute the ſame, &c. The 13 *Geo.* 2. c. 18. ſ. 5. enacts, that no *certiorari* ſhall be granted to remove any judgment, order, or other proceedings before juſtices, unleſs ſuch *certiorari* be applied for within ſix calendar months next after ſuch order, &c.; *and unleſs the party ſuing forth the ſame hath given ſix days' notice*

thereof in writing to the juſtices, &c.—Lord KENYON, Ch. J. The formal objection, to the want of notice, muſt prevail in this caſe. The act of parliament poſitively requires ſix days' notice to be given; and it is the uſual practice to give that notice. Nor is notice of the rule to ſhew cauſe ſufficient, becauſe it may have been granted on improper grounds: in this caſe, had the want of notice been diſcloſed when the rule was applied for, the Court would not have given even a rule to ſhew cauſe. But even if ſufficient notice had been given, I do not think we ought to grant a *certiorari* to remove theſe proceedings, ſince it appears that the juſtices were warranted in what they did. With regard to the appointing of the committee, it was proper that the information ſhould be acquired out of the ſeſſions; and the act of the committee was afterwards confirmed by the ſeſſions; ſo that it was the act of the ſeſſions. And although the county could not be diſtrained for the expence of building a new bridge, there was no objection to the re-building of this, which was in lieu of the old one. ASHHURST, J. Notice ſhould have been given to the juſtices before the firſt application to this court. BULLER, J. This was a contract under the authority of the court of ſeſſions, and it was confirmed by the following ſeſſions. As to the power of the juſtices to change the road, by changing the local ſituation of the bridge, there certainly are old caſes againſt it; and they were properly decided; becauſe previous to the ſtat. 14 *Geo.* 2. the juſtices at the ſeſſions had no power to change the ſituation of bridges: but that act of parliament impliedly gives them that power, for it enables them to purchaſe land adjoining any county bridge "for the more commodious enlarging or convenient rebuilding the ſame." This, therefore, impliedly gives them the power of altering the poſition of the bridge, to ſuit the convenience of the public. This is an anſwer to the juſtice of the caſe; and, I think, alſo, that the objection to the writ for the want of notice is well founded. The notice ſhould have been given to the magiſtrates previous to the application for the rule to ſhew cauſe. GROSE, J. of the ſame opinion.—Rule diſcharged.

Brokers.

Janſſen, Bart. Chamberlain of London, v. Green, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2103.

A perſon who for brokerage and hire negotiates and concludes bargains for ſtocks, is a broker in point of law.—This was an action for a forfeiture on 6 *Ann.* c. 16. ſ. 5. for having acted as a *broker*, without being admitted ſo to do by the court of mayor and aldermen. That ſtatute enacts "that "every ſuch perſon ſo offending ſhall forfeit and pay to the "uſe

" uſe of the ſaid mayor and commonalty and citizens, for " every ſuch offence, the ſum of 25*l.* to be recovered by " action of debt, in the name of the chamberlain of the " ſaid city," The declaration charged divers inſtances of his acting as a broker: to which he pleaded the general iſſue. The point reſerved at the trial was, " Whether a perſon " who, *for brokerage, and hire* negotiates and concludes bar- " gains for *ſtocks*, is a *broker* within 6 *Ann.* c. 16.—Lord MANSFIELD, Sir *John Barnard*'s act (1) to prevent ſtock-jobbing, is deciſive of this queſtion: it directs, that " every " *broker*, or other perſon who ſhall *negotiate or act as a broker*, " receiving brokerage in the buying, ſelling, or otherwiſe " diſpoſing of any of the ſaid public or joint ſtocks, or other " public ſecurities, ſhall keep a book, which ſhall be called " *The Broker*'s Book." No words can more ſtrongly expreſs what the parliament meant by a *broker*. YATES, J. The Court will follow the parliamentary idea of a broker: and Sir *John Barnard*'s act (" to prevent the infamous practice of ſtock-jobbing") is concluſive as to their idea of a broker. It alſo appears from the ſtatute of 10 *Ann.* c. 19. ſ. 121. The two other judges concurred. Lord MANSFIELD, The caſe of a merchant who acts by commiſſion from a correſpondent abroad, may be a different caſe: but here is nothing in the caſe before us to diſtinguiſh this commiſſion from common brokerage.—*Poſtea* to the plaintiff.

The King *v.* Gillham, Ea. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 269.

On an indictment on the Annuity-act 17 *Geo.* 3. c. 26. ſ. 7. for taking more than 10*s.* in the 100*l.* for brokerage, &c. it is not neceſſary to prove that the defendant took the exact ſum laid in the indictment, though it be not laid under a viz. and on the trial of ſuch an indictment it muſt be left to the jury to conſider whether the exceſs above 10*s.* in the 100*l.* were really taken as a fair charge for drawing the writings, &c. or whether it were not ſo taken as a device to avoid the ſtatute.—The defendant was indicted on the ſtatute 17 *Geo.* 3. c. 26. ſ. 7. which enacts " that every ſolicitor, ſcrivener, bro- " ker, and other perſon, who ſhall aſk, demand, accept, or " receive, for ſoliciting or procuring the loan, and for the " brokerage of any money that ſhall be advanced, as the " conſideration of any annuity *above ten ſhillings for every* " *one hundred pounds*, &c. ſhall be guilty of a miſdemeanor, " and puniſhable by fine and impriſonment." The firſt count ſtated, that " the defendant, on the 1ſt of February, " 1792, unlawfully did aſk, demand, accept, and receive, " of and from Lord Viſcount *Falkland*, *H. Speed*, and " *D. Broughton*, 332*l.* 10*s.* as a gratuity and reward for " ſoliciting and procuring the loan, and for the brokerage of

(1) *Vide* 7 *Geo.* 2. c. 8. ſ. 9.

" the ſum of 2,450*l.* then and there actually and *bonâ fide*
" advanced and paid by *S. Phillips* to them the ſaid Lord
" *F. H. S.* and *D. B.* as and for the price and conſideration
" of divers annuities, &c. which ſaid ſum of 322*l.* 10*s.* for
" the loan and brokerage of the ſaid 2,450*l.* exceeded the
" ſum of 10*s.* for every 100*l.*" It was objected at the trial, that the evidence did not ſuſtain the indictment; the charge being, that 322*l.* 10*s.* was paid for brokerage, and the evidence being, that the defendant, at the time of the money being paid, ſaid, that 100*l* was for the writings, 100*l.* by way of preſent, and 5*l.* per cent on the whole ſum, viz. 122*l.* 10*s.* Lord *Kenyon* over-ruled the objection, thinking it not material; but he left it to the jury to conſider, Whether the whole tranſaction were not a mere device and colour to receive the ſum ſtated under different pretences, but in truth for the brokerage and ſoliciting of the loan, in fraud of the act of parliament? and the jury being of this opinion, found the defendant guilty. A rule *niſi* having been obtained on a former day for a new trial, on the ground that the verdict was againſt law and evidence; cauſe was ſhewn.—Lord KENYON, Ch. J. The offence here conſiſts in taking more than ten ſhillings for every hundred pounds for brokerage or procuring the loan; and for this purpoſe the quantum of the exceſs taken is immaterial. In the caſe of uſury, to which this has been compared, it is material, becauſe in ſetting forth a contract in pleading, it is neceſſary to ſet it out correctly, and prove it as ſet forth. But here the offence is the ſame, whether more or leſs be taken, and the judgment does not depend on the quantum taken, as it does in the caſe of uſury. GROSE, J. In caſes of this kind, the queſtion muſt be left to the jury to conſider whether the defendant really took more than ten ſhillings in the hundred pounds by way of brokerage; for if he colourably take a large ſum under pretence that the exceſs above ten ſhillings was received for another purpoſe. that will not avail him. In the caſe of uſury it is always left to the jury to ſay, whether the ſum taken, though oſtenſibly for another purpoſe, was not in reality taken as uſurious intereſt. LAWRENCE, J. The queſtion here is not, whether the witneſs did or did not prove that the defendant had taken 322*l.* 10*s.* for the brokerage, but whether he did not prove that more than ten ſhillings in the hundred pounds was taken by the defendant; and if that were proved, it was ſufficient to convict the defendant.—Rule diſcharged.

By-Law.

By whom it may be made.

If a power of making by-laws is, by charter, given to a ſelect body, they do not repreſent the whole community, and cannot aſſume to themſelves what belongs to it; but if the power of making by-laws is in the body at large, they may delegate their rights to a ſelect body. And a by-law cannot ſuperadd a qualification to an elector which the charter does not require.—In ſhewing cauſe againſt arreſting the judgment for the defendant, and entering judgment for the king againſt the defendant, an objection was taken to the validity of the by-law, under which the defendant juſtified his election into the office. It was urged, that it was a bad by-law, as it reſtrains and narrows the number of electors without any authority from the charter, and even contrary to it; and without the conſent of the electors, takes away their rights; and is vague, indefinite, and uncertain; and that ſuch a reſtriction of the number of electors cannot be allowed in the caſe of a common council-man's election, whatever might be the caſe of the election of the principal officer. It was an information in the nature of a *quo warranto* for uſurping the office of a common council-man of Maidſtone. The defendant juſtified, under a BY-LAW, dated the 18th of Auguſt, 1764, and made by the mayor, jurats, and common-council, by virtue of letters patent of 21 *Geo.* 2. It recites the power given by the charter "for the mayor, jurats, *and* "*commonalty*, to elect common council-men;" and recites "that the *commonalty were very numerous*, and the admiſſion "of them to vote at the election of common council-men "had been found, by experience, to be attended with many "inconveniences, and had, from time to time, occaſioned "divers riots and diſorders, and great popular confuſions, "and had very much diſturbed and broken in upon the "peace, good order, and government of the ſaid town and "pariſh;" and further recites, "that ſuch inconveniences "would be likely to be remedied, if the right of electing of "the common council were to be CONFINED *to the mayor*, "*jurats, and common council, and* SUCH *of the common free-*"*men as had executed parochial offices in and for the ſaid town* "*and pariſh in manner therein-after mentioned:*" and then (for preventing of the like inconveniences for the future, and for the avoiding of popular confuſion and diſorder in the election of common council-men) it ordains, "that upon "every or any *future* election of a common council-man or "common council-men of the ſaid town and pariſh, the "mayor

Rex *v.* Spencer, common council-man of Maidſtone, Hil. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1827.

" mayor, jurats, *and common-council* for the time being, of " the ſaid town and pariſh, and SUCH *of the common freemen* " for the time being, who ſhould reſide in, *and ſhould* " *reſpectively* have gone through and ſerved for the ſpace of " *one whole year* RESPECTIVELY *the* SEVERAL *offices of* " CHURCH-WARDEN AND OVERSEER OF THE POOR, " RESPECTIVELY, *for the ſaid town and pariſh*, or the major " part of ſuch mayor, jurats, common-council-men, and " common freemen, QUALIFIED AS AFORESAID, ſhould " meet and aſſemble themſelves together in the court-hall of " the ſaid town and pariſh; and being then and there ſo met " and aſſembled together, the ſaid mayor, jurats, *common-* " *council*, and common freemen, of the ſaid town and pariſh, " QUALIFIED AS AFORESAID, or the major part of them " ſo met and aſſembled together, ſhould, *by themſelves*, " WITHOUT *the* PRESENCE *or* CONCURRENCE *of* ANY *of* " *the* COMMONALTY of the ſaid town and pariſh, *elect and* " *chooſe* one or more of the principal inhabitants of the ſaid " town and pariſh, to be a common-council-man or common- " council-men of the ſaid town and pariſh (1). To this by-law, pleaded by the defendant, the proſecutor replied: 1ſt, that the common-council were not duly aſſembled; 2dly, that they had no power to make ſuch a by-law: and iſſue was joined thereupon. Both theſe iſſues were found for the defendant. It was inſiſted, on the behalf of the defendant, that the proſecutor could have no more than a rule to ſhew cauſe " Why this judgment ſhould not be *arreſted*;" whereas the preſent rule is drawn up not *only* to ſhew cauſe " Why the judgment ſhould not be arreſted," but *alſo*, why judgment ſhould not be ENTERED " FOR *the* KING AGAINST *the defendant*." The proſecutor's objections to the by-law were, FIRST, this is a bad by-law, becauſe it is not warranted by the charter; which only extends to caſes where penalties are annexed; and that the penalties muſt be inflicted by the *whole* body: SECONDLY, that the by-law is *contradictory* to the charter, which requires the election to be by the body at large: ſo that it is repugnant to the charter both in letter and ſpirit: THIRDLY, that the number of electors ought not to be narrowed as to the election of a *common council-man*; however it might have been, if it had been the *head-officer*: FOURTHLY, that the by-law takes away the power of the commonalty, *without the conſent* of the

(1) The CHARTER directs the nomination and election of common council-men to be *by* the mayor, jurats, *and* COMMONALTY, and their ſucceſſors, or the majority of them, out of the principal inhabitants of the ſaid town and pariſh.

Alſo, The new letters patent of incorporation bear date the 17th of June, 21 *Geo.* 2. and incorporate them by the name of " mayor, jurats, and common- " alty;" to conſiſt of a mayor, thirteen jurats (including the mayor), and forty common council-men: and power is granted to the mayor, jurats, and common council, to make by-laws.

commonalty;

commonalty: and the caſe of the corporations in 4 *Co.* 78. and 3 *Bulſtr.* 71. the caſe of the corporation of Colcheſter is urged in ſupport of this objection: FIFTHLY, that the by-law is vague, indefinite, and uncertain.—Upon the firſt argument, Lord MANSFIELD ſaid, he ſaw reaſon to doubt of the by-law; and deſired to conſider of it. It is now ſettled (1), "that the number of the *electors* may be reſtrained "by a by-law: but a by-law cannot ſtrike off an integral "part of them; neither can it narrow the number of the "perſons *out of whom* the election is to be made." The charter gives the right of election to the commonalty. The by-law reſtrains it to a *few* of them; and thoſe few, under a particular deſcription, namely, ſuch as have been churchwardens and overſeers. The corporation-juſtices appoint overſeers: and ſeveral perſons may be exempted or excuſed from ſerving that office at all. Theſe perſons would be totally excluded from ever voting. So that ſome votes would be preſerved, of perſons nominated by the mayor and jurats: and others could never vote at all. It deſerves conſideration, "Whether this is a reaſonable reſtriction?" though this ſelect body have a power given them by the charter to make by-laws. Mr. Juſtice WILMOT inclined to think the by-law unreaſonable. He thought, the Court ought to take care that the perſons impowered to make by-laws, exerted their power in a reaſonable manner. They ought not to take the power of election from others, and place it in themſelves. Here, the jurats, &c. being corporation-juſtices, have the appointment of overſeers. Conſequently, this by-law puts it into their power to ſay *who* ſhall be the electors. And as ſome of the overſeers are to be named by the parſon, it ſo far puts the election into the power of the parſon: or, at leaſt, it may put it into the power of other perſons, not corporators, who may have the right of chooſing churchwardens. As to the objection of the want of the *conſent* of the commonalty to the by-law; he thought them as much included in, and bound by, a by-law made by the ſelect body, to whom the charter gives the power of making by-laws, as if they had actually given their own conſent. Mr. Juſtice YATES, and Mr. Juſtice ASTON, thought it bad. A by-law may narrow the number of *electors*; not altering the conſtituent parts. But here they have gone out of the charter, and *impoſed qualifications not mentioned in it*, nor at all *connected* with the corporation. The commonalty are, by the charter, an integral part of the conſtitution. And this

(1) It was ſettled, not only in the caſe of *Rex* v. *Philips*, mayor of Carmarthen, (hereafter mentioned), but alſo in a later caſe, of *Lee* v. *Wallis* et al. the 27th of January, 1756, in this court, "that a by-law may narrow the number of the *electors*, but not of the *eligible*.

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by-law admits thoſe of them to have a vote, who *have ſerved theſe offices*; and *excludes* thoſe of them who *have not*; though ſome of them may be incapable, or not obliged, to ſerve them; and though this qualification has *no connexion* at all with the corporation. And the corporation-juſtices have the appointment of overſeers, in their own hands. In the caſe of *Rex* v. *Tucker*, mayor of Weymouth, a by-law by the mayor and aldermen, "that the mayor ſhould be choſen out "of the aldermen," was held bad (1). So here, they have reſtrained the electors, *not generally*, but with ſuch a diſtinction as, in effect, places the election in *themſelves*. Lord MANSFIELD ſaid, theſe obſervations ſtruck him very ſtrong. The by-law *introduces a new deſcription* not mentioned in the charter, nor at all *connected* with their corporate character, as a qualification to enable them to elect; and excludes ſuch of them from the right of electing, as *have not this qualification*. CURIA ADVISARE VULT.—The objections, on the ſecond argument, were, 1ſt, that an *integral* part of the corporation cannot be ſtruck off; 2dly, that the by-law places the power in *themſelves*; 3dly, that it *impoſes a qualification* not at all *connected* with the corporation. Lord MANSFIELD, It appears to me, that where the power of making by-laws is by charter *given* to a *ſelect body*, they do *not repreſent* the whole community; and, therefore, cannot aſſume to themſelves what belongs to the body at large: but where the power of making by-laws is in the *body at large*, they may *delegate* their rights to a ſelect body, who become the repreſentative of the whole community. Now here the charter appoints the election of the mayor to be by the jurats; and of the jurats, by the mayor, jurats, and common-council-man, (excluding commonalty); and of the commonalty, by the mayor, jurats, *and commonalty*. I remember, the charter was much litigated at the time of paſſing it. And it was matter of deliberation, "Whether the "power of election ſhould be fixed in the body *at large*, or "in the *ſelect* body?" I underſtand the charter as if it had ſaid in expreſs words "that the *commonalty* ſhall vote *for* "*themſelves*, and *not* be repreſented by the common council." It is by no means to be compared to caſes where there is a common council who are ſuppoſed to have been *created by the commonalty*, and, therefore, have the original power of the commonalty in them. Here the common council is *no part* of the commonalty, but a *diſtinct body*. They are conſtituted *eo nomine*, *as common council-men*; which is an office

(1) It was Eaſt. Ter. 14. *Geo.* 2. B. R. and in *Dom. Proc.* 1742-3, when the Lords affirmed the judgment of this court. The *charter* directed the election to be made out of four perſons to be nominated *out of* the burgeſſes or inhabitants *at large*: the *by-law* directed it to be made *out of* four perſons out of the *aldermen*, or at leaſt one of whom ſhould be an alderman.

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for life. This, alone, would be a ſufficient objection to the by-law. But further, they have here confined the qualification to what *does not relate to, or concern, the corporation*; to having been churchwardens, perſons appointed annually by the parſon; or overſeers, perſons nominated by the juſtices. This is an abuſe of their power, for the private benefit of thoſe that have exerciſed it. I am, therefore, clearly of opinion, "That it is *null* and *void* by law.—Mr. Juſtice WILMOT declared himſelf of the ſame opinion. The true teſt of all by-laws is the *intention of the crown* in granting the charter, and the apparent *good of the corporation*. And upon this principle ſtands the power of controlling, by a by-law, the words of a charter, as far as relates to the diſtinction between narrowing the number of *electors*, and narrowing the number of thoſe *out of whom* the election is to be made. A by-law may reſtrain the number of the *electors*: but it cannot narrow the *objects* of election. The former tends to avoid popular confuſion and riot: but that reaſon does not apply to the *objects* of election. This was ſettled in the Carmarthen caſe [*Rex* v. *Philips*, jun. mayor of Carmarthen, Trin. Ter. 1749, 22, 23 *Geo.* 2. B. R.]; and it was there holden, "that a by-law cannot exclude an integral part of "the electors." I do not ſay, that any integral part is here ſtruck off: which, I think, could not be done. But a qualification is required, which is neither mentioned in the charter, nor at all connected with their corporate character. The *charter* ſays, the election ſhall be by the mayor, jurats, and *commonalty*. The *by-law* ſays, it ſhall be *confined* to the mayor, jurats, *and common council*, and SUCH *of the commonalty* as ſhall have ſerved the offices of churchwarden and overſeer of the poor for one whole year. The charter having named the common council, ſhews, that they were meant to be a diſtinct body or claſs. No by-law could have confined it to the common council *alone*: neither can a by-law confine it to *ſuch* of the *commonalty* as are under ſuch a qualification as is here required. The crown have added no qualification to the votes of the commonalty. The by-law cannot ſuperadd a qualification when the crown has not; and which has no relation to, or connexion with, their corporate character and capacity. It is in the teeth of the grant. Beſides, this is, in effect, putting the power in *themſelves*: for they have the nomination of *overſeers*. The *churchwardens* are not, indeed, appointed by themſelves: but they are appointed by ſtrangers to the corporation. The makers of the by-law had no right to impoſe ſuch qualifications. Therefore, this by-law is *void*. It not only reſtrains the number of electors, but *impoſes qualifications contrary to the intention of the charter*. Therefore it is not juſtified by the caſe of corporations in 4 *Co.* 77, 78. Mr. Juſtice

YATES,

YATES, Corporations cannot make by-laws *contrary* to their conſtitution. If they do, they act without authority. This by-law is made by the mayor, jurats, and common council; to whom the power of making by-laws is given by the charter. The common council cannot be conſidered as the repreſentatives of the whole body of the commonalty. The common council, mentioned in this charter, are plainly a diſtinct body from the commonalty. This by-law was not *actually* made by the whole body. The Carmarthen by-law was ſuppoſed to be a by-law made by the *whole* body: ſo was the caſe of corporations in 4 *Co.*; whereas, here, the mayor, jurats, and common council (which common council are a diſtinct body from the commonalty), make the by-law, and place the election in the mayor, jurats, *and common council*, together with a part of the common freemen. *This* part of the by-law, I, therefore, hold to be unreaſonable, illegal, and bad. Then, as to that part of it which impoſes the qualification upon the freemen; it requires from the electors appointed by the charter, a qualification not mentioned in the charter; the having executed quite diſtinct offices, not at all connected with the corporation. I cannot conceive that even the *whole* body could have thus *varied* an *eſſential* part of their conſtitution. Theſe officers (churchwardens and overſeers) are alien to the corporation; and depend upon the will of others, and partly upon the nomination of ſome of the very makers of the by-law. The by-law is, in my opinion, clearly *void*.—Mr. Juſtice ASTON, The common-council, though part of the corporate body, are a *diſtinct claſs* from the commonalty: they are part of the ſelect body, to whom the power of making by-laws is given. A by-law may narrow the number of the *ſame* electors; but it cannot *transfer* the right of election to *different* perſons. There was no common council diſtinct, and as a ſelect body, either in the Carmarthen caſe, or in the Corporation caſe, in 4 *Co.* 77. b.: therefore, they remained as part of the general body: here, they are a diſtinct claſs. The intention of the whole charter is to be conſidered in the conſtruction of it. You cannot change the right of the electors from one body to a different body, or *intermix* other perſons with thoſe who have the right in them. This by-law is a manifeſt ſcheme of the makers of it, to put the power of election in themſelves. And the qualification, here annexed, is a ſuſpenſion of their right, *till* they ſhall have ſerved theſe offices, reſpectively, for a whole year: ſo that it is a ſuſpenſion for *two* years, at the leaſt. There is no end of qualifications of this ſort. It is a *bad* by-law.—The by-law being thus holden to be bad, the judgment was *arreſted*. And the Court declared, that there ought to be *no coſts* of the trial or motion, on either ſide.

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A corporation has no power to exclude an integral part of the body, when a charter gives them the right of election. —This was a queſtion concerning the validity of a corporation *by-law*. It came before the court, upon a motion on behalf of the proſecutor, for a rule upon the defendants, to ſhew cauſe why *judgment of ouſter* ſhould not be entered *againſt* them, *notwithſtanding* that all the iſſues had been found *for* them. It was ſaid, that it appeared *upon the whole record*, "that the defendants had *not a good title:*" and in ſuch caſe, there ſhall be judgment of ouſter againſt them, although the particular iſſues may all be found for them. This information charged them with uſurping the office of burgeſſes and freemen. They juſtify, under a *by-law*. This by-law was made by the mayor and aldermen, with the aſſent of the commonalty; and ordains, "*that the mayor and* "*aldermen, by themſelves,* AND WITHOUT *the commonalty,* "*may, for the future, elect burgeſſes and freemen:*" and they ſhew that they were elected under it, *by the mayor and aldermen only*. Whereas, the *charter* places the election of them in the mayor, aldermen, AND COMMONALTY. This by-law was given in evidence upon the foot of uſage: and no contrary uſage was ſhewn. But it is not in the power of a corporation to exclude any one *conſtituent part* of their body, to whom the *charter* has given the right of election: they cannot put it into the hands of *two* conſtituent parts of their body only, when the charter has placed it in *three*. *The information* ſet forth, that the borough of Helleſton, alias Helſton, in Cornwall, is an ancient borough; and the burgeſſes thereof incorporated by the name of the *mayor and commonalty* of the borough of Helleſton, in the county of Cornwall; and that within the ſaid borough there are, and ought to be, and for and during, &c. there have been, or ought to have been, a mayor, four aldermen, and an indefinite number of burgeſſes and freemen; and that the office of a burgeſs and freeman is a public office, &c.: and that *Abraham Head*, late of, &c. *William Paſmore*, *Thomas Nicholls*, *John May*, and *John Odgers*, late of, &c. on the 1ſt day of January, 2 *Geo.* 3. and from thence continually, afterwards, and to the time of exhibiting this information, have, and each of them, ſeverally hath uſed and exerciſed, and ſtill do, and each of them doth there ſeverally uſe and exerciſe, the office of a burgeſs and freeman, without any legal warrant, &c. and claim, without any legal warrant, &c. to be a burgeſs and freeman, &c. THE PLEA of the ſaid *Abraham Head*, *William Paſmore*, *Thomas Nicholls*, *John May*, and *John Odgers*, admitted that the ſaid borough is an ancient borough; and that the burgeſſes are one body corporate and politic, by the name of the *mayor and commonalty*; and that within the ſaid borough there are, or ought to be, and for and during, &c. there

Rex v. Abraham Head *et al* freemen of Helſton, Hil. Ter. 10 Geo. 3. B. R. 4 *Burr.* 2515.

there have been, or ought to have been, a mayor, four aldermen, and an indefinite number of burgeſſes and freemen; and that the office of a burgeſs and freeman is a public office, &c. But the ſaid defendants ſay, that the borough of Helleſton, alias Helſton aforeſaid, is, and *from time immemorial* had been, an *ancient town and borough*; and that the Lady *Elizabeth*, late queen, &c. by her letters patent, dated the 26th of January, 27 *regni* (reciting "that the burgeſſes and inhabitants of the ſaid borough of Helleſton, from time whereof, &c. had had, and enjoyed, divers cuſtoms, &c. as well by preſcription as by letters patents, charters, &c. and alſo, that the burgeſſes and inhabitants of the ſame borough, had beſought her to create them into a body corporate, &c."), taking it for granted, "that the ſaid borough, or vill, was an ancient borough, and one of her moſt ancient boroughs within her dutchy of Cornwall," did, by her ſaid letters patent, GRANT, that the ſaid borough, or vill, of Helleſton, ſhould be, and remain for ever, a free borough; and that the burgeſſes of the ſaid borough ſhould be *incorporated* by the name of *mayor and commonalty* of the borough of Helleſton; and did create them a body corporate and politic, &c. and that by that name they ſhould have perpetual ſucceſſion, and might have, poſſeſs, and enjoy, &c.; and did nominate and conſtitute, &c. *Peter Collyns*, an honeſt man, and an inhabitant of the ſaid borough, to be the firſt and modern *mayor*, to execute the ſaid office until Sunday next before the feaſt of *St. Michael the Archangel* next following, and from thence until another perſon ſhould be elected and ſworn into that office; and did grant to the ſaid mayor and commonalty, &c. that forever thereafter, from time to time, there ſhould be *four men*, of the more diſcreet, honeſt, and quiet men, &c. to be aiding and aſſiſting to the ſaid mayor; who ſhould be *aldermen*, and who, *together with the mayor*, ſhould be the *common council* of the ſaid borough, *for the* MAKING STATUTES, &c. *by them, or the major part of them, without the mayor* of the ſame borough; and did thereby nominate *J. P.* alias *R. J. J.* alias *W. T. P.* and *P. A.* inhabitants of the ſaid borough, to be the firſt and modern four *aldermen* of the ſame borough; and to be, upon their oath, corporally to be taken before the ſaid modern mayor, the *common council* of the ſaid borough, *with* the ſaid mayor; and the ſaid *mayor and aldermen for the time being*, did create the *common council*, for ever; and did thereby grant to the ſaid mayor, and commonalty, and their ſucceſſors, that the ſaid mayor *and commonalty*, for the time being, together with the aldermen for the time being, or the major part of them, might *elect and admit* ſo many of the more diſcreet, honeſt, and quiet men, and inhabitants of the ſame borough, to be *burgeſſes and freemen* thereof, as to them ſhould ſeem fit and convenient; as by

by the ſaid letters patent remaining, &c. may appear, &c. which ſaid letters patent, on the 1ſt of February, in the ſaid 27th year of Queen *Elizabeth*, the then burgeſſes of the ſaid borough of Helleſton *accepted*; and, by virtue thereof, have, from thenceforth hitherto been, and ſtill are, one body corporate and politic, &c. by the *name* of *mayor and commonalty* of, &c. And they further ſay, that *after the accepting* the ſaid letters patent, and *long before their election*, to wit, on the 2d of February, 27 *Elizabeth*, at, &c. the *then* MAYOR AND ALDERMEN of the ſaid borough, and then being the common council of the ſaid borough, WITH THE ASSENT OF THE COMMONALTY of the ſaid borough, did make a certain reaſonable ſtatute, act, and ordinance, commonly called a BY-LAW (not now extant in writing), for the avoiding of popular confuſion in the election of burgeſſes and freemen of the ſame borough; whereby it was ordained, "that the *mayor* "*and aldermen, or the major part of the ſaid aldermen* of the "ſame borough, for the time being, by *themſelves*, and "WITHOUT *the concurrence or aſſiſtance of the* COMMONALTY of the ſaid borough, might, and might be able, at "all future times, forever thereafter, to *elect and admit* ſuch "and ſo many of the more diſcreet, honeſt, and quiet men, "and inhabitants of the ſame borough, to be BURGESSES "AND FREEMEN of the ſame borough, as to them ſhould, "from time to time, ſeem fit and convenient:" to which ſaid BY-LAW the mayor and commonalty of the ſaid borough of Helleſton have, from the making thereof, hitherto *conformed* themſelves; and the ſame ſtill is *in full force*, in nowiſe reverſed, repealed, or annulled. And the ſaid defendants further ſay, that afterwards, to wit, on the 14th of November, 1749, at the borough aforeſaid, *John Williams*, Eſq. then *mayor*, together with the *major part of the aldermen* of the ſaid borough, *did elect and admit them*, the ſaid defendants (then and there being of the moſt diſcreet, honeſt, and quiet men, and inhabitants of the ſaid borough), to be *burgeſſes and freemen* of the ſame borough: and thereupon they did, on the ſame day and year laſt aforeſaid, take upon themſelves, and each of them did take upon himſelf, the office of a burgeſs and freeman, &c.; and by reaſon of the premiſes, they, and each of them, were, and ſtill are, &c.; and, by that warrant, they, and each of them have and do uſe, exerciſe, and claim, &c. as it was, and is, lawful, &c. They conclude with traverſing the uſurpation, and praying judgment. THE REPLICATION, proteſting "that the plea, and matter "contained in it, are not ſufficient to bar, &c." denies that Queen *Elizabeth* made any ſuch *letters patent*, as in the plea is alleged: and iſſue is joined thereon. It denies the *acceptance* of the letters patent, as is alleged in the plea; and, on

this, a ſecond iſſue is joined. It denies the making any ſuch *by-law*, by the mayor and aldermen, and then being the common council, &c. as by the plea is alleged: and, on this, a third iſſue is joined. It denies the *election* of the defendants to be burgeſſes and freemen, as by the plea is alleged: and, on this, a fourth iſſue is joined. It denies their *being burgeſſes and freemen*, as by the plea is alleged: and, on this, a fifth iſſue is joined. It denies their being *inhabitants* at the time of their ſuppoſed election, as by the plea is alleged: and, on this, a ſixth iſſue is joined. ALL theſe iſſues were found *for the defendants*. On ſhewing cauſe againſt this rule, it was inſiſted, that this is a *good* by-law, on the *face of the plea*; that the proſecutor might have demurred to it, if he had thought fit; that he had not demurred: and a verdict was found for the defendants.—PER CUR. The *body at large* had no power to *make by-laws*; becauſe that power is, by the charter, given to the *common council*, conſiſting of the *mayor and aldermen:* and the *common council* could not, by a by-law, take away, from the body at large, the right of election, which the charter had veſted in the *whole body*. This is exactly the caſe of Maidſtone. The whole of the preſent caſe is ſhortly this: *The charter* of Queen *Elizabeth* gave the power of *making by-laws*, to the *mayor and aldermen*; and granted the power of *electing burgeſſes*, to the mayor or aldermen AND COMMONALTY. An information, in nature of a *quo warranto*, is brought againſt the defendants, who plead a by-law, not now extant in writing, made by the mayor and aldermen, WITH THE ASSENT *of the commonalty*, "that the mayor and aldermen, or the major part "of them, might elect burgeſſes and freemen, WITHOUT "the concurrence or aſſiſtance of the *commonalty* of the ſaid "borough:" and they add, "to which ſaid by-law the "mayor and commonalty of the ſaid borough have, from "the making thereof hitherto, conformed themſelves." Several iſſues were taken upon this by-law, and the defendants title under it: which were all found *for the defendants*. But the proſecutor moved for a rule to ſhew cauſe "why "judgment of ouſter ſhould not be entered." Upon ſhewing cauſe, the counſel have gone into a very long argument at the bar; and great ſtreſs has been laid upon the allegation, "that the by-law was made WITH THE ASSENT *of* "*the commonalty*." But the judgment turns upon a very ſhort and clear point.—THE COURT directed that JUDGMENT OF OUSTER ſhould be entered, but without any coſts of the trial.

What ſhall be a good By-Law.

A by-law, that a butcher in London ſhall be free of the butchers' company, is good.—A *mandamus* having iſſued, directed to Sir *Thomas Harriſon*, knight, chamberlain of the city of London, to *admit William Cope* into the *freedom* of the ſaid city; having ſerved an apprenticeſhip to *John Cope*, a freeman of the company of cloth-workers, and having afterwards duly admitted himſelf into the freedom of the ſaid company of *cloth-workers*.—The return ſets forth, that the city of London is an ancient city, &c. and a body corporate, &c.; and that there are ſeveral guilds, companies, &c.; which guilds, companies, &c. have uſed, and ought to have the *overſeeing*, *correction*, and *government* of the ſeveral perſons, *uſing and exerciſing the ſeveral arts*, *trades*, *miſteries*, *and manual occupations*, *belonging to ſuch ſeveral* ſocieties, guilds, fraternities, fellowſhips, and companies, in the uſe and exerciſe of ſuch arts, trades, miſteries, and manual occupations, within the ſaid city and the liberties thereof; and that the ſaid ſeveral ſocieties, guilds, fraternities, fellowſhips, and companies of the ſaid city, and the men of the ſame, for all the time aforeſaid have uſed, and ought, and yet uſe, and ought to be *under the order*, *government*, *and regulation* of the mayor and aldermen of the ſaid city for the time being, with the commonalty of the ſaid city, in common council aſſembled. The return further certifies a *cuſtom*, "That every perſon, "at the time of his or her admiſſion into the ſaid city, be "*free of* SOME *one* of the aforeſaid ſocieties, guilds, fraternities, fellowſhips, or companies of the ſaid city; and be "admitted into the freedom of the ſame city, *as* a freeman "or freewoman of or in ſuch ſociety, guild, fraternity, fellowſhip, or company." Then it certifies another cuſtom, "That no perſon, not being free of the city, may ſell by retail, or keep any ſhop for retail ſale, or uſe any occupation "for hire, gain, or ſale, within the ſaid city or its liberties;" and that there is another cuſtom within the ſaid city, "That "if any cuſtoms, obtained, prevailing, and uſed in the ſaid "city, be or have been *difficult*, *or defective in any part*; *or if* "any things *newly ariſing* in the ſame city, *where a remedy is* "*not*, *or hath not been*, *already ordained*, ſhould want, or have "wanted *amendment*; the mayor and aldermen of the ſaid "city, for the time being, with the aſſent of the commonalty "of the ſaid city, in common council aſſembled, may apply "and ordain, and have been uſed and accuſtomed to apply "and ordain, and of right ought to *apply and ordain*, as often "as to them ſhall or hath ſeemed meet, AN APT AND PRO-"PORTIONABLE REMEDY in that behalf, for the *common* "*benefit* of the citizens of the ſaid city, and of other perſons "reſorting

Rex *v.* Sir Tho. Harriſon, Chamberlain of London, Tr. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1322. 1 *Black. R.* 372.

" reſorting thither; ſo as ſuch ordinances be *agreeable to good*
" *faith and reaſon, not prejudicial to the king* and his progeni-
" tors, or to the *people*, and *in no wiſe contrary to the laws and*
" *ſtatutes* of this kingdom." The return further certifies, that there hath been, for all the time aforeſaid, and ſtill is, within the ſame city, a certain *ancient ſociety or company* of perſons uſing and exerciſing the art, trade, and miſtery of BUTCHERS, within the ſaid city and the liberties thereof; which ſaid ancient ſociety or company, on the 20th day of June, in the twenty-ſeventh year of the reign of the late Lord *George* the Second, king of Great-Britain, &c. and long before was, and ſtill is, a *body corporate*, by the name of the maſter, wardens, and commonalty of the art or miſtery of butchers of the city of London; and that the ſaid company or ſociety is, and for all the time aforeſaid hath been, *one of the aforeſaid companies or ſocieties*. The return then ſets forth a BY-LAW, made at a common council of the ſaid city, holden according to the cuſtom, &c. on the 20th June, 1727; namely—that it was, by the authority of the ſame common council, in and by an act of the ſaid common council, intitled, " An Act
" *for regulating the Company of* BUTCHERS *of the City of*
" *London*," enacted, ordained, and eſtabliſhed, in manner and form as follows, *to wit*, " WHEREAS the maſter, wardens,
" and commonalty of the art or miſtery of butchers, of
" the city of London, are, and have been, an ancient fel-
" lowſhip, and long ſince incorporated, and have obtained
" ſeveral royal grants for confirmation of their privileges:
" and *whereas* many perſons, who exerciſe the trade of a
" butcher within the city of London, have obtained their
" freedoms of OTHER *companies*, by redemption and other-
" wiſe; by *reaſon whereof, the ſaid company of* BUTCHERS *is*
" MUCH DIMINISHED *and* MAY FALL *in decay*; *for re-*
" *medy* WHEREOF, be it enacted, ordained, and eſtabliſhed,
" by the right honourable the lord mayor, aldermen, and
" commons of the city of London, in this preſent common
" council aſſembled, and by the authority of the ſame, that
" from and after the 29th day of September next, *every per-*
" *ſon not being already free of this city*, occupying, uſing, or
" exerciſing, or who ſhall occupy, uſe, or exerciſe the art,
" trade, or miſtery of a BUTCHER within the city of Lon-
" don or liberties thereof, *ſhall take upon himſelf the freedom,*
" *and be made a freeman of the ſaid* COMPANY *of* BUT-
" CHERS; and that NO *perſon or perſons* now uſing or exer-
" ciſing, or who ſhall *hereafter* uſe, occupy, or exerciſe the
" ſaid art, trade, or miſtery of a BUTCHER, within the ſaid
" city or liberties thereof, ſhall, from and after the ſaid 29th
" day of September, be *admitted, by the chamberlain* of this
" city for the time being, *into the* FREEDOM *or liberties of*
" THIS CITY, OF *or* IN *any* OTHER *company than the ſaid*
" *company*

" *company of* BUTCHERS; any law, uſage, or cuſtom of this " city to the contrary notwithſtanding: *provided* always, " that all and every perſon and perſons not being already " free of this city, and who now are, or hereafter ſhall be, " *intitled* to the freedom of any *other* company within this " city, by patrimony or ſervice, and ought (in purſuance of " this act) to be made free of the ſaid company of butchers, " SHALL BE ADMITTED into the freedom of the ſaid com- " pany of BUTCHERS, upon payment of *ſuch and the like* " *fine and fees (and no more)* as are uſually paid, and payable " upon admiſſion of the child or apprentice of a freeman of " the ſame company." The return then ſets forth, that the ſaid *William Cope* was *educated*, as an apprentice, in the art, trade, or miſtery of a BUTCHER; and *at the time* of the preſentment of the ſaid *William Cope* to the chamberlain, to be admitted into the freedom of the ſame CITY (as in the writ is mentioned), *did uſe*, *occupy*, and *exerciſe*, and *ſtill doth uſe, occupy, and exerciſe the art, trade or myſtery of a* BUTCHER, *within the ſaid city and the liberties thereof*; and that the ſaid *William Cope*, at the time of ſuch preſentment as aforeſaid, *was not, nor yet is, a freeman of the ſaid company of* BUTCHERS. And for *theſe cauſes*, the chamberlain returns, that he had *refuſed* to admit him into the freedom of the ſaid CITY; nor can he admit him into it. The objections to the preſent by-law were: FIRST, It *exceeds the juriſdiction* of the makers of it. For firſt, it *varies the conſtitution of the city eſſentially*; ſecondly, it *injures all the other companies* of the city; and thirdly, it *reſtrains trade*. SECONDLY, That if the mayor and aldermen and common council really had power to make ſuch a by-law as this is, yet the CAUSE here aſſigned for making it is *inſufficient*, as their by-laws muſt be made for the *common good* of the citizens; where any ancient cuſtom is *difficult* or *defective*; or any thing, *newly ariſing*, wants amend- ment. But this by-law was not agreeable to *any* of theſe re- quiſites. Lord MANSFIELD. The end of this by-law is, to *reduce* the matter to what muſt have been the *original* inſti- tution. This is a *regulation* of a very *extenſive* trade, that concerns every body who eats in the city of London. It is not neceſſary that *all* the reaſons of the by-law ſhould be given in the *preamble* of it. Mr. Juſtice DENISON, The caſe of *Wannell* againſt the chamberlain of London (1), was determined

(1) It was determined in Michaelmas term, 1725, 12 *Geo.* 1. when the reſolu- tion of the Court was delivered by Sir *Robert Raymond*, then lord chief juſtice. It had been twice argued. The firſt argument was in Lord Chief Juſtice *Pratt*'s time; who held the by-law to be reaſonable, in reſpect of its tending to prevent fraud; and ſaid, that " The *only* difficulty was, Whether *Wannell* had a right to *demand* " his freedom in the *joiners*' company:" having ſerved a maſter who was *not free* of the *joiners*' company, but of the *merchant taylors*'. But the Court, after hearing a ſecond

determined to the ſatisfaction of every body: and I took the point to be thereby *ſettled.* And this is *not an alteration* of the conſtitution: but *agreeable to*, and a *true expoſition* of, the *original* cuſtom. This caſe is as different from that of *Rex* v. *Philips*, as light and darkneſs. *That* by-law put the right of being *elected* into another ſet of men than the conſtitution required: whereas, they could not alter the right to be elected. But *this* is *only regulating* the trade to what is moſt right and reaſonable, and *reſtoring* it to the *true meaning* of the cuſtom. I am extremely ſatisfied with the reſolution of the caſe of *Wannell.* I think this a very *good* by-law: and the objections are of no weight. Mr. Juſtice FOSTER concurred in opinion, that this by-law only *reſtored the conſtitution* to what it originally muſt have been, and ought to be; and that it was right and reaſonable, and muſt have been the meaning of the cuſtom, "That each company ſhould have the in-"ſpection of their *own* members." Mr. Juſtice WILMOT quite concurred alſo. He ſaid, the only doubt in *Wannell's* caſe, turned upon the power of the joiners' company *to refuſe admitting* the man: but when that was gotten over, there was no more doubt. Corporations were originally inſtituted for the regulation of trade: and every company muſt have had, and ought to have, the inſpection and regulation of their own trade. It muſt be underſtood, *reddendo ſingula ſingulis.* Therefore, he was very clear, that this was *no innovation* or *alteration* of the conſtitution, but a *reſtoration* of it to its true and original inſtitution. PER CUR. (clearly and unanimouſly) Let the RETURN be ALLOWED.

Pierce v. Bartrum, Ea. Ter. 15 Geo. 3. B.R. *Coup.* 269.

Upon a demurrer to a declaration in debt, brought by the chamberlain of the corporation of Exeter, to recover the penalty mentioned in a certain by-law, made by the corporation, under a general power given them by charter, *anno* 3 *Eliz.* to make by-laws; it appeared, that the terms of the by-law were as follows: "That no butcher, or other perſon, "ſhould, within the walls of the ſaid city, ſlaughter any "beaſt, upon pain to forfeit for every bull, ox, cow, or heifer, "ſo ſlaughtered as aforeſaid, the ſum of 40*s.*; and for every "other beaſt ſo ſlaughtered as aforeſaid, the ſum of 20*s.*: "and that no butcher, or other perſon, ſhould keep any "ſwine within the walls of the ſaid city; nor any ſtinking "filth, garbage, or annoyance within his houſe, curtilage, or "backſide, upon pain to pay for every time ſuch butcher, "or other perſon, ſhould ſo offend, the ſum of 5*l.*" The declaration charged the defendant to have had notice of the

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ſecond argument, and taking time to adviſe, held "That a *mandamus* would lie to the joiners' company, to admit him." Sir *James Burrowes* note of this caſe of *Wannell* is agreeable to Sir *John Strange's* report; it was, upon a *mandamus*, directed to Sir *George Ludlam*, then chamberlain of London.

ſaid

ſaid by-law, but did not ſtate him to be free of the city of Exeter. The OBJECTIONS, upon the argument of the demurrer, were, that this by-law was void, 1ſt, As being in reſtraint of trade: and, 2dly, Becauſe it included perſons who were not free of the city, without any cuſtom ſhewn to warrant it. Lord MANSFIELD, The by-law in queſtion is not in reſtraint of trade, but only a regulation of it in this particular city: and it is made in confirmation of the ſtat. 4 *Hen.* 7. c. 3. by which this is declared a nuiſance. As to the objection, that the defendant was a ſtranger, the anſwer is, that he is an inhabitant *pro hac vice*, and, conſequently, is bound by the ſame regulations as the other members of the corporation. ASTON, J. The defendant is ſubject to the local government of the corporation, though he is not a member of it: as to the by-law itſelf, it is certainly not a reſtraint of trade, but a regulation only; and I think it a reaſonable one, and therefore it ſhall bind the inhabitants.—WILLES, J. and ASHHURST, J. of the ſame opinion.—PER TOT. CUR. The by-law is a good one, and the demurrer muſt be overruled.

The Butchers' Company v. Morey, Ea. Ter. 30 Geo. 3. C. B. 1 *Hen. Black.* 370.

A power granted by charter, to a company exerciſing a particular trade, in a certain place, to make by-laws for the government of *all perſons* exerciſing that trade in that place, enables it to make by-laws binding on perſons ſo exerciſing the trade, who are *not members of the company*, as well as thoſe who are.—This was an action of debt for 8*l.* The declaration ſtated, "That king *Geo.* 2. by letters patent, bearing date the 10th of October, in the 23d year of his reign, ordained that all and ſingular the freemen of the ſociety of the art or miſtery of butchers, within the city of London, and EVERY OTHER PERSON WHO THEN USED OR EXERCISED, OR SHOULD THEREAFTER USE OR EXERCISE, the art and miſtery of butchers, within the city of London, the liberties and ſuburbs thereof, and within any other place whatſoever, within two miles from the ſaid city of London, by whatſoever name ſuch ſociety was called or known, and their ſucceſſors for ever thereafter might and ſhould be, by virtue of the ſaid patent, *one body corporate and politic, by the name of the maſter, wardens, and commonalty of the art or miſtery of butchers of the city of London*," *&c.* After other particulars, the power of the company to make by-laws was thus ſtated: "That they ſhould have full power and authority to appoint, from time to time, ſuch reaſonable ordinances, decrees, orders, and conſtitutions in writing, which to them, or the major part of them, &c. ſhould ſeem to be good, wholeſome, profitable, honeſt, and neceſſary, for the good order and government of the maſter, wardens, &c. and of *all other perſons* for the time being, exerciſing or uſing the ſaid art or miſtery of butchers, or *expoſing fleſh to ſale* within the

city of London, and for declaring in what manner the ſaid maſter, &c. and *all perſons uſing the art, &c.* or *expoſing fleſh to ſale* within the ſaid city, and within two miles thereof, in their offices, ſervants, and trades, ſhould behave, bear, and uſe themſelves for the public good, and common benefit of the ſaid maſter, wardens, &c. and in all caſes and things whatſoever, touching, or in what manner ſoever concerning, the art or miſtery, &c. and as often as they ſhould make, conſtitute, &c. ſuch inſtitutions, ordinances, orders, and conſtitutions, ſhould make, limit, and provide ſuch pains, penalties, and puniſhments, by impriſonment of the body, or by fines and forfeiture, or by either of them, againſt and upon *all offenders* againſt ſuch laws, as to the ſaid maſter and wardens, &c. ſhould ſeem neceſſary, &c." It was alſo ſtated, that the ſaid fines and forfeitures were to be recovered and levied to the uſe of the ſaid maſter, and wardens, &c. "which ſaid letters patent, the ſaid freemen of the ſociety of the art or miſtery of butchers, and *the ſaid other perſons therein named, and thereby meant to be incorporated afterwards, &c. accepted &c.*" The by-law in queſtion, was as follows: "That whereas the Lord's-day, commonly called *Sunday*, was, by Chriſtians, to be kept holy; it was ordained, that *no perſon* then uſing, or who ſhould thereafter uſe the ſaid art, &c. and ſhould inhabit and dwell within the ſaid city or ſuburbs thereof, or within two miles of the ſame city, ſhould keep open any ſhop, or *offer to ſale* any freſh meat, upon the ſaid day; and that *every ſuch perſon* who ſhould offend, contrary to any part of that ordinance, ſhould forfeit and pay to the ſaid maſter, wardens, &c. for the firſt time 20*s.* for the ſecond time 40*s.* and for every time afterwards 3*l.* And that it was farther ordained, that all the penalties, forfeitures, and ſums of money to be forfeited, ſhould be to the uſe of the maſter, wardens, &c. and on refuſal, ſhould be recovered by action of debt, &c." of which ſaid by-law the defendant had notice. It was then averred, that the defendant, after the making of the ſaid law, and before committing the ſeveral offences hereinafter mentioned, had been, and ſtill was, a butcher, and then uſed, and ſtill did uſe the art, &c. within the ſpace of two miles from the ſaid city, in Mint-ſtreet, &c. that the defendant did, on the 29th of January, 1786, the ſame *being Sunday*, in a certain ſhop of him the ſaid defendant, &c. ſell divers large quantities of fleſh, to wit, thirty pounds weight of pork, &c. to divers perſons unknown, contrary to the form and effect of the ſaid order, in that behalf made as aforeſaid, whereby he forfeited the ſum of 20*s.* &c. The other offences were ſtated in a ſimilar manner, and the declaration concluded in the common form. Plea *nil debet*. The cauſe was tried at Guildhall, at the ſitting after laſt Michaelmas term, and a verdict found for the plaintiffs. A rule having been obtained

for

for arreſting the judgment, and cauſe ſhewn. Lord LOUGHBOROUGH—I can ſee no good ground of objection to this by-law itſelf, nor to the ſubject-matter of it. It is a regulation made in affirmance of the general ſtatute law of the kingdom, which prohibits buying and ſelling on the Lord's-day. The butchers' company have affixed a penalty on perſons exerciſing the trade of butchers, who ſhall ſell meat on that day, and have increaſed the penalty in proportion to the firſt, ſecond, and third offence. The objection raiſed is, that the authority by which theſe regulations are made, is defective, becauſe, it is contended, it can only extend to thoſe perſons who are members of the company. It is alſo ſaid, that though large corporations, and thoſe which are eſtabliſhed for the general purpoſes of local government have a right to bind, by their laws, all perſons within the limits of their juriſdiction; yet, that a private particular corporation, like the butchers' company, can have no right to affect any perſons but their own members. But no caſe was cited which ſupports this poſition. I agree, that ſtrangers, and they who are not concerned in the trade, for the regulation of which the company was eſtabliſhed, cannot be bound by the laws of that company: if this by-law had inflicted a penalty on the *buyers* of meat, I ſhould hold it to be clearly bad, becauſe they are perfect ſtrangers. It is an object of public policy that the exerciſe of certain trades ſhould be under the regulations of particular bodies; charters have various effects, according to the ſubjects of them. Some are granted with excluſive rights to particular perſons; others contain rules which only affect certain members. On principles of general policy, the object of the law is, that by means of charters of this kind, the power of carrying on trade, of making up goods, of expoſing them to ſale, and the like, ſhould belong to the local government of particular diſtricts. For theſe purpoſes, certain reſtraints are impoſed, ſince every regulation is more or leſs a reſtraint. Now if, in the preſent inſtance, the butchers' company had no power to regulate their own trade, ſo as to make laws binding on perſons who exerciſe that trade, as well thoſe who were not members of the company, as thoſe who were: the conſequence would be, that the beneficial purpoſe of the charter would be entirely defeated, and the only perſons injured by the reſtraint would be the members themſelves. For then all other perſons might carry on the trade without controul, while the members of the company would be excluded, and the whole buſineſs of ſupplying meat on *Sundays*, would fall into the hands of butchers, not of the company. But this would be contrary to the intent of the charter. I think this caſe comes within the principle of the Exeter caſe, and, therefore, that the judgment ought not to be arreſted. GOULD, J. The only difference

ference between this and the Exeter caſe is, that there the regulations were confined to the city of Exeter, but here, the limits extend beyond the boundaries of the city of London. But, where a charter is granted to a company, in affirmance of an act of parliament, made for the purpoſe of common decency and piety, it is fit that the limits of the charter ſhould be as extenſive as the miſchief to be remedied. If the charter were confined to the city itſelf, perſons, who pay no regard to the law, might eaſily go out of the limits preſcribed and buy meat; by which means, the purpoſe of the charter would be defeated. I, therefore, think, theſe are reaſonable limits, and ſee no reaſon to object to the validity of the by-law.—HEATH, J. I am of the ſame opinion. The by-law ſeems to me to be a good one, and within the authority given by the charter to the company: nor is it contrary to the caſe in 1 *Bulſtr.* 11. where it is ſaid, the by-law had been good, if made to ſuppreſs any general inconvenience. And that caſe may well be reconciled with 2 *Ventr.* 33, which was on a queſtion, Whether a by-law of the univerſity of Oxford was good, which reſtrained all perſons, townſmen as well as ſtudents, from walking in the ſtreets after nine o'clock at night? a prohibition was granted, and one of the judges obſerved, that though it might be proper to reſtrain ſcholars of the univerſity from being in the ſtreets after that hour, yet there was no reaſon why the townſmen ſhould be under the ſame reſtraint. Now this agrees with the doctine in *Bulſtrode*, for ſo far from ſuppreſſing a general inconvenience, it would be highly inconvenient, if the inhabitants of a town were prevented from walking in the ſtreets after nine o'clock, whatever may be the caſe in regard to the ſtudents of an univerſity. WILSON, J. I am of the ſame opinion. I think it a good by-law, and that no objection can be made to the ſubject-matter of it. The ſame prohibition is eſtabliſhed all England over, by act of parliament. But it was ſaid, that the charter could give no ſuch power to the company. If this be true, the king had no right to grant ſuch a charter, which expreſsly gives a power to bind not only members of the company, but likewiſe all perſons exerciſing the trade in London, and within two miles round. The queſtion then is, Whether the king could give this power? for the object of its exertion is admitted to be a proper one. Now, Is there any authority denying the king to have the right? It is allowed, that general corporations have ſuch a power by their charters. But by what authority? Who can give them that power but the king? Then, if the king can grant a power of this kind to general corporations, what ſhall prevent him from granting it to particular and private corporations?—Rule diſcharged.

So

So a by-law, founded on a cuſtom, that no ſtrange perſon, of right, ought to uſe the craft of a taylor within a city, except he be free thereof, is a good by-law. This was an action of debt, brought upon a by-law, by the maſters of the fellowſhip and company of merchant-taylors within the city of Bath. The declaration ſtated the charter of that city, granted 32 *Eliz.* with a power to the mayor, aldermen, and common-council to make by-laws; that there was an ancient company, called the fellowſhip and company of merchant-taylors; of which there have been, and ſtill are, two maſters: and that there hath been, time immemorial, an ancient *cuſtom*, "That no ſtranger-perſon hath of right uſed or exerciſed, "or of right ought to uſe or exerciſe the craft or miſtery "of a taylor, within the city aforeſaid, except he be free of "the ſaid city." It then ſtates a by-law, made the 12th of May, 4 *C.* 1. which ordains, "that no *ſtranger* nor *foreigner*, "at any time thereafter, ſhould uſe or exerciſe the craft or "miſtery of a taylor within the ſaid city, except he ſhould "firſt be made *free of the ſaid city*; under a *penalty* of 3*s.* 4*d.* "*per diem*, to be paid to the maſters of the ſaid company of "merchant-taylors for the time being, to the uſe of the poor "of the ſaid company." It then charges upon the defendant, that he having notice of the ſaid by-law, and being a ſtranger and foreigner, had exerciſed the craft and miſtery of a taylor within the ſaid city, on the 1ſt of April, and two days afterward, without being free of the city; and thereby forfeited, to the uſe of the poor of the ſaid company, the ſum of 3*s.* 4*d.* *per day*, for each of the ſaid days. To this declaration, the defendant demurred, generally: and the plaintiffs joined in demurrer. PER CUR. There is nothing of doubt in this caſe. The cuſtom is good; and warranted by a vaſt number of caſes: therefore, the demurrer muſt be overruled.—Judgment for the plaintiffs.

Woolley *et al.* v. Idle, Mic. Ter. 7 Geo. 3. 4 *Burr.* 1951.

What ſhall not be a good By-Law.

A by-law made by a company, in a corporation, in reſtraint of trade, ſuch as to reſtrain the number of apprentices to be taken by any of the members, is void.—This caſe came before the Court, on a return to a mandamus. The writ recited, that the town of Newcaſtle was an ancient town, and the inhabitants and burgeſſes an immemorial corporation. That from time whereof, &c. there have been divers ancient companies, fellowſhips, or fraternities of the freemen of the town. That from time whereof, &c. every perſon who has ſerved an apprenticeſhip of ſeven years, under indentures of apprenticeſhip, to a free burgeſs of the town, ſuch free burgeſs being a free meeting brother and member of any

The King on the Proſecution of W. Coates v. the Wardens of the Coopers' Company of Newcaſtle-upon-Tyne, Pa. Ter. 28 Geo. 3. B.R. 7 T. Rep. 543.

of the companies, &c. whoſe indentures of apprenticeſhip have been inrolled in the books of ſuch company, and who was not diſqualified by law from being made a freeman of the town, has been entitled, and ought to be admitted a freeman or burgeſs of the town, and to be a free meeting brother of the company. That the company of coopers, or coopers, pulley-makers, turners, and rope-makers, has been immemorially one of the ſaid companies. That one *J. Oxnard*, on the 27th of December, 1794, was, by indentures, bound apprentice to *W. Coates* (*Coates* then being a free burgeſs of the town, and a free meeting brother and member of the ſaid company, and duly entitled to take ſuch apprentice) for ſeven years; that the ſaid indentures ought, upon being tendered to the wardens of the ſaid company, to have been inrolled, &c. and that the ſaid indentures were tendered by *Coates* to the defendants, in order that they might be inrolled in the books of the ſaid company, but that the defendants refuſed, &c. It then commanded the defendants to inrol the ſaid indentures, &c. To this writ of mandamus the defendants returned, that the company of coopers was, from time immemorial until the making of the ordinance after mentioned an ancient company, and that the company of pulley-makers, turners, and rope-makers, was alſo, from time immemorial until the ſaid ordinance, another ancient company. That by an ordinance, made in the 17th of *Eliz.* the mayor, aldermen and ſheriff of the town (naming them), being lawfully authoriſed ſo to do, ordained that the ſaid company of coopers ſhould be a corporation; and, as much as in them lay, granted to the ſaid company power *to make acts and lawful decrees for the well and quiet government of themſelves*; and, as much as in them lay, alſo ordered, that it ſhould be lawful for the ſaid company to receive, accept, and join to the ſame company, the company of pulley-makers, turners, and rope-makers, and to make one company for ever, &c. That the ſaid mayor, aldermen, and ſheriff, by the ſaid ordinance, alſo ordered, that "*none of the ſaid companies of coopers, pulley-makers, turners, or rope-makers, ſhould take any apprentice, but one in four years* (except ſuch apprentice ſhould die); *and if any of the ſaid brethren, having children of their own, then it ſhould be lawful to any free-member or brother of the ſaid companies to take ſuch children and put them, or any of them, to work with himſelf, at all times as occaſion ſhould ſerve.*" That that ordinance was duly accepted by the company of coopers, and alſo by the ſaid company of pulley-makers, &c. and the ſaid companies being joined together, by virtue of the ſaid ordinance, have from thence hitherto been one company. That by a bye-law of the ſaid company, made in June, 1786, in purſuance of the ſaid ordinance, it was ordered, "that every brother, for each apprentice he ſhould take, after the firſt

firſt apprentice, ſhould pay to the ſaid fellowſhip 10*l.* provided ſuch apprentice ſhould be bound within the ſpace of four years from the time of ſuch firſt apprentice being bound; but if the ſecond apprentice ſhould not be bound until the firſt ſhould have ſerved four years, then the brother, taking ſuch apprentice, ſhould pay 5*l.* only to the ſaid fellowſhip." That *W. Coates*, on the 3d of June, 1793, by indentures, duly inrolled, &c. took one *W. Wilſon* as an apprentice for ſeven years, who was living when *Oxnard* was ſo bound apprentice to *Coates*, and alſo when *Oxnard*'s indentures were tendered to the defendants for inrolment. That when *Oxnard* was ſo bound, *Wilſon* had not ſerved four years of his apprenticeſhip. And that *Coates* did not, nor did any perſon on *Oxnard*'s behalf, at the time of tendering *Oxnard*'s indentures, pay the ſum of 10*l.* to the ſaid company, in the by-law mentioned. For which reaſons, the defendants cannot inrol the ſaid indentures, &c. Lord KENYON, Ch. J. If the defendants could have returned any reaſon to ſhew that this party is not entitled to have the indentures inrolled, they ſhould have ſhewn it. But this return is bad, from the beginning to the end. To one objection the defendants' counſel has not even attempted to give any anſwer, namely, that it is not alleged, that the apprentice was not the ſon of a freeman. Theſe two companies have exiſted immemorially; but how they could be conſolidated together, I cannot conjecture: however, as they have aſſumed that character, we are to take it as againſt themſelves, that they are conſolidated. There is a caſe in *Salkeld* (1), where it is ſaid, that a corporation may make a fraternity: but no notice is taken of that point in the other (2) reports of that caſe; and I cannot conceive that they have ſuch a power; it can only be effected by the legiſlature, or by the crown. Here, however, it is ſufficient to ſay, that theſe defendants have aſſumed that character, and are now bound by it. *But when the corporation of Newcaſtle choſe to conſolidate theſe two companies, they certainly had no right to ſuperadd by-laws, in reſtraint of trade; and a prohibition not to take more than a certain number of apprentices, is a by-law in reſtraint of trade.* By-laws have been ſeveral times brought to me, as chief juſtice, for confirmation under the ſtatute; and not long ago, I refuſed to allow ſome, becauſe I thought them illegal in reſtraining maſters from taking beyond a certain number of apprentices. On the act of parliament alſo, I think the laſt by-law is void: that ſtatute ſays, that only a ſmall ſum, 2*s.* 6*d.*, ſhall be taken for the inrolment of indentures of apprenticeſhip; whereas, the defendants inſiſt, that under this by-law, 10*l.* ſhall be

(1) Vid. *Cudden* v. *Eaſtwick*, *Salk.* 192.
(2) Vid. 6 *Mod.* 123. *Holt's Rep.* 433.

taken

taken for it. But even if the company had a right to demand that ſum of the maſter, that is no reaſon why the indentures ſhould not be inrolled. If they think they can ſupport this by-law, they may ſtill bring their action againſt the maſter, to recover the penalty. But I am clearly of opinion, that this return cannot be ſupported, and that a peremptory mandamus ought to go. Ashhurst, J. agreed. Grose, J. This mandamus is drawn in the uſual form. The defendants do not controvert any of the facts ſtated in the writ, but they rely on certain pretended by-laws. Now, without enquiring whether one corporation can make another, or whether theſe by-laws are good, it is clear, that this apprentice is not brought within the laſt of them. That ſays, that *every brother*, for each apprentice he ſhould take, ſhould pay 10l. &c.; the meaning of which, evidently is, that the brother ſhall pay that ſum: but this is not an application by a brother, but by an apprentice. But the by-law does not ſay, that the indentures of apprenticeſhip ſhall not be inrolled unleſs the money be paid. Therefore, on this ſhort ground, I am of opinion, that the return is bad.—Lawrence, J. I alſo think, that this writ is in the uſual form. As to the argument of the defendants, that the party applying to be admitted into this company, ought not to be permitted to make the firſt objection to the return, becauſe it is contrary to the conſtitution of the corporation, that conſequence by no means follows; for even though the corporation of Newcaſtle could make an ordinance for the purpoſe of uniting theſe two companies, it does not follow, that they could make a by-law in reſtraint of trade: that ordinance might be good in part, though the reſt were bad.—Return quaſhed.

Rex v. Robert Cutbuſh, common council-man of Maidſtone, Ea. Ter. 8 Geo 3 4 *Burr.* 2204

Corporations, by charter, cannot make by-laws inconſiſtent with the intention, or counteracting the directions of, their charter.—This was an information, in nature of a *quo warranto*, brought againſt the defendant, to ſhew by what warrant he claimed to be a common-council-man of Maidſtone; which is alleged to be an ancient town and corporation, conſiſting of a mayor, jurats, and commonalty, and that the office of common-council-man was a public office therein. The defendant, in his plea, admits this; but goes on, and ſhews a charter of incorporation, dated the 17th of June, 21 *Geo.* 2. by the name of the mayor, jurats, and commonalty of the king's town and pariſh of Maidſtone, in the county of Kent; ordaining, that thirteen of the inhabitants ſhould be choſen jurats, and one of the jurats mayor; of which thirteen inhabitants, the twelve others ſhould be aiding and aſſiſting to the mayor; and that there ſhould be forty of the remaining principal inhabitants choſen to be, and ſhould be, and be called the common-council of the ſaid town and pariſh. That the ſaid charter directed, that the mayor, jurats,

rats, and common-council ſhould have power of making by-laws. That it places the election of common-council-men in the mayor, jurats, and COMMONALTY, or the majority of them. That the corporation accepted this charter: and afterwards, viz. on the 14th of March, 1767, the then mayor, jurats, and common-council, in due manner aſſembled for that purpoſe, made a by-law; which by-law recited the ſaid charter, and the power thereby given them; and that the commonalty of the ſaid town and pariſh were very numerous, and the admiſſion of them to vote in the *election of common-council-men* of the ſaid town and pariſh had been *found, by experience,* to be attended with many inconveniencies, and had, from time to time, *occaſioned divers riots and diſorders, and great popular confuſion* within the ſaid town and pariſh, and had very much diſturbed and broken in upon the peace, good order, and government of the ſaid town and pariſh; and further recited, that ſuch inconveniencies would be likely to be remedied, if the right of electing of the common-council-men of the ſaid town and pariſh were to be *confined* to the mayor, jurats, and SUCH of the *commonalty* of the ſaid town and pariſh who then were, or ſhould be, *of the common-council* of the ſaid town and pariſh, for the time being, and *ſixty others* of the ſaid commonalty, who were, or ſhould be the *ſenior common freemen* for the time being, of the ſaid town and pariſh, *as they ſhould ſtand,* in order and place of ſeniority *upon the books* of admiſſion of freemen of the ſaid town and pariſh; ſuch ſixty not being either mayor, jurats, or of the common-council of the ſaid town and pariſh.—After this recital and preface, it is then *(for the preventing the like inconveniencies* for the future, and *for the avoiding of popular confuſion and diſorder* in the election of common council-men within, and for the ſaid town and pariſh) ORDAINED, that upon every, or any future election of a common-council-man, or common-council-men of the ſaid town and pariſh, the mayor, jurats, and SUCH *of the commonalty* of the ſaid town and pariſh who were, or ſhould be, *of the common-council* of the ſaid town and pariſh for the time being, and SIXTY *others* of the ſaid commonalty, who then were, or ſhould be, the SENIOR *common freemen* for the time being of the ſaid town and pariſh, *as* they ſhould, from time to time, ſtand in order and place of ſeniority *upon the books of admiſſion of freemen* of the ſaid town and pariſh (ſuch ſixty not being either mayor, jurats, or of the common-council of the ſaid town and pariſh), or the major part of ſuch mayor, jurats, *common-council and ſixty ſenior* common freemen for the time being of the ſaid town and pariſh, ſhould meet and aſſemble, &c.; and being ſo met and aſſembled ſhould, *by themſelves,* WITHOUT *the* PRESENCE *or* CONCURRENCE *of* ANY OTHER *of the commonalty* of the ſaid town and pariſh, elect

elect and chooſe one or more of the principal inhabitants of the ſaid town and pariſh, to be a common-council-man, or common-council-men, of the ſaid town and pariſh. They aver, that the ſaid by-law, from the time of the making thereof, had been, and ſtill is, in full force and virtue, and in no wiſe annulled, revoked, or repealed. The defendant then ſhews, that he was elected a common-council-man *purſuant to this by-law:* and by that warrant, he has ever ſince exerciſed, and ſtill claims to exerciſe, the ſaid office. The king's coroner and attorney, in his replication, prays *oyer* of theſe letters patent of 21 *Geo.* 2. which being read and heard, he demurs generally to the defendant's plea: and the defendant joins in demurrer. In the caſe of *the King* v. *Spencer*, in p. 489, *ſupra*, the by-law, which was made on the 18th of Auguſt, 1764, *ſuperadding a qualification*, which was neither required by the charter, nor connected with the corporate character of the electors, was holden to be a *bad* one.—Whereupon, the mayor, jurats, and common-council, ſtill purſuing their ſcheme of excluding the greateſt part of the commonalty from voting at the elections of common-council; and hoping to evade the objections taken to their former *bad* by-law; made this *new* one, dated the 14th of March, 1767; whereby, they *confined* the commonalty's right of election to the *ſixty ſeniors* of them, and excluded all the reſt of the commonalty (except theſe ſixty ſeniors) from having any ſhare in any future election of common-council-men. It was now inſiſted, on the part of the proſecutor, that this alſo was a *bad* by-law; a departure from the charter, and contrary to the ſpirit and intention of it. The Court were clear and unanimous, that this by-law was bad. They held it to be manifeſtly contrary to the intention of the charter: (which, Lord *Mansfield* ſaid, had paſſed upon hearing all parties, and after much litigation). It is made by a part of the corporation, to deprive the reſt of their right to elect, without their conſent. The charter gives this right to the whole body of the commonalty: the by-law confines it to a narrow compaſs of the ſixty ſeniors only. This expreſsly contradicts the charter. Mr. Juſtice Yates obſerved, that in the caſe of corporations, 4 *Co.* 77. *b.* the by-law, which was put in queſtion, did not vary the conſtitution. And the great ground of that reſolution was, "that it muſt be made by *common aſſent.*" But a by-law, made by a *part* of the corporation, to *exclude the reſt*, without their aſſent, is not good. And he likewiſe agreed to what Lord *Mansfield* had before obſerved. That where a corporation is by charter, and the common-council is *created by the charter*, they ought (as being the *creature* of the charter) to be reſtrained from making any by-laws inconſiſtent with it, or counteracting the end, intention, and directions of it: though it may not be

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unreaſonable to allow a greater latitude in making by-laws for the good of the corporation, to the common-council of a corporation by preſcription, where the common-council is by preſcription, and ſuch *preſcription* authorizes them to make by-laws for the good of the corporation. PER CUR. unanimouſly—Judgment of ouſter.

A by-law, that any perſon ſhall be admitted to the freedom of a corporation, upon payment of money, together with the fees, is a bad by-law.—This caſe now came on, in the crown-paper, on a demurrer to a ſpecial plea to an information, in nature of *quo warranto*, to ſhew by what authority the defendants claim the liberty, privilege, and franchiſe of admitting perſons to be freemen of the town of Northampton, who had not any previous title to it, by *birth*, *ſervitude*, or *election*. The Court had ſome difficulty, at firſt, about granting an information of this kind; and ordered a ſearch for precedents: upon which ſearch, the following were found: *Hil.* 10 *W.* 3. *Rex* v. *Mayor, Aldermen, and Commonalty of the borough of Hertford*—To ſhew "by what "warrant they claim to have and uſe *divers liberties and pri-* "*vileges* within the ſaid borough." *Paſch.* 11 *W.* 3. *Idem* v. *Eoſdem*—It was referred to Sir *Samuel Aſtry*, to examine the proceſs iſſued againſt the defendants. *Mich.* 11 *W.* 3. *Idem* v. *Eoſdem*—Ordered, that unleſs cauſe be ſhewn to the contrary, on, &c. the ſeveral iſſues returned upon the ſeveral writs of *diſtringas* againſt the defendants be eſtreated into the exchequer: afterwards, in the ſame term, the above rule was diſcharged, upon hearing the maſter's report. *Paſch.* 11 *W.* 3.—A rule was made upon *T. Warburton*, eſq. late mayor of Holt, in Denbighſhire, to ſhew cauſe why an information ſhould not be exhibited againſt him, to ſhew by what warrant he claimed the priviledge "*to elect and ſwear peregrinos* "*& extraneos anglicè foreigners* to be *burgeſſes* of the ſaid bo- "rough, without the conſent of the bailiffs and burgeſſes of "the borough." *Trin.* 11 *W.* 3.—The above rule was made abſolute. *Mich.* 11. *W.* 3. *Rex* v. *Warburton*—A *ſuperſedeas* was ordered to the writ of attachment upon that information, *quia erronicè emanavit:* and all further proceſs, upon the ſaid information, was ordered to be ſtayed, until the Court ſhould be further moved on the part of the proſecutor. *Hil.* 7 *Ann.*—It was ordered, that an information, in the nature of a *quo warranto*, ſhould be exhibited againſt *Alexander John*, to ſhew by what warrant he claims the liberty and privilege "to AMOVE *capital burgeſſes* of the borough of "Leſtwithiel, in Cornwall, and *to chooſe others in their places*, "*ad libitum ſuum proprium.*" *Paſch.* 3 *Geo.* 2.—A rule was made upon *William Pole*, one of the bailiffs of Liverpool, and upon *Richard Norris* and others, twenty-two of the common-council of the ſaid borough, to ſhew cauſe why an informa-

Rex v. Breton, eſq. mayor, and Jeyes, gent. town-clerk of Northampton, Mic. Ter. 9 Geo. 3. B. R. 4 *Burr.* 2260.

tion, in the nature of a *quo warranto*, ſhould not be exhibited againſt them, to ſhew "by what warrant they, without the mayor, and not being twenty-five of the common-council of the ſaid town, claim to have, uſe, and enjoy the *liberty*, *privilege*, and *franchiſe* of *electing*, *approving*, *and admitting* perſons to be *burgeſſes* of the aforeſaid town." Which rule, after ſeveral enlargements, was, in *Mich.* 4 *Geo.* 2. made abſolute. And in *Paſch.* 4 *Geo.* 2.—Rules were given, to plead to an information which had then been accordingly exhibited againſt them: and a plea of *diſclaimer* was entered. In *Mich.* 32 *Geo.* 2.—An information, in the nature of a *quo warranto*, was ordered to be exhibited againſt *Thomas Lewis*, clerk, to ſhew by what authority he claimed "to *make and ſwear free burgeſſes of the borough of New Radnor*, *without the concurrence* of the bailiff, aldermen, and capital burgeſſes of the ſaid borough:" and an information was exhibited againſt him accordingly. On theſe precedents, the Court granted the information.—The information ſtated, *inter alia*, that the town of Northampton is an ancient town, &c. AND that the mayor and bailiffs of the town, for the time being, and ſuch other burgeſſes of the ſaid town as have been mayor or bailiffs of the ſaid town, and the company of eight-and-forty for the time being, or the major part of them, in common-council aſſembled, have elected, and ought to *elect ſuch and ſo many fit perſons to be freemen of the ſaid town, as to them hath ſeemed meet*; AND that *no perſon* ought to be *admitted a freeman* of the ſaid town, UNLESS elected thereto in manner aforeſaid, or intitled to be a freeman of the ſaid town, by *birth* or *ſervitude*, according to the cuſtom of the ſaid town. It then charged, that *Thomas Breton*, of the ſaid town, eſq. (being *mayor* of the ſaid town), and *John Jeyes*, of the ſaid town, gentleman (being *town-clerk* of the town), had exerciſed, without any legal warrant, royal grant, or right whatſoever, the *liberty*, *privilege*, and *franchiſe* of ADMITTING *perſons* FREEMEN of the ſaid town, *who had not*, *nor have any* PREVIOUS TITLE to be freemen of the ſaid town, by *birth*, *ſervitude*, or *election*, &c. To this information, the defendants pleaded—THAT the town of Northampton was an ancient town, &c. and that King *Charles* the Second, by his letters patent, dated the 3d of Auguſt, 15 *regni*, granted, that the town of Northampton ſhould be a free town of itſelf; and that the burgeſſes, and their ſucceſſors, ſhould be one body politic and corporate, by the name of *The mayor*, *bailiffs*, *and burgeſſes of the town of Northampton*; and that there ſhould be a mayor, and two bailiffs; and forty-eight of the commonalty, who ſhould be called, "The company of forty-eight;" and that the aforeſaid mayor, and two bailiffs, and *ſuch other* burgeſſes of the ſame town, who formerly had been, or thereafter, from time

to time, ſhould be mayors or bailiffs of the ſame town, together with the aforeſaid forty-eight burgeſſes, called, "The company of forty-eight," ſhould be, and be called, "The *common-council* of the town aforeſaid;" and ſhould be, from time to time, *aſſiſting and aiding to the mayor of the ſaid town, for the time being, in all caſes and matters touching or concerning the town aforeſaid.* And the ſaid late king further willed, that the mayor and bailiffs of the town aforeſaid, for the time being, and ſuch burgeſſes of the ſame town, which theretofore had been, or thereafter, from time to time, ſhould be mayors or bailiffs of the ſame town, together with the aforeſaid other burgeſſes, called, "The company of the forty-eight," and their ſucceſſors for the time being, or the major part of them (of which major part the late king willed, that the mayor of the town aforeſaid for the time being, and ſuch three other burgeſſes of the town aforeſaid, which theretofore had been, or thereafter ſhould be, mayors, commonly called aldermen of the ſame town, ſhould be one), ſhould have full power and authority to conſtitute, ordain, and make, from time to time, ſuch REASONABLE *laws, ſtatutes, and ordinances whatſoever*, which to them, according to their *ſound diſcretion* (as aforeſaid), ſhould ſeem to be *good* and *wholeſome, profitable, honeſt*, and *neceſſary* for the good rule and government of the ſaid burgeſſes, &c. And the ſaid defendants further ſay, That the MAYOR and TOWN-CLERK of the ſaid town of Northampton, for the time being, from time whereof the memory of man is not to the contrary, have *admitted*, and have *uſed*, and been *accuſtomed* to admit, and during all the time aforeſaid *of right* OUGHT *to have admitted to the* FREEDOM of the ſaid town of Northampton, ALL perſons having a *right* to be admitted to the ſame: whether by reaſon of *birth* or *ſervitude*, or by virtue of any *order* or *orders* of the ſaid mayor, bailiffs, and burgeſſes, or in any *other* manner howſoever. And the ſaid defendants further ſay, That on the 22d day of October, in the year of our Lord 1767, the then mayor and bailiffs, and the major part of ſuch of the then burgeſſes of the ſaid town, who theretofore had been mayors and bailiffs of the ſame town, and the other then burgeſſes of the ſame town, called, "The company of forty-eight," in due manner made the following by-law: to wit, "That "ANY perſon or perſons (*not* being entitled to the freedom "of the ſaid town, by *birth* or *ſervitude*) ſhould be *thereafter* "ADMITTED *to the freedom* of the ſaid town, UPON PAY-"MENT of the *price* or *ſum* of TEN POUNDS; except ſuch "perſon or perſons who had married or ſhould be married "(at the time of their admiſſion) to the daughter of a free-"man of the ſaid town; and *thoſe*, upon payment of the "price or ſum of *five* pounds; with the uſual and accuſtomed "fees; provided, that upon every ſuch their admiſſion, they

" ſhould reſpectively pay for the ſame, in *caſh*, as aforeſaid; " and that no note, or other ſecurity, ſhould be taken as a " conſideration for ſuch freedom." And BY VIRTUE of the ſaid *ordinance* or *by-law* the ſaid *Thomas Breton*, being mayor, and the ſaid *John Jayes*, being town-clerk of the ſaid town of Northampton, have exerciſed the liberty of *admitting perſons* PAYING SUCH SUMS OF MONEY as are directed by that by-law, &c. &c. To this plea, the king's coroner and attorney *demurs*, generally; and prays judgment againſt the defendants; and that they may be convicted and forejudged. The defendants *join in demurrer*. For the proſecution it was objected, that this by-law, " That any perſon, not intitled to the freedom, either by birth or ſervitude, ſhould be " admitted to the freedom, upon payment of a certain *price* " or *ſum* of *money*," was a *bad* one. And the COURT were clearly of opinion, " That this by-law was an alteration of " the conſtitution given by the crown; and void." Accordingly, PER CUR. unanimouſly, judgment for the king.

Heiketh *v.* Braddock, Hil. Ter. 6 Geo. 3. B. R. 3 *Burr.* 1847.

A by-law in reſtraint of trade is bad, unleſs there be a cuſtom to ſupport it.—Lord MANSFIELD, This was an action of debt for the penalty of a by-law, which the defendant was ſuppoſed to have incurred by keeping a ſhop within the city of Cheſter, not being a freeman. The action was brought in the *portmote*-court, which is holden before the mayor; and was proſecuted by the plaintiffs, as treaſurers of the city (who are ſimilar to chamberlains in other corporations). The declaration ſtates a *cuſtom* in the city of Cheſter, " That " no perſon who is *not a freeman* could keep any ſhop, or " expoſe goods to ſale by retail, within the ſaid city; except- " ing at fairs." And then the by-law is ſet forth: which ordains " That *no perſon* who is *not free* of the city ſhould ſell " goods by retail, or keep any ſhop for a retail ſale, within " the ſaid city, excepting at fairs; upon pain of *forfeiting* 5*l.* " for every offence." This penalty is directed by the by-law to be recovered by action of debt, to be proſecuted in the *name* of the *treaſurers of the city*, in the *portmote-court* to be holden before the *mayor:* and *one-third of the penalties* (deducting the coſts) is allotted to the poor priſoners in the *North-Gate* gaol of that city; another third, to the perſon who ſhould firſt give information of the offence; and the remaining third is left *undiſpoſed of*. The declaration then charges, that the defendant had kept an open ſhop in the city, not being free, in violation of the cuſtom and by-law aforeſaid: and, therefore, the plaintiffs, being treaſurers of the city, demand this penalty. To this declaration the defendant pleaded *nil debet:* and iſſue being joined thereupon, a *venire* was awarded to the *ſheriffs of the city*, to return a jury of twelve free and lawful men *of the city*. When the jury were returned, the defendant *challenged the array*; becauſe the *ſheriffs*

riffs were *citizens and freemen.* The plaintiffs demurred to the challenge: and the defendant joined in demurrer. In this part of the record, an extraordinary entry is introduced, as a ſuggeſtion of the court, that it was *judicially taken notice of*, "That, *by the cuſtom of the city*, *no* perſon could *array any* "*jury*, within the juriſdiction of that court, but the ſheriffs "or *coroner of the city*, or one of them:" and "that *none* "*could be ſheriffs or coroners, but citizens and freemen.*" After this ſuggeſtion, the court gave judgment on the challenge, "that the ſame ſhould be *over-ruled*, and the *array* "*allowed.*" The defendant then challenged the *polls* of the jury, becauſe they were, all of them, *freemen.* And *this* challenge was alſo *diſallowed.* And, thereupon, the jury (thus returned and objected to) proceeded to try the iſſue: and a verdict and judgment were given for the plaintiffs. Upon this judgment the defendant brought a writ of error in the court of pleas for the county palatine: and there the judgment of the *portmote*-court was *reverſed.* And, upon this judgment of reverſal, the preſent writ of error was brought in *this* court. THE ERRORS for which the judgment was reverſed in the county-palatine court, were: 1ſt, becauſe the *two ſheriffs* who returned the jury, and the *jurors themſelves* were *freemen* of the city, and (*as* ſuch) were *intereſted* in the matters to be tried; and, therefore, that the *challenges were erroneouſly over-ruled:* 2dly, that, as it appears from the ſuggeſtion introduced into the record, "that in the "*portmote-court*, no jury could be returned, but *by* ſheriffs or "coroners, who are *freemen of the city*; the by-law which "*confines the action* to *ſuch* a juriſdiction (where the ſheriffs "and jury *muſt neceſſarily be intereſted*) is, in *that* reſpect, a "*bad* and *illegal* by-law." In anſwer to theſe objections, it was argued for the plaintiffs, "that neither the *ſheriffs* nor "the *jurors* were *intereſted* at all, in the *preſent* ſuit." It was admitted, "that where a corporation are *parties* to the "ſuit, or *immediately intereſted* in the very iſſue in queſtion, "no freeman can be either a juror or a witneſs." *Co. Litt.* 157. 3 *Keble*, 12. 295. But it was ſaid, that, in *this* caſe, the corporation are *no parties* to the action, nor *any way concerned* in the point in iſſue. That the ſuit is by the treaſurers in their *ſeparate* capacity; and, whatever be the event of it, the corporation can neither pay nor recover any *coſts.* That in *this* action the object of litigation is merely the *penalty* of the by-law; and in that penalty, the corporation have *no ſhare or intereſt.* It was further argued, that though the by-law is founded on a cuſtom "to exclude all foreigners from the "city;" and the freemen may be ſaid to have an intereſt in that excluſion; yet this is a *remote* conſideration, which, at moſt, can affect *only ſuch* of the freemen as happen to be *traders.* That the circumſtance of a freeman's being a

trader, is a particular *uncertain incident*; which, if it happens to occur in any of the jurors, might, indeed, warrant a challenge *for favour* (where the fact would be tried): but that a *mere possibility* of such an intereſt is no ſufficient ground for a *principal* challenge. It was alſo obſerved, that the verdict for this penalty would not avail the corporation, in any ſuit upon the *cuſtom*. For, if the cuſtom were to be litigated in a ſuperior court, the corporation could not give this verdict in evidence. And as to the *ſuggeſtion*, it was inſiſted, that *every court* muſt *judicially* take notice of their own cuſtoms: and, as none but freemen could poſſibly be either ſheriffs or jurors, if the preſent objection ſhould prevail, this by-law would be left without a remedy to enforce it; and conſequently there would be a failure of juſtice. THIS is the ſubſtance of the arguments which were offered in ſupport of the judgment of the *portmote*-court. BUT WE ARE ALL VERY CLEARLY OF OPINION, that in *this* caſe *neither* the *ſheriffs* nor *jury* were competent; and therefore the challenge was IMPROPERLY *over-ruled* at the *portmote*-court. There is no principle in the law more ſettled than this—That *any* degree, even the *ſmalleſt* degree of intereſt in the queſtion depending is a deciſive objection to a witneſs, and much more to a *juror*, or to the *officer* by whom the jury is *returned*. The law has ſo watchful an eye to the pure and unbiaſſed adminiſtration of juſtice, that it will never truſt the *paſſions* of mankind in the deciſion of any matter of right. If, therefore, the *ſheriff*, a *juror*, or a *witneſs*, be *in any ſort intereſted* in the matter to be tried, the law conſiders him as under an influence which may warp his integrity, or pervert his judgment; and therefore will not truſt him. The *minuteneſs* of the intereſt would not relax the objection. For, the *degrees* of influence can not be meaſured: no line can be drawn, but that of a total excluſion of *all* degrees whatſoever. In the preſent caſe, *every* member of the corporation was evidently intereſted in the very iſſue to be tried. For, the cuſtom "To exclude all ſtrangers from trading in the city," is the main foundation of the action: it is the only ground upon which ſuch a by-law could, in any caſe, be valid. For, a by-law "To exclude," *without* a cuſtom to *ſupport* it, would be void, as an illegal reſtraint upon the common right of the ſubject. It was, therefore, neceſſary for the plaintiffs to allege this cuſtom in their declaration. And the defendant's plea of "*Nil debet*" puts the *whole* declaration in iſſue. Upon that iſſue, the plaintiffs muſt *prove* the *cuſtom* "to exclude," as well as the *by-law:* and the jury muſt form their verdict upon the *whole*. For, *all* the facts alleged muſt *concur*, to prove the defendant indebted to the plaintiffs. *If* there was *no* ſuch cuſtom, the *by-law* was a *nullity*; and, conſequently, the defendant could not owe the penalty. So that here *every* free-

man

man was intereſted in the very iſſue to be tried. They may, indeed, have no ſhare in the penalty itſelf: but they are intereſted in the facts on *which* the penalty depends.—The excluſion of foreigners is a MONOPOLY *to the freemen themſelves*. The enforcing of this excluſion, by by-laws and penalties, is ſecuring that monopoly. And in this action, the very freemen who were to gain by ſecuring this monopoly, were the jury to determine it. Therefore *every* freeman had an intereſt and bias in the matter of the iſſue to be tried in this cauſe. It is no anſwer to the objection, to ſay "that they were to have no part of the *penalty*:" for ſtill they had a *bias* upon them in relation to the queſtion to be tried. Whatever the action may be, if a juror be intereſted in *any* of the matters in iſſue, he is unfit to try them. The incapacity ariſes from his bias in the particular facts he is to try: and *whatever* be the facts which that bias touches, he is incapable of trying *thoſe* facts. In the caſe of *Day* v. *Savadge*, in *Hobart* 87. The ſuit was an action of treſpaſs between two private perſons. But an iſſue being taken upon a cuſtom in London, "For every freeman to be diſcharged "of warfage," the Court would not ſuffer this cuſtom to be proved by the recorder: and on that occaſion they held that "Where the iſſue *concerns* a corporation, though they be not "directly *parties* to the ſuit, if they are to make the pannel, "or any of their body are to go upon the jury, it is a cauſe "of challenge." None of the caſes cited on the part of the plaintiff, come up to the preſent caſe. *Vanacker*'s (1) caſe [with reſpect to the city of London fining thoſe who are elected and refuſe to ſerve the office of ſheriff] was on a by-law that affected their own members only; and where the parties on both ſides were equally freemen. In the caſe of *Bodwick* v. *Fennel*, *M.* 1748, it was ſtated at the bar, "that no exception or challenge was taken." And as a party may waive all exceptions, if he pleaſes; if he does *not* object, it is a virtual acquieſcence. In *Wakeman* v. *Harris*, B. R. Tr. 1753, there was alſo no challenge; and the bill of exceptions was *not ſealed*: and therefore the court could not take any notice of it. *The caſe of the city of London* v. *Wood*, 1 *Salk*, 397, was cited on *both* ſides; and for the plaintiff, the words of Lord Chief Baron *Ward* was relied on, that the objection to the mayor's ſitting as judge in a cauſe of the corporation, was not ſo much in point of *intereſt*, as inconſiſtency. But is not the *intereſt* a great *ingredient* in that inconſiſtency? And hence comes the rule, "that no man "ſhall be judge in his own cauſe." And the ſame rule will equally apply to a *juror*. It was ſaid, "that if the defend-

(1) *Carth.* 480. 1 Lord *Raym.* 496.

" ant's challenges be allowed, the corporation will be left " without remedy on the by-law." The anſwer is, that *if* the fact be true, " that they can impannel no jury but free- " men," the fault was their own, in confining the action to their own court. On the other hand, *if* they had a power (as the city is a *county* of itſelf), to have impannelled *non-freemen*, it was their own fault that they did not. In the regulation of their own members, they may indeed make by-laws, and enforce the obſervance of them, by proſecutions amongſt themſelves; becauſe every member of the corporation is bound by the juriſdiction into which he voluntarily enters; and being all of them freemen, their circumſtances are equal. But if corporations were to try their *own* ſuits *againſt ſtrangers*, upon a by-law " for excluding *all* traders " *but themſelves*," there would be an end of the diſtinction which has long been eſtabliſhed, " that a by-law which lays " this reſtraint upon trade is void, *unleſs* there be a *cuſtom* to " ſupport it." If the cuſtom be a *neceſſary foundation* for ſupporting ſuch a by-law, it is neceſſary to *prove* it. But if the freemen themſelves might determine upon it, they would not be very exact in that proof: and by-laws themſelves, *without* any ſuch cuſtom, would ſoon have an equal effect. Had this by-law been *general* without *limiting the action* to the treaſurers, or to their own court, they might then have tried it in a ſuperior court, and the whole would have come to a proper deciſion, THEREFORE WE ARE ALL OF OPINION, that the judgment of the Court of great ſeſſions, reverſing the judgment of the *portmote*-court, ought to be affirmed.

Kirk *v.* Nowill and Butler, Hil. Ter. 26 Geo. 3. B. R. 1 *Ter. Rep.* 118.

A corporation, created by letters patent, with a power of making by-laws, cannot make any laws to incur a *forfeiture*; neither can a corporation created by act of parliament, unleſs ſuch a power be expreſsly given.—This was an action of treſpaſs for ſeizing and taking a quantity of forks, the property of the plaintiff. The defendant pleaded, 1ſt, The general iſſue. The ſecond plea ſtated, that the town of Sheffield, in which the ſaid treſpaſs is ſuppoſed to have been committed, was within the lordſhip and liberty of Hallamſhire, in the county of York. That the company of cutlers was incorporated by ſtat. 21 *Jac.* 1. *c.* 31. That that act directed that one maſter, two wardens, ſix ſearchers, and four-and-twenty aſſiſtants, ſhould be annually choſen out of the ſaid company to govern the ſaid corporation. That it was by the ſaid act of parliament further enacted, " That no perſon " uſing the ſaid arts or manufactures within the liberty of " Hallamſhire, or ſix miles compaſs of the ſame, ſhould at " any time hereafter make any knives, or knife-blades, ſheers, " ſciſſars, or ſickles, except he or they did put ſteel into the " edges of them, upon pain to loſe, for every ſuch offence, 10s.

" and

" and the wares ſo deceitfully made; to be ſeized and re-
" covered by the maſter and wardens of the ſaid company,
" for the time being, and to be levied, diſtributed, and em-
" ployed to the uſe of the ſaid corporation, to and for the
" relief and benefit of the poor of the ſaid corporation."
And that the forks mentioned in the declaration were for-
feited and ſeized under that act. The third plea ſet forth the
incorporation of the ſaid company, by the ſaid act of 21 *Jac.*
1.; that it was, by the ſaid act, further enacted, " That no
perſon uſing the ſaid myſtery or crafts, ſhould at any time
hereafter ſtrike, grave, or uſe, upon his knives, or wares,
any more marks than one, upon pain to forfeit 40*s.* to be
levied as aforeſaid;" and that the forks mentioned in the de-
claration were forfeited and ſeized under that act. 4*thly*, The
defendants ſet forth the incorporating of the ſaid company,
by the ſaid act of 21 *Jac.* 1.; " and that for the due order-
" ing and better maintaining of the ſaid company, and for
" the better relieving and employing of the poor of the ſaid
" trade, it was ordained and enacted, that it ſhould be law-
" ful for the maſter, wardens, ſearchers, and aſſiſtants of
" the company of cutlers aforeſaid, or the greater part of
" them, and their ſucceſſors, from time to time, *to conſti-*
" *tute, ordain, make, and eſtabliſh, ſuch laws, acts, orders,*
" *ordinances, and conſtitutions, which to the ſaid maſter*, war-
" dens, ſearchers, and aſſiſtants, or the greater part of them,
" according to their diſcretions, ſhall be good, wholeſome,
" profitable, honeſt, and neceſſary, for the good order, rule,
" and government of the ſaid maſter, wardens, ſearchers,
" and commonalty, in their ſeveral arts aforeſaid, and of
" all other their apprentices, and ſervants, in the ſame
" arts, manufactures, and profeſſions, aforeſaid; ſo that
" the ſaid ordinances and conſtitutions were not any way
" repugnant and contrary to his majeſty's royal prerogative,
" or to the laws of this realm. And that the ſaid maſter,
" wardens, ſearchers, and aſſiſtants of cutlers aforeſaid, or
" the greater part of them, having made ſuch laws, inſtitu-
" tions, ordinances, and conſtitutions, might appoint and
" *impoſe ſuch reaſonable pains, puniſhments, and penalties, by*
" *fine or amerciament, or by either of them*, upon all thoſe
" which they ſhould find offending contrary, &c. *and the ſame*
" *fines and amerciaments to levy*, receive, and have, to the uſe
" of the ſaid corporation, &c. That on the 31ſt day of July,
" 1780, the maſter, wardens, ſearchers, and aſſiſtants of the
" ſaid company, did make a certain by-law, and thereby
" (amongſt other things) ordain, order, and eſtabliſh, *that*
" *it ſhould be lawful for the ſearchers of the ſaid corporation,*
" *for the time being, or any three or more of them, at all times*
" *thereafter in the day-time, to enter into the reſpective work-*
" *ſhops and warehouſes of any the reſpective members or freemen*

" *of*

" *of the ſaid corporation, or company, within the ſaid lordſhip*
" *or liberty, or ſix miles compaſs thereof, to ſearch for deceitful*
" *and unworkmanly cutlery wares, and other wares, made or*
" *wrought of iron or ſteel, and all ſuch deceitful and unwork-*
" *manly wares as ſhould be there found upon ſuch ſearch, to*
" *ſeize, take, carry away, break, and deſtroy; and the iron*
" *and ſteel thereof coming, to ſell and diſpoſe of for the relief*
" *and benefit of the poor of the ſaid corporation*; that the ſaid
" by-law was afterwards examined and approved of by the
" juſtices of aſſize, &c. according to the form of the ſtatute,
" &c. &c.. The defendants then juſtified the ſeizure of the
" wares as ſearchers under the above by-law." Replication took iſſue on the firſt plea.—To the 2d, 3d, and 4th pleas, the plaintiff replied *de injuriâ ſuâ propriâ*; and the iſſues thereon. There was a verdict for the plaintiff on the three firſt iſſues, and for the defendants on the laſt. Afterwards a rule to ſhew cauſe why judgment ſhould not be entered for the plaintiff in this cauſe on the general iſſue, and the two firſt juſtifications, notwithſtanding the verdict for the defendant on the laſt juſtification, the ſame juſtification being inſufficient in law, was obtained upon two grounds. 1*ſt*, That a power, claimed by a corporation, of creating by-laws to incur a forfeiture, was bad in point of law (1), unleſs founded on an ancient cuſtom within a city, or unleſs ſuch power was expreſsly given to them by act of parliament. 2 *Inſt.* 47. and 8 *Rep.* 125. 2*dly*, That the ſtatute, on which this by-law was founded, had appointed a ſpecific puniſhment for the offence which had been committed, *viz. by fine or amerciament*, which precluded the corporation from inflicting any other. Cauſe having been ſhewn, the judgment of the Court was pronounced as follows: Lord MANSFIELD, Ch. J. A corporation, in the definition of it, is a creature of the crown, created by letters patent; and ſuch a corporation, with a power of making by-laws, cannot make any ſuch law to incur a forfeiture. Thoſe corporations, which are created by act of parliament, have no other additional powers incident to them, than thoſe have which are created by charter, unleſs they be expreſsly given. No ſuch extraordinary power of making by-laws to incur a forfeiture appearing upon this plea to have been conferred, it is impoſſible for the Court to ſay, that this by-law can be ſupported by the act. BULLER, J. This by-law is bad, conſidered in every point of view. Taking it generally as a by-law, creating a forfeiture; the act of parliament not having given this corporation a power to make ſuch by-law, it is bad on that ground. Then, it has been ſaid that this by-law is ſup-

(1) *Vid.* 1 *Wilſ.* 63; *Barn.* 133. 267.

ported

ported by the act: but ſo far from it, they have expreſsly negatived ſuch a power; for the act preſcribes in what terms by-laws ſhall be enforced, namely, *by fine or amerciament*; therefore the corporation is precluded by the act from inflicting any other puniſhment. There never was ſuch an idea before, as the counſel againſt the rule have ſuggeſted, that one plea might be ſupported by what was contained in another. Each plea muſt ſtand or fall by itſelf; they are as unconnected as if they were on ſeparate records. And though it be true that acts of parliament relating to trade in general are public acts, yet a ſtatute which relates only to a certain trade, is a private one. Therefore the Court cannot now take notice of any other part of this act of parliament, than that which is ſet out in this plea; for it is not a public act. Rule, for the plaintiff to have leave to enter up judgment, notwithſtanding the laſt plea, abſolute.

So in this caſe, which was an information in nature of a quo warranto, calling on the defendant to ſhew by what warrant or authority he claimed the office of ſenior bailiff of the town of Eaſt Retford, in Nottinghamſhire. The defendant in his plea ſtated, that the borough of Eaſt Retford was a corporation by preſcription. That King *James* the Firſt, in the 5th year of his reign, granted them a charter, incorporating them by the name of the bailiffs and burgeſſes of the town of Eaſt Retford; willing that there ſhould be two bailiffs, one the ſenior, the other the junior, bailiff, and twelve aldermen; giving power to the bailiffs and aldermen, or the major part of them, to make by-laws "for the good rule and government of the town, and of all and ſingular the officers, miniſters, artificers, inhabitants, and reſidents of the town for the time being, and for a declaration in what manner and order the bailiffs and aldermen, and all and ſingular officers, &c. might behave and uſe themſelves for the further good, public common utility, and good government of the town, and all other matters and things touching, or in any manner concerning the town, ſo nevertheleſs that ſuch laws, &c. ſhould be reaſonable, and not repugnant or contrary to the laws, &c. of this kingdom;" appointing the firſt officers; and *giving the bailiffs and aldermen, or the major part of them*, power to chooſe and nominate yearly, one of the aldermen to be ſenior bailiff of the town for the year enſuing. The plea then ſtated a by-law, made in the 6th year of the reign of King *James* the Firſt, by the bailiffs and aldermen, in purſuance of the charter, by which it was ordained, that if at any time hereafter in the election of bailiffs, aldermen, and other officers, the voices ſhould happen to be equal, the ſenior bailiff, for the time being, ſhould have the caſting voice. The defendant then deduced his title under this by-law, ſtating, that on the firſt of Auguſt, 1795, at a meeting

The King *v.* J. Ginever, Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 732.

meeting of the bailiffs and aldermen for the election of the ſenior bailiff, the then ſenior bailiff and ſix aldermen voted for the defendant, and the junior bailiff and the other ſix aldermen voted againſt him; whereupon the then ſenior bailiff gave his caſting voice for the defendant, &c. To this plea there was a general demurrer (1). Lord KENYON, Ch. J. It is impoſſible to raiſe any doubt in this caſe. That corporations are the creatures of the crown, muſt be univerſally admitted. It is argued, however, on behalf of the defendant, that this corporation were not bound to follow the intention of the crown, but that they were at liberty to provide for a difficulty which the crown did not foreſee; but that is aſſuming the prerogative of the crown. The crown having, in the eſtimation of the corporation, made a defective inſtrument, the latter wiſh to clear that defect. In many inſtances omiſſions have been diſcovered in charters, but it has always been conſidered neceſſary to apply to the crown to remedy them, by granting another charter. Not many years ago, it was much wiſhed that there might be a deputy recorder in Cheſter, but no power being given by the charter to elect one, application was made to the crown for another charter. I wiſh to avoid ſaying any thing reſpecting the propriety of a by-law to reſtrain the number of electors. But this by-law meets with contradiction in every caſe, and in every opinion delivered on the ſubject. In *R.* v. *Spencer*, Mr. J. *Wilmot* ſaid, "the true teſt of all by-laws is the intention of the crown in granting the charter, and the apparent good of the corporation." *Yates* J. ſaid, "corporations cannot make by-laws contrary to their conſtitution." Then what is this caſe? the crown provided by charter that the election of ſenior bailiff, ſhould be made by the bailiffs and aldermen, or the major part of them; ſuch is the law given by the only power that could give it; but theſe perſons, not liking that mode of election, choſe to give a double vote to the ſenior bailiff; by the ſame reaſon they might have given this caſting vote to the junior inſtead of the ſenior bailiff, nay they might have gone farther, and given ſix or any other number of votes to each of the bailiffs, and ſuch a by-law would have had the ſame foundation for its ſupport as the preſent. This is reverſing the proviſions of the crown,

(1) At firſt the proſecutor demurred only to that part of the plea that related to the right of the ſenior bailiff to have the caſting voice; and replied to five other parts of the plea. But upon ſome doubt being made at the bar and on the bench whether ſuch a mode of pleading was warranted by the prerogative of the crown, it was agreed to amend the pleadings, and take the opinion of the Court upon the principal queſtion in this ſhape; though the court rather inclined to think that the proſecutor might have demurred to *the whole plea*, and alſo denied particular parts of it.

and

and putting the magiſtracy of the town in different hands from thoſe in which the crown wiſhed to place it.—Ashhurst J. The by-law has not acquired any force from the length of time ſince which it was made. The ſelect body were only authoriſed to make by-laws for the regulation of the corporation and the town, but not ſuch as altered the conſtitution of the corporation.—Grose J. A corporation cannot make by-laws contrary to the conſtitution of the charter. It ſeemed to me as if the counſel for the proſecutor imagined, that this by-law would have been good, if it had been made by the whole corporation; but the caſe of *R.* v. *Spencer* ſhews, that in ſuch caſe it would have been equally bad, becauſe it is againſt the proviſions of the charter. But here the whole corporation could not make by-laws, the power of making them is given to a ſelect body. And that body in framing this by-law, inſtead of adhering to that which was intended by the charter, namely, an election by a majority, have ſaid that an election ſhould be good if made by an equality of votes, adding one other vote to ſuch equality. —Lawrence J. The by-law amounts to this, that when there is an equality of votes, inſtead of the election being made by a majority, the ſenior bailiff ſhall nominate his ſucceſſor. Judgment of ouſter.

Canals.

AN original ſubſcriber to a canal navigation, is not liable for any call made by the committee after he has aſſigned his ſhare.—This was an action on the caſe in tort. The declaration ſtated, that the defendant had ſubſcribed to advance the ſeveral ſums of 500*l.* 100*l.* and 200*l.* towards making and maintaining the Huddersfield canal, mentioned in the ſtatute, 34 *Geo.* 3. *c.* 53. and in reſpect of ſuch ſubſcription, had become one of the proprietors of the company, and an owner of, and entitled to, eight ſhares in the undertaking; that afterwards, the committee, duly choſen, &c. made a call of 10*l. per cent.* on the proprietors. The ſecond count ſtated a further call of 10*l. per cent.* The third count was for 8*l. per cent.*; and the fourth count was 10*l. per cent.* The declaration then ſtated, that though the proportions of the ſaid calls in reſpect to 300*l.* (being three of the ſaid eight ſhares) had been duly paid to the plaintiffs, the defendant had not paid the ſeveral proportions of 500*l.* reſidue of the ſaid ſeveral ſums of 500*l.* 100*l.* and 200*l.* ſo ſubſcribed by the defendant as he was directed, &c. amounting to 180*l.* but neglected ſo to do, &c. The defendant paid 40*l.* into court on the firſt count, and pleaded the general iſſue, not guilty. At the trial,

The Huddersfield Canal Company v. Buckley, Mic. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 36.

trial, a verdict was given for the plaintiffs, damages 146*l.* 14*s.* 1½*d*; 140*l.* being the amount of the calls ſtated in the three laſt counts; 2*l.* 14*s.* 4*d*½. being intereſt of the 40*l.* paid into court by the defendant on the firſt count; 3*l.* 12*s.* 8½*d.* being intereſt of the ſeveral calls ſtated in the three laſt counts from the ſeveral times when thoſe calls became due to the day of the plaintiffs ſuing out their writ; ſubject to the opinion of the Court on the following caſe: On the 30th of May, 1793, the defendant and many other perſons ſubſcribed an inſtrument duly ſtamped, not under ſeal, by which they agreed to ſubſcribe the reſpective ſums ſet oppoſite to their names, towards the expences of ſoliciting the act in queſtion, and of making and maintaining the canal, &c. and agreed to pay ſuch ſums to the treaſurer when called upon for that purpoſe, &c. The defendant ſubſcribed for five ſhares and two ſhares, and afterwards ſubſcribed for another ſhare. By the ſtatute 34 *Geo.* 3. c. 53. the ſubſcribers were incorporated by the name of the Huddersfield Canal Company, and were empowered to make the calls ſtated in the declaration, which were regularly made as ſtated in the declaration. *The firſt proportion of the firſt call, being* 2*l. per cent. was paid by the defendant on all the eight ſhares ſo ſubſcribed for by him; and the remainder of that call, being* 8*l. per cent. on his remaining five ſhares, amounting to* 40*l. was paid into court by the defendant; and the calls on the three other ſhares were paid by* R. Gray, *the purchaſer of them.* On the 6th of Auguſt, 1794, the defendant ſold five of his eight ſhares to *J. Kelſall*, at a profit of 17*l.* per cent. on each ſhare, and transferred his intereſt therein to *Kelſall* by a proper transfer, regiſtered by the company's clerk. On the 4th of December, 1794, the following entries were made in the plaintiffs' books by their agents, "*J. Buckley*, firſt ſubſcription, 500*l.*; ſecond ditto, 100*l.*; ſubſcription as a land owner, 100*l.*; ſubſcription as a mill owner 100*l.*—1794, July 9th. By transfer to *R. Gray*, 300*l.*; Auguſt 6th, ditto to *J. Kelſall*, 500*l.*" By a correſponding entry alſo in the books, under the name of *J. Kelſall*, the transfer of 500*l.* to him from *Buckley* was ſtated. The queſtions for the opinion of the Court were, 1ſt, Whether the plaintiffs' can recover in this action the amount of the ſubſcriptions demanded by the declaration; 2dly, Whether the defendant be liable to pay intereſt on the call paid into court from the time it was ordered by the committee to be paid to the treaſurer, and on the calls mentioned in the three laſt counts from the reſpective days when thoſe calls were required to be paid until payment thereof. —By ſect. 1. of this act of parliament, certain perſons by name, among whom are the defendant and *T. Kelſall*, and their reſpective ſucceſſors, executors, adminiſtrators and *aſſigns* are incorporated. By ſect. 74, it is directed, that "if

" if any perſon ſhall neglect to pay his proportionable ſhare of the money to be called for by the firſt call, &c. it ſhall be lawful for the company to ſue for, and recover the ſame in any of his majeſty's courts of record, by action of debt, *or on the caſe*; and if any perſon ſhall neglect to pay his proportionable ſhare of the money, to be called for after the firſt call, he ſhall forfeit 5*l.* for every ſhare; and if he ſhall neglect to pay, &c. for the ſpace of three months after the time appointed, &c. he ſhall forfeit his ſhare for the benefit of the other proprietors, &c. By ſect. 79, the proprietors may ſell ſhares; and duplicates of the aſſignments of ſhares are to be delivered to the committee, and an entry thereof made in the company's books; and after ſuch aſſignment, the purchaſers are to have ſhares in the profits, and to be entitled to vote as proprietors. But by ſect. 80, *no ſhare is to be ſold after the call of any money until ſuch money is paid.* By ſect. 119, ſubſcribers are required to pay the ſums by them reſpectively ſubſcribed, or ſuch proportions thereof, as ſhall from time to time be called for by the committee, &c. " and in caſe any perſon ſhall neglect to pay the ſame at the time required, it ſhall be lawful for the company *to ſue for and recover the ſame in any court of law or equity.*" There were three objections made on behalf of the defendant; 1ſt, That the action could not be maintained in its preſent form; 2dly, That no intereſt is payable on the calls made by the committee after non-payment of thoſe calls; 3dly, That the aſſignment to a purchaſer diſcharges the original ſubſcriber from all future reſponſibility. Lord KENYON, Ch. J. Though I am of opinion with the plaintiffs upon the two firſt points, I am clearly of opinion with the defendant on the laſt. I think that the action is maintainable in this form, the act having ſaid in expreſs terms, that the company may ſue by *an action on the caſe*; and the plaintiffs having ſtated in their declaration every thing that the act of parliament requires. Nor is there any doubt but that the jury may give intereſt, not *eo nomine* as intereſt, but as damages for the detention of the debt, for non-performance of the contract. But *the laſt point is equally clear againſt the plaintiffs.* And not entertaining any doubt upon it, as it is a matter of infinite moment to the great maſs of property embarked in this kind of ſpeculation, I think we ought not to order a ſecond argument leſt an idea ſhould go abroad that we have any doubts. —On looking through the act of parliament, it is clear that the legiſlature meant, that the parties ſhould only be liable to the payment of their ſhares ſo long as they individually continue members of this company, that is, ſo long as they have property which conſtitutes them ſuch. The perſons, who have the right of voting, are to vote in reſpect of their ſhares. The act alſo ſays, that perſons who have ſubſcribed, and their *aſſigns*, ſhall be deemed proprietors; but it would

would be ridiculous to determine that a perſon, after he has ſold his ſhares, in reſpect of poſſeſſing which only he became a proprietor, ſhould ſtill continue to be a proprietor. After aſſignment, the aſſignees hold the ſhares on the ſame conditions, and are ſubject to the ſame rules and orders, as the original ſubſcribers, and are to all intents and purpoſes ſubſtituted in the places of the original ſubſcribers. One reaſon, however, now urged why the original ſubſcribers ſhould always continue reſponſible is, becauſe, perhaps, the ſhares may be aſſigned to inſolvent perſons (1); but the legiſlature, when they gave their ſanction to this undertaking, did not ſuppoſe that it was a mere *South-ſea* ſcheme; they thought it a beneficial undertaking for the public, and conceived they had introduced a ſufficient check by enacting that, if the ſubſcribers did not pay their money from time to time as they ſhould be required by the committee, they ſhould forfeit their reſpective ſhares; and that no ſubſcriber ſhould part with his ſhare while he was in arrear to the company. No miſchief, therefore, is likely to enſue either to the company, or the public, from this conſtruction of the act. I think, that every clauſe in this act of parliament leads to this concluſion: that the perſons liable to the calls are thoſe only who continue to be at the time when the calls are made members of this corporation. Here the defendant had aſſigned his ſhares, and that aſſignment had been entered into the company's books, before the calls ſtated in the three laſt counts of the declaration were made, and therefore he is not liable to pay them; but he is liable for the calls ſtated in the firſt count, and not having paid them by way of damages, the plaintiffs are entitled to that laſt ſum on the firſt count, the money paid into court on that count only covering the principal ſum.—Ashhurst, J. There is no doubt reſpecting the principal queſtion. The original ſubſcribers have power to aſſign their ſhares to whomſoever they pleaſe; then it would be ſtrange to ſay, that after diſpoſing of their ſhares they ſhould ſtill continue liable to all the burdens which are thrown on the owners of this property. The point, however, does not reſt on general reaſoning; for the only reſtriction impoſed by the act on the power of alienation is, that the owners ſhall not aſſign until all the money due at the time of aſſigning is paid; but in all other caſes, the ſubſcribers may aſſign their ſhares, and diſcharge themſelves from their liability to future calls by the aſſignment.—Grose, J. As to the form of the action: the words in the act are, general "action on the caſe."—Lawrence, J. The only difficulty reſpecting the form of the action is, that ſuggeſted by the defendant's counſel, that the defendant is by this mode of declaring deprived of a ſet-off: but that difficulty is not ſuffi-

(1) See the caſe of *Taylor* v. *Shum*, in vol. i. p. 692.

cient to reſtrain the generality of the words uſed in the act of parliament. PER CUR, *Poſtea* to the plaintiffs, in order that they may enter up their judgment on the firſt count for 2*l.* 14*s.* 4½*d.* for the intereſt on the 40*l.* paid into court.

CARRIERS. *See Title* Action (1).

Carts.

The owner of a cart, who does not reſide within the bills of mortality, or within five miles of Temple-Bar, need not enter his name and place of abode with the commiſſioners of hackney coaches, or have his name, or any number upon the cart, though it be driven within thoſe limits.—This was a conviction on the ſtat. 24 *Geo.* 3. ſeſs. 2. c. 27. ſ. 8. for that the defendant reſiding at Parſon's-green, in the county of Middleſex, farmer, was the owner of a certain cart, which was on that day driven within five miles of Temple-Bar (that is to ſay), in a certain place called Old-ſtreet, which is in the pariſh of St. *Luke*, in the county of Middleſex, the defendant not having entered his name and place of abode with the commiſſioners for licenſing hackney coaches, and not having upon ſome conſpicuous part of ſuch cart, the number of the cart, &c. The firſt ſtatute on this ſubject is the 18 *Geo.* 2. c. 33; by the fourth ſection of which, after reciting the inconveniences ariſing from the irregular behaviour of the carmen, &c. driving carts, &c. within the cities of London and Weſtminſter, and the ſuburbs thereof, and other ſtreets within the bills of mortality, it is enacted that no perſon ſhall *drive* any cart, &c. within thoſe limits, unleſs the owner ſhall place upon ſome conſpicuous part of it his name, and the number of ſuch cart, &c. The fifth ſection enacts, That every owner, *reſiding within thoſe limits*, ſhall enter his name and place of abode with the commiſſioners of hackney-coaches; and the ſixth inflicts a penalty of 40*s.* on the *driver* within the limits, if the cart be not *marked*, *numbered*, and *entered*. The ſtatute 30 *Geo.* 2. c. 22. ſ. 1. directs, that a moiety of the above forfeiture ſhall be paid to the informer, and the other moiety to the poor of the pariſh where the offence is committed. Then came the ſtatute in queſtion; which recites a doubt, "whether under and by virtue of any of the laws now in being, the owners of any carts, &c. belonging to perſons reſiding out of the bills of mortality, although within the adjoining places of the cities of London and Weſtminſter, and the borough of Southwark, ought to enter their names and places of abode with the commiſſioners for licenſing hackney coaches;" and then it enacts, "that no perſon ſhall drive any cart, &c.

The King *v.* J. Powell, Hil. Ter. 32 Geo. 3. B. R. 4 *Term. Rep.* 527. *Nolan* 45.

(1) Vol. i. p. 57.

within the cities of London or Weſtminſter, and ſuburbs thereof, the borough of Southwark, and other ſtreets and places within the bills of mortality, or five miles of Temple-Bar, except the owner of ſuch cart, &c. ſhall have entered his name and place of abode with the commiſſioners for licenſing hackney coaches, and ſhall upon ſome conſpicuous part of ſuch cart, have the name of the owner of ſuch cart, &c. and the number of ſuch cart, &c. in order that the driver of ſuch cart may be the more eaſily convicted for any miſbehaviour, &c. and in caſe of ſuch neglect, &c. *the owner, or driver, of ſuch cart ſo reſiding and driven* within five miles of Temple-Bar, ſhall be ſubject to all the penalties and forfeitures created by any laws now in being relative to ſuch owners (1) or drivers of carts, &c. within the ſaid cities of London or Weſtminſter, and ſuburbs thereof, the borough of Southwark, and other ſtreets within the bills of mortality; *which ſhall or may be recovered and applied in ſuch manner as forfeitures and penalties are by law now recoverable from the* OWNERS (2) *of ſuch carts, &c. ſo driven within the ſaid cities of* London or Weſtminſter, and ſuburbs thereof, the borough of Southwark, and other ſtreets within the bills of mortality. Lord KENYON, Ch. J. The eighth ſection of the ſtatute 24 *Geo.* 3. c. 27. is very inaccurately penned; but I think that the penalties inflicted by it do not extend to this defendant. The ſtat. 18 *Geo.* 2. only reſpects perſons who drive carts within the cities of London and Weſtminſter, and the ſuburbs thereof, and other ſtreets within the bills of mortality; for that claſs of perſons certain regulations are preſcribed; the act requires that the name of the owner, and the number, ſhall be placed on ſome conſpicuous part of the cart, and that the *owners reſiding within thoſe limits*, ſhall enter their names with the commiſſioners of hackney coaches. The numbers which the act directs ſhall be put upon the carts, are ſuch as the commiſſioners of hackney coaches direct; they go on progreſſively. But the legiſlature afterwards thought that the limits, deſcribed in this act, were not ſufficiently extenſive; and they wiſhed to extend the regulations of the former act to a larger claſs of perſons; namely, thoſe owners of carts who live within five miles of Temple-Bar, though not within the bills of mortality. The 24 *Geo.* 3. ſt. 2. c. 27. ſ. 8. recites a doubt whether the owners of carts, reſiding out of the bills of mortality, though in

(1) It does not appear that the *owners* are liable to any penalty by any prior ſtatute.

(2) If there be no penalty upon the *owners* in any former act, it ſeems doubtful whether the penalties of this act can be recovered againſt them; as theſe penalties are directed "to be recovered and applied in ſuch manner as forfeitures and penalties are by law now recoverable from the *owners* of ſuch carts ſo driven, &c. 4 *Ter. Rep.* 574. *n. b.*

places

places adjoining to the metropolis, were bound to enter their names and places of abode with the commiſſioners of hackney coaches; and then it proceeds to enact, that no perſon ſhall drive any cart within the limits mentioned in the former act, or within five miles of Temple-Bar, unleſs the owner ſhall have entered his name and place of abode with the commiſſioners of hackney coaches, and ſhall have his name and the number of the cart upon ſome conſpicuous part of it. If the act had ſtopped there, however inconvenient it might have been to perſons reſiding at a great diſtance from London, we ſhould have been bound to ſay, that all owners indifferently (without any regard to the place of their reſidence) were to comply with the requiſitions of the act, if their carts were accidentally driven within any of theſe limits; but the act proceeds further, and adds other words, which are ſufficient to reſtrain the operation of the former ones to perſons reſiding within thoſe limits; "and in caſe of ſuch neglect, the owner of ſuch cart ſo reſiding and driven within five miles of Temple-Bar, &c." This ſentence is not grammatically expreſſed; but it refers only to perſons who reſide within the given limits. Then the evidence given in ſupport of this conviction, ſhews, that the defendant is not liable to the penalties of the act; for it ſtates, that he lives at Parſon's-green, which is not within five miles of Temple-Bar. I am therefore of opinion, that the magiſtrate had no juriſdiction in this caſe, and that the conviction ſhould be quaſhed. Ashhurst, J. The miſchief, which the legiſlature wiſhed to remedy, is the improper behaviour of perſons driving carts in London, or the adjoining places. That miſchief does not depend upon the place of reſidence of the owner of the cart; for it is as much to be apprehended when the owner lives at a diſtance, as when he reſides in London. However, the legiſlature in that clauſe, in the 24 *Geo.* 3. which creates the forfeiture as againſt the owner, confines the operation of the act to perſons reſiding within the limits before deſcribed. And, as this defendant does not live within thoſe limits, he is not liable to the penalties of the act. Per. Cur. Conviction quaſhed.

Certiorari.

When it Lies.

A *certiorari* lies to remove a preſentment in a court leet; and when removed, the preſentment is traverſable in *B. R.*— In this caſe, a rule had been obtained, to ſhew cauſe why a certiorari ſhould not iſſue, to remove a preſentment againſt

Rex *v.* James Roupell, Tr. Ter. 16 Geo. 3. B. R. *Cowp.* 458.

the defendant, in the court leet of the Savoy, for keeping a diſorderly houſe, in which he had been amerced 5*l.*; after cauſe ſhewn, and two arguments, the rule was made abſolute. Lord MANSFIELD, We are clear, that a *certiorari* ought to go; the preſentment cannot be traverſed at the leet, but the proper method is, to grant a *certiorari*, that it may be traverſed here: there are many authorities which ſay a preſentment may either be traverſed by being removed into the King's-Bench, or in an action: it cannot be true, that it is not traverſeable any where: the defendant has never been heard at all; and it would not be juſt that he ſhould be condemned and fined unheard: and, as he cannot traverſe the preſentment at the leet, he ought to have a *certiorari* to remove it, in order to traverſe it here; his lordſhip alſo added, that another reaſon for granting a *certiorari* was, that the defendant might have an opportunity of taking exceptions to the preſentment itſelf, in point of form or otherwiſe.—ASTON, J. In *Dyer*. 13. pl. 64. *Fitzherbert* ſaid, that *Briton*, who is a good authority, ſaid, that every preſentment is traverſeable, which is preſented in a leet; and alſo, in the ſheriff's tourne, out of which, leets were at firſt derived, which is taken notice of in *Matthews* v. *Carey*, 3 *Mod.* 137. In *Finch* 386. 8vo. ed. it is ſaid, the courſe is, to remove ſuch preſentments into the King's-Bench, by *certiorari*, where the party may traverſe them. To ſay, that the defendant ſhould have no opportunity of being heard, would give a court-leet a power ſuperior to that of any other juriſdiction in the kingdom; therefore, what is ſaid in 2 *Hawk.* 71. namely, that it is not traverſeable any where, is a miſtake; it is not traverſeable in the court-leet, but it is traverſeable when removed hither; and that is the reaſon why a *certiorari* ought to go.

The King v. Heaton, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 184.

But the Court will not grant a *certiorari* to remove the record and proceedings out of a court-leet, in order to enquire into the propriety of an amerciament, where the fine has been eſtreated, and paid.—In this caſe, cauſe was ſhewn againſt the rule which had been obtained, calling on the ſteward of the liberty of the Savoy, to ſhew caaſe why a writ of *certiorari* ſhould not iſſue, to remove into this court the record and proceedings of the court-leet, held on the third of May, 1787, for the ſaid manor and liberty, at which court, the defendant *Heaton*, one of the reſiants, was amerced the ſum of five pounds for non-attendance; in order that the ſame might be quaſhed for irregularity. The manor and liberty of the Savoy, is parcel of the poſſeſſions of the duchy of Lancaſter. Previous to holding the Eaſter court, the ſteward iſſues his warrant to the chief bailiff, requiring him to ſummon all reſiants, &c. to appear, and do ſuit and ſervice; and alſo to warn a ſufficient number of reſiants to be, *upon pain*

to

to ſerve offices, &c.; whereupon, the chief bailiff iſſues his precept to the deputy, to ſummon them accordingly. It appeared, that *Heaton* had been ſo ſummoned to attend the court at twelve o'clock, on the 3d of May; that he came accordingly at the exact time, and waited a few minutes at the court houſe; but the ſteward not being come at that time, he deſired one of the officers preſent to take notice that he had duly attended; and that, being elſewhere engaged, he was obliged to go away. It farther appeared, that though the ſummonſes were iſſued, to attend at twelve o'clock, yet, in order to give time to the ſuitors to collect together, it had not been uſual to open the court till near one o'clock, and that this was well known to all of them. That the court was opened at the uſual time on this occaſion, and *Heaton* not appearing, the jury preſented him, and amerced him for his default in the uſual ſum of five pounds; and that the amerciament had been duly affeered. In Trinity term following, the amerciaments were eſtreated by the ſteward; and the eſtreat roll delivered by him, upon oath, into the court of the Duchy Chamber of Lancaſter; in conſequence of which, the uſual writ of *levari facias et capias* iſſued under the duchy ſeal to the bailiff of the liberty, into whoſe hands *Heaton* paid the fine. THE COURT, after cauſe ſhewn, without hearing the objections to the preſentment itſelf, were clearly of opinion, that a *certiorari* would not lie in this caſe, as the fine had been eſtreated and paid.—The next day, the counſel for the defendant endeavoured to take a diſtinction between thoſe caſes where the fines were eſtreated into the Exchequer, and into the Duchy Court; for the one was a court of record, and could ſummon a jury to inquire into the fact; the latter was not ſo, as is ſaid by *Blackſtone* (1): But ASHHURST, J. ſaid, There could be no doubt but that the court of Duchy Chamber had cognizance of various matters, which they might ſummon a jury to try. That informations for intruſions were frequently tried there.—Rule diſcharged.

If a ſtatute, creating an offence, give cognizance of it to one juſtice, with an appeal to the ſeſſions, and take away the *certiorari* as to all the proceedings, and afterwards further powers for the puniſhment of the offender, are given to the ſeſſions by another ſtatute, which does not take away the *certiorari*; the clauſe for taking away the *certiorari*, in the former act, cannot be extended to the proceedings under the latter: therefore, where there have been proceedings under both ſtatutes, thoſe under the former act cannot be removed, but thoſe under the latter may.—A rule having been obtained, to ſhew cauſe why a *certiorari* ſhould not iſſue to remove all

The King *v.* Mark Terret, Mic. Ter. 29 Geo. 3. B. R 2 *Term Rep.* 733

(1) 3 Com. 78.

orders and adjudications concerning a certain judgment and conviction of the defendant, for buying fifteen pounds of Spaniſh ends of yarn, freſh ſcribled, contrary to the ſtatute, &c.; cauſe was ſhewn. The adjudication of the ſeſſions, after reciting, that a conviction of the defendant, on the 31ſt of March, 1788, before one *Juſtice*, for buying fifteen pounds of Spaniſh ends, on the 25th of March, was returned to the ſeſſions; and alſo reciting, that on the 7th of February, 1788, the defendant was committed to the houſe of correction till the general quarter-ſeſſions at Eaſter, for buying, of one *Evans*, ſeven pounds of Spaniſh ends; proceeded thus, "And "which conviction, on examination of the circumſtances of "the caſe, hath been, by this Court, ordered to be quaſhed; "and they order, that the conviction for buying the fifteen "pounds of yarn, be confirmed; and that the defendant be, "and he is hereby adjudged, an incorrigible rogue, and that "he be kept and detained to hard labour, in the houſe of "correction, for two years, to be computed from this preſent "ſeſſions." By the 12 *Ann.* ſt. 2. c. 23. ſ. 6. incorrigible rogues are to be committed, by one juſtice, till the next ſeſſions, when they are to be whipped three times, and kept to hard labour for ſuch further time as the ſeſſions ſhall think fit. The ſtatute 13 *Geo.* 1. c. 23. for the better regulation of the woollen manufacture, which created ſeveral penalties for certain offences therein ſpecified, to be recovered before two juſtices, gave an appeal (by the 6th ſection) to the ſeſſions; but enacted, that neither the order of the ſeſſions, nor the proceedings of the juſtices out of ſeſſions, ſhould be removed by *certiorari*. The 8th ſection of that ſtatute then directs, that any perſon, who ſhall be convicted of buying ends of yarn, &c. before one juſtice, ſhall be deemed an incorrigible rogue, &c. in the ſame manner as is directed by the 12 *An.* ſt. 2. c. 23. After the paſſing of this latter act, the 12 *An.* was repealed by the 13 *Geo.* 2. c. 24; which was itſelf repealed by the 17 *Geo.* 2. c. 5. This laſt ſtatute declares (ſect. 5.), that all end-gatherers offending againſt the 13 *Geo.* 1. c. 23. ſhall be deemed incorrigible rogues within the meaning of the act: and the 9th ſection enables the juſtices at the next ſeſſions to order incorrigible rogues to be kept in priſon for any time not exceeding two years, nor leſs than ſix months from the ſeſſions; and by this latter act, the *certiorari* is not taken away. In ſupport of the rule, it was inſiſted, that all the proceedings, ſubſequent to the conviction before the juſtice, were under the 17 *Geo.* 2. which act did not take away the *certiorari*; and the proviſion in the ſtatute of the 13 *Geo.* 1. which ſays, that the proceedings under that act ſhall not be removed by *certiorari*, cannot be incorporated in the latter act. It being an indiſputable rule that nothing but expreſs words can take away a *certiorari*, THE COURT took time

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to conſider this queſtion: and Lord KENYON, Ch. J. afterwards ſaid, they were of opinion, that in the proceedings, as far as they were under the 17 *Geo.* 2. c. 5. the *certiorari* was not taken away: but they were clearly of opinion, that it was on the order of the magiſtrate, under the ſtat. 13 *Geo.* 1. c. 23.—they, therefore, made the rule abſolute for a *certiorari* to remove the order of ſeſſions only.

Rex *v.* Lewis and ſeven others, Tr. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2456.

A *certiorari* lies to a Welſh quarter-ſeſſions of the peace, to remove an indictment into the King's-Bench.—On behalf of the defendants, it was moved for a PROCEDENDO to a *certiorari* to the quarter-ſeſſions of the peace for the county of Glamorgan, in Wales, "to remove an indictment from thence into this court:" for that an indictment ought not to be removed up hither, in the *firſt inſtance*; there being a court of *grand ſeſſions* there. It was for not repairing a highway, *ratione tenuræ*. A rule to ſhew cauſe having been granted, and cauſe ſhewn againſt the iſſuing of a *procedendo*, Lord MANSFIELD, This is a *certiorari* to the quarter-ſeſſions of a Welſh county, to remove an indictment againſt eight or nine perſons for not repairing a highway; which it charges them with being bound to repair *ratione tenuræ*. I believe there is a diſtinction (and it has been attended to lately,) between an indictment only in the *name* of the *crown* (as all indictments *muſt* be), and an indictment actually proſecuted by the *officer* of the crown. In the *latter* caſe the king has, undoubtedly, a right to proſecute in what court he pleaſes. I remember a caſe from Briſtol (1), where the attorney-general, on behalf of the crown, moved for a *certiorari* to remove ſome orders of two juſtices, made for the relief of glaſs-makers, from an overcharge upon them by the officers of exciſe: and it was holden, "That the *king* had a right, in *every* caſe "where the crown is concerned, to *demand* a *certiorari*; and "that the Court are *bound* to grant it, unleſs the king's right "to it is reſtrained by ſome act of parliament." In the caſe of Richmond Park (2), I prayed a *certiorari*, *as attorney-general*, in the name of the crown: and, though I moved it on the part of the *defendant*, the Court were of opinion, "That the king's attorney-general had a right to *demand* it, "when it appeared that the right of the crown was in queſ-"tion." Therefore, in *ſuch* caſes, the Court will exerciſe no diſcretion. But, where the matter is really proſecuted only by a *private* perſon (which private perſon is under the controul of the attorney-general, who may ſtop the proſecution), there is a diſtinction. In the caſe of an application, on

(1) The name of it was, the king v. *Oneſiphorus Tindall* and others: and it was in Eaſter term 1754, 27 *Geo.* 2. His lordſhip was then himſelf attorney-general, and made the motion.

(2) The name of this caſe was, the king v *Deborah Burgeſs*: it was in the very ſame Eaſter term, 27 *Geo.* 2. He declared, that he made the motion by ſpecial order from the king (who was deſirous that the right ſhould be ſolemnly tried).

the part of the profecutor, for a *certiorari*; it goes of courſe: in caſes of application by the *defendant*, there muſt be a *ſpecial ground* laid, in order to remove it from Wales, or from *any* juriſdiction whatſoever. *This certiorari* is moved for by the *profecutor:* and no ground is ſhewn "why he ſhould not "have it?" *This* is not a diſpute between the grand ſeſſions and this court, about juriſdiction. Mr. Juſtice YATES concurred. The crown has a right, in general, to a *certiorari:* and *no* ſufficient reaſon is ſhewn why the profecutor ought *not* to have it, in the caſe now before the Court. Beſides, as this *certiorari* is *filed*, the proper previous motion to this motion for a *procedendo*, would have been "*to take the* certiorari "*off from the file:*" for you cannot move for a *procedendo* while it is upon the file here. But the profecutor has a right to remove his indictment, *unleſs* ſome ground be laid before the Court, to the contrary. Mr. Juſtice ASTON, The *king* has a right to chooſe his court: but the Court will not remove indictments from the GRAND ſeſſions at the application of a (1) *defendant*, without *grounds*. In the caſe of *Berwick* (*Rex* v. *Cowle*), a caſe was cited of *Trin.* 12 *Geo.* 1. *B. R. Rex* v. *Lewis*; where the defendant moved for a *certiorari* to remove an indictment for a miſdemeanor, from the grand ſeſſions of Angleſea: and it was granted, upon producing an affidavit, inducing a ſuſpicion "that a fair trial could not be "had in Wales." [*Vide* 1 *Strange* 704.——In the caſe of *Rex* v. *Berkeley* and *Bragg*, on the glaſs-act (2), in Lord Chief Juſtice *Ryder*'s time. The Court were clear in opinion, "that the words in 2 *Hawk. P. C.* 287. *ſect.* 27. related "merely to the *crown*." The true diſtinction is, that where the *profecutor* moves for it, it goes of courſe: but the *defendant* muſt ſhew a *ſpecial ground*, to obtain it, or to remove the record *back again* by *procedendo*. Mr. Juſtice WILLES was of the ſame opinion with Lord *Mansfield* and the two other judges.—Rule diſcharged.

Rex v. Griffiths, Ea. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 658.

So alſo in this caſe, the Court granted a *certiorari*, to remove an indictment for a miſdemeanor, from the great ſeſſions in Wales into this court.

Rex v. the Inhabitants of Bodenham, Tr. Ter. 14 Geo. 3. B. R. *Cowp.* 78.

So in this caſe, which was an indictment upon the ſtatute 13 *Geo.* 3. c. 78. for a nuiſance in the highway. The profecutor had taken out a *certiorari*, which the defendant had moved to ſuperſede: upon ſhewing cauſe why a *procedendo* ſhould not iſſue, it was inſiſted, on the part of the profecutor,

(1) In a caſe of *Rex* v. *Owen Parry* and *Gainor Thomas* (never determined), where Mr. Juſtice *Aſton* moved for a procedendo, Mr. Juſtice *Wilmot* (on Saturday, the 5th of May, 1759), that he looked into the caſe of *Theodore Morris*, reported in 1 *Ventris*, 146. and 2 *Keble*, 724, 729. And that it appeared, by the rule-book, that the *certiorari* did not iſſue at the application of the *defendant*, but at the inſtance of the *profecutor*.

(2) He meant *Rex* v. *Oneſiphorum Tindall et al.* For, *Norborne Berkley* and *Charles Bragg* made that order.

that

that ſec. 24. of the ſtatute, which provides, "that no indictment or preſentment ſhall be removed by *certiorari*, *till ſuch indictment be traverſed*, and judgment thereupon given does not extend to the crown, but only to a *certiorari* at the inſtance of a defendant. PER CUR. The words of the act, *till ſuch indictment be traverſed*, ſhew very plainly that this clauſe was not intended to take away a *certiorari*, at the inſtance of the crown, for the king does not traverſe; it is calculated only to prevent defendants bringing a *certiorari* for delay.—Rule abſolute.

A *certiorari* lies to remove a conviction on 16 *Geo.* 3. c. 30. for deer-ſtealing, if the defendant has not appealed to the quarter-ſeſſions.—In this caſe, it was moved for a *certiorari*, to remove a conviction by a juſtice of the peace, upon the ſtatute 16 *Geo.* 3. c. 30. which was paſſed to prevent the ſtealing of deer: and an objection was taken, that no *certiorari* lay; for by the 23d ſection, it is enacted, that no conviction or judgment ſhould be removed by *certiorari*. But THE COURT were of opinion, that the reſult of the ſeveral proviſions in the act was, that the defendant had an option either to remove the proceedings from before the juſtice convicting, by *certiorari*, or to appeal to the quarter-ſeſſions; that if he had adopted the latter mode, the *certiorari* would have been barred, but not in the former caſe. It was then objected, that the defendant ought to lay a ground, by affidavit, before the Court granted a *certiorari*. BULLER, J. The language of the Court has always been, that the king has a right to remove proceedings, by *certiorari*, of courſe; but that where a defendant makes an application of this ſort, he muſt always lay a ground for it before the Court. Lord *Mansfield* has laid down this diſtinction again and again; that on the part of the crown it is a matter of courſe for the Court to grant it, but that it is not a matter of courſe on the part of the defendant. Now, if it be not a matter *of courſe* to grant ſuch an application as this, it can only be obtained by laying a ground by affidavit: a ſlight ground, indeed, may be ſufficient; but there muſt be ſome, or elſe, What is the conſequence? We ſhould have to decide upon every conviction in the kingdom, which would be removed into this court. The two other judges concurred. WHEREUPON, an affidavit of the merits being read, the rule was made abſolute for a *certiorari*.—BULLER, J. on a ſubſequent day ſaid, that upon further enquiry into the caſes, it appeared moſt clearly, that the opinion of the Court, before delivered in this caſe, was correctly proper; and that the rule, requiring the defendant to lay a ground before the Court, for granting a *certiorari* had obtained ſince the time of *Charles* 2 (1). That it appeared, from a caſe in Sir *Edward Northey*'s notes, *M.* 25 *Car.* 2, that it was

The King v. Eaton, Mic. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 89.

(1) 4 *Burr.* 2458. *S. P. ante* 535.

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then held, as clear law, that a *certiorari* ought not to be granted in vacation, but in open court, *and upon a ground ſhewn.*

The King *v.* R. Davies *et al.* Ea. Ter. 32 Geo. 3. B.R. 5 *Term Rep.* 626.

The general words of the ſtat. 25 *Geo.* 2. c. 30. ſ. 10. that no indictment for keeping a diſorderly houſe ſhall be removed by *certiorari*, do not reſtrain the crown from removing the indictment by *certiorari*; there being nothing in the act to ſhew, that the legiſlature intended that the crown ſhould be bound by it.—An indictment, which was found againſt the defendants at *the laſt aſſizes* for the county of Surrey, for keeping a diſorderly houſe, was removed here by *certiorari*, by the proſecutor, on an affidavit, ſtating, that he wiſhed to gain time by the removal, and to have a ſpecial jury. The defendants then obtained a rule, calling on the proſecutor to ſhew cauſe why the *certiorari* ſhould not be ſet aſide *quia improvidè emanavit*, on the ſtat. 25 *Geo.* 2. c. 36. ſ. 10. which enacts, that no indictment, which ſhall be preferred againſt any perſon for keeping a diſorderly houſe, &c. ſhall be removed by any writ of *certiorari* into any other court, but ſuch indictment ſhall be heard, tried, and finally determined, at the ſame general or quarter-ſeſſions, or aſſizes, where ſuch indictment ſhall have been preferred, &c. BULLER, J. I do not ſee what purpoſe the iſſuing of this *certiorari* can anſwer; becauſe, as the indictment was preferred at the aſſizes, the place of trial is the ſame, with this difference only, that it will now be tried on the civil, inſtead of the criminal, ſide of the hall. But the queſtion here is, Whether or not we are warranted in ſaying, that the crown is precluded, by this act of parliament, from removing the indictment by *certiorari?* The general rule is, that where the *certiorari* is taken away by act of parliament, the crown in not included in the reſtriction, unleſs there be ſome words in the act to ſhew that the legiſlature ſo intended it. There are no ſuch words in this act: but, on the contrary, the act is made againſt perſons keeping diſorderly houſes; the 8th and 9th ſections were inſerted to guard againſt "the many ſubtle and crafty contrivances of perſons keeping diſorderly houſes, &c." and the object of the tenth ſection, which takes away the *certiorari*, was to prevent any delays that might be attempted to be made by thoſe perſons. The whole ſcope of the act was, to render the puniſhment of ſuch offenders more effectual. And as there are no words in the act to extend this reſtriction, reſpecting the *certiorari*, to the caſe of the crown, the general rule applies, that the proſecutor is intitled to a *certiorari*. Though, perhaps, the proſecutor would have acted more diſcreetly, by ſuffering the indictment to remain in the court where it was found, I cannot ſay, from any authority, that he has precluded himſelf from removing the record by any ſtep which he took below; for that would equally apply to all proſecutions where bail had been put in below: but that

that is not even contended for. GROSE, J. We cannot break in upon the general rule, which has been ſo long eſtabliſhed, that the crown is not bound by the general words of a ſtatute taking away the *certiorari*, unleſs it appear, upon the face of the act of parliament, that the legiſlature intended that the crown ſhould be bound. The obſervations made by my brother *Buller*, on this ſtatute, are very ſtrong to ſhew that the legiſlature did not intend to reſtrain the crown in this caſe: therefore, the rule muſt be diſcharged.——Rule diſcharged.

The attorney-general moved, on behalf of the defendant, for a writ of *certiorari*, to remove an indictment againſt the defendant, an officer of exciſe, who was indicted, with two others, for a riot and aſſault at the Dover ſeſſions; which *The Court* immediately granted, without any affidavit being produced to ſupport the motion. The King v. Stannard, Hil. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 161.

It is diſcretionary in the Court to grant or refuſe a *certiorari*, to remove a conviction before juſtices of the peace; and if the Court ſee that the juſtices have drawn the proper concluſion, from preſumptive evidence, they will not grant a *certiorari*.—The defendant was convicted on an information on the 9 *Geo.* 2. c. 23. ſ. 7. charging him with having brought into his cellar certain ſpirituous liquors, without a certificate that the duties had been paid, &c. On a motion for a *certiorari*, to remove the conviction, becauſe the information was not laid within three months (1) after the offence was committed; and becauſe the defendant was convicted in too great a forfeiture. It appeared, on the affidavits, that the evidence given below, was this: that on the 21ſt of June, the exciſe-officer granted a permit to the defendant to bring into his cellar ſixty-four gallons; that on the 25th of June, he went to the defendant's cellar, where he found a caſk, containing ſeventy-ſix gallons, for which, no permit had been obtained; and the defendant was convicted in the penalty of 20*l.* together with the value of the ſeventy-ſix gallons of liquor.—The conviction was on September 15th. Lord KENYON, Ch. J. It is admitted, that a *certiorari* is not to be granted *ex debito juſtitiæ*, but that the application is made to the ſound diſcretion of the Court, which will not be well exerciſed if they do not give an opportunity to the parties applying for the writ to litigate any probable cauſe. For if there be a probable ground, that juſtice has been done below, the conviction ought to be removed, that it may be reviewed by this Court. But there is no ſuch probable ground in this caſe. The King v. Baſs, Ea. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 251. *Nolan* 227.

(1) By ſtat. 1 *W.* and *M.* c. 24. ſ. 16. The time for exhibiting informations againſt brewers for offences againſt the exciſe laws is limited to "three months after the offence is committed; the ſame as to diſtillers by 12 and 13 *W.* 3. c. 11. ſ. 17.; and in 24 *G.* 2. c. 40. ſ. 29. there is a general reference to former exciſe laws as to the mode of ſuing, &c.

What

What would the *certiorari*, if granted, remove in this caſe? Not any evidence, which may now be produced, but only the evidence which was given before the juſtices; for they muſt ſtate, in the conviction, the evidence of thoſe facts which was the foundation of their judgment. Now the evidence given before the magiſtrates was, that on the 25th of June, there was found, in the defendant's cellar, a caſk containing ſeventy-ſix gallons of liquor, for which no certificate had been given; the concluſion to be drawn from which fact was, that the defendant then brought it in, unleſs he could ſhew (which he did not) that it was brought in on ſome prior day. There is no pretence to apply the permit to the liquor found; it does not correſpond with it in any particular; for that only enabled the defendant, on another day, to carry into his cellar ſixty-four gallons. Nor is there any foundation for the objection to the quantum of the forfeiture; for the quantity found in the defendant's cellar, there was no permit whatever; and, therefore, the whole was forfeitable. Sufficient appears to convince us, that the magiſtrates were warranted in entertaining this application, and in drawing the concluſion which they did: and, I think, we ſhould only entangle the parties in unneceſſary expence if we were to grant the writ applied for. ASHHURST, J. If it had appeared, that the juſtices had exceeded their juriſdiction, the Court would have granted a *certiorari*, in order that the conviction might be quaſhed, even though no objection to the want of juriſdiction were made below: but that is not this caſe; for here the evidence was of a tranſaction on the 25th of June; and if the offence were committed on that day, the juſtices had juriſdiction. BULLER, J. and GROSE, J. were of the ſame opinion.—Rule diſcharged.

The King v. Hube *et al.* Hil. Ter. 34 Geo. 3. B. R. 5 *Ter. Rep.* 542.

An indictment found at the quarter-ſeſſions, upon the toleration-act 1 *W.* and *M.* c. 18. for diſturbing a diſſenting congregation, may be removed into this court, by *certiorari*, before verdict; and, upon conviction of ſeveral defendants upon ſuch indictment, each is liable to the penalty of 20*l.* impoſed by that ſtatute.—The defendants were indicted, on the 18th ſection of the toleration-act 1 *W.* and *M.* c. 18. at the quarter-ſeſſions. The indictment ſtated, that the defendants being perſons of evil minds and diſpoſitions, and not regarding the laws and ſtatutes of this realm, nor fearing the pains and penalties therein contained, but unlawfully and wilfully intending maliciouſly and contemptuouſly to diſquiet and diſturb a certain congregation of proteſtant diſſenters from the church of England, aſſembled for the purpoſe of religious worſhip, on, &c. with force and arms, &c. did wilfully, and of purpoſe maliciouſly and contemptuouſly come into a certain chapel, ſituate, &c. the ſame chapel then, and ſtill being, duly certified, regiſtered, and allowed, purſuant to the ſtatute in ſuch caſe made and provided; and did then and there, wilfully

fully and of purpoſe, during the time of divine worſhip, maliciouſly and contemptuouſly diſquiet and diſturb a certain congregation of proteſtant diſſenters from the church of England, being then and there aſſembled in the aforeſaid chapel, for the purpoſe of religious worſhip, in contempt of public worſhip, &c. and againſt the form of the ſtatute, &c. The indictment having been removed by the proſecutor, by *certiorari*, before verdict, and the defendants having been convicted before Lord *Kenyon*, at the ſittings at Weſtminſter, it was moved in arreſt of judgment, on the ground of a defect of juriſdiction in the trial; for that, before the toleration-act, the meetings of diſſenters, to celebrate public worſhip, was forbidden by various ſtatutes (*vide* 16 *Car.* 2. c. 4. 22 *Car.* 2. c. 1.), and that act, for the firſt time, legaliſed ſuch aſſemblies, on certain conditions, and prohibited the diſturbance of them. It, therefore, created a new offence; the trial and puniſhment of which is particularly marked out in the 18th ſection, which enacts, "that if any perſon or "perſons ſhall willingly, &c. diſquiet or diſturb any con"gregation permitted by the act, &c. ſuch perſon or per"ſons, *upon proof thereof before any juſtice of the peace*, by "two or more ſufficient witneſſes, ſhall find two ſureties "to be bound, by recognizance, in the penal ſum of 50*l.* "and in default of ſuch ſureties, ſhall be committed to pri"ſon, there to remain till the next general or quarter-ſeſ"ſions; and, *upon conviction of the ſaid offence, at the ſaid* "*general or quarter-ſeſſions*, ſhall ſuffer the pain and penalty "of 20*l.* &c." It was therefore contended, that, by this ſtatute, the cognizance of the offence was confined to the juſtices in the firſt inſtance, and in the next to the quarter-ſeſſions; and that no indictment, there found, could be removed, becauſe the penalty can only be levied upon ſuch as are "*convicted at the quarter-ſeſſions*;" which, by neceſſary implication, takes away the *certiorari*. BULLER, J. ſuggeſted, that the motion ſhould rather be to quaſh the *certiorari quia improvidè emanavit*; for, that the ſtatute having directed the penalty to be levied on conviction, there could be no doubt but that an indictment might be found at the ſeſſions; and that, probably, the indictment was good upon the face of it. Another queſtion was alſo ſtarted at the bar, Whether, in caſe the Court ſhould be of opinion that the indictment was properly removed, the penalty to be levied on the defendants, ſhould be 20*l.* on each, or only 20*l.* altogether? that is, Whether the offence were ſeveral or entire? Both theſe rules, the one to quaſh the *certiorari*, and the other to arreſt the judgment, were directed to come on together: and after cauſe ſhewn againſt the rules, *The Court* took time to conſider of this caſe. And on its being mentioned at the beginning of this term, Lord KENYON ſaid, that they had not entertained any doubt upon any queſtion, except that which related

lated to the *quantum* of the punishment, Whether or not each of the defendants were liable to pay the penalty of 20*l.*? and, on that point, they would give their opinion in the course of this term. Accordingly, when the defendants were brought up for judgment, ASHHURST, J. in passing sentence upon them, said, That the Court were of opinion, that the penalty of 20*l.* was intended, by the legislature, to be levied upon each offender. That otherwise, the construction of the act would be absurd; for if the penalty were single, then, if there were but one offender, he would pay 20*l.*; and if there were twenty offenders, in which case the offence would be much encreased, each would only pay 20*s.* which could never have been intended. And that the more reasonable construction was, that each of the defendants should be adjudged to pay 20*l.*

When a Certiorari does not lie.

Rex *v.* Lloyd, Tr. Ter. 23 Geo. 3. B.R. *Cald.* 309.

A *certiorari* does not lie for other than judicial acts.—On a motion to enlarge a rule which had been obtained to shew cause why an order of the court of quarter-sessions (whereby it was ordered, that Mr. *Edward Jones*, an attorney at law, should be employed to bring an information against the defendant, for several crimes and misdemeanors committed by him as justice of peace, and that the expences attending such prosecution should be defrayed by the county) should not be quashed. BULLER, J. said, The *certiorari* ought not to have issued, that it was settled in the case of *the King* v *Lidiard*, *Sayer* 6. that a *certiorari* does not lie to remove any other than judicial acts. THE COURT, however, admitted, that this act of the sessions was clearly illegal, and such an excess of their authority, as it was impossible to support; and said, the justices might be punished for making it.

Rev *v.* Smith, Hil. Ter. 14 Geo. 3. B.R. *Cowp.* 24.

Davenport had moved for a *certiorari* to the justices of Middlesex, to remove an indictment against the defendant, upon the statute of 30 *Geo.* 2. c. 24. for the more effectual punishment of persons obtaining goods or money under false pretences. He said, it was a doubt whether a *certiorari* would lie: and now, upon shewing cause, the Court were clearly of opinion it would not.

The King *v.* Young *et al.* Ea. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 472.

So also in this case, where the defendants had been indicted at the Bristol sessions, on the 30 *Geo.* 2. c. 24. s. 1. for obtaining money by false pretences; and it was moved, to remove the indictment by *certiorari*. *The Court* were of opinion, that the twentieth section, which enacts, "that no *certiorari* shall "be granted to remove any indictment, conviction, or other "proceedings had thereon, in pursuance of this act," referred to the whole act of parliament. That this point appeared

to

to have been already decided in the caſe in *Cowper:* and that there did not appear to be any reaſon, from the nature of the ſubject, why it ſhould relate to one part more than to another.—Rule refuſed.

A *certiorari* does not lie to remove an indictment for felony from the general ſeſſions of oyer and terminer, without the conſent of the proſecutor.—It was moved, on the part of the defendant, for a *certiorari* to be directed to the juſtices of oyer and terminer, at Hicks's-Hall, to remove into this court an indictment found againſt her at the ſeſſions there, for bigamy. LORD MANSFIELD ſaid, that the motion was irregular, for a defendant has no right to remove an indictment of felony, from Hicks's-Hall, without the conſent of the proſecutor; and in this caſe, there was no conſent; therefore his lordſhip ſaid, the writ iſſued *improvide*, and muſt be ſuperſeded—the counſel then ſaid, the only object of removing the indictment was, for the purpoſe of being bailed: BUT PER LORD MANSFIELD, The purpoſe for which it was intended makes no difference. The next day her counſel moved for an *habeas corpus*; (*Aſton*, J. having granted a warrant for her apprehenſion, upon a certificate of the indictment being found:) the warrant and return being read, it was moved, that ſhe might be bailed, to which the counſel for the proſecutor conſented. Lord MANSFIELD, Though we ſhould, undoubtedly, have bailed her, it is better to take it as upon the conſent of the proſecutor; and ſhe muſt be bound to appear in the Houſe of Lords when required, to anſwer to the indictment, as well as to appear in this court; but as there is nothing againſt her in this court, her appearance here may be diſpenſed with for the future upon motion, without giving her the trouble of actually appearing here in court any more. —She was accordingly bailed, herſelf in 4000*l.* and each of her four bail in 1000*l.*

Rex v. Duchess of Kingston, Ea. Ter. 15 Geo. 3. B. R. *Cowp.* 283.

A *certiorari* will not lie to remove a conviction by the commiſſioners of exciſe for the double duties on beer.—A rule had been obtained, to ſhew cauſe why a *certiorari* ſhould not iſſue, to remove a conviction, by the commiſſioners of exciſe, for the double duties on beer. The rule was oppoſed, on two grounds, 1ST, it was contended, that a *certiorari* would not lie in any caſe, to remove proceedings before the commiſſioners of exciſe: 2DLY, that in this caſe, there were not ſufficient reaſons laid before the Court to induce them to grant the *certiorari*, even if it would lie. Lord MANSFIELD delivered the opinion of the Court to the following effect: Though great induſtry has been employed, no caſe was produced in which a *certiorari* has been granted to remove proceedings before the commiſſioners of exciſe; this circumſtance alone affords a ſtrong ground to ſuſpect that none is grantable; for in the multiplicity of buſineſs which occurs before them, it is natural to ſuppoſe, that ſome perſons, diſſatisfied

The King v. Whitbread, Mic. Ter. 21 Geo. 3. 2 *Doug.* 548.

tisfied (whether right or wrong) with their determination, would have wiſhed to remove it before another tribunal: this has induced us to look very attentively into all the ſtatutes on the ſubject: the ſtatute of 6 *Geo.* 1. c. 21. has a clauſe which ſeems to be very material: it is the 22d ſection. By the clauſe immediately preceding (ſ. 21.) a forfeiture of brandy, arrack, rum, ſpirits, and ſtrong waters, is created in certain caſes; and in thoſe caſes, both appeal and *certiorari* are taken away: then comes the ſection to which I refer, which inflicts a penalty on the removal of ſweets without certificate; and enacts, that the ſweets themſelves, together with the caſks in which they are contained, ſhall be forfeited, and liable to be ſeized by any officer of exciſe. It then goes on, and ſays, "that every ſeizure, and ſeizures, of ſuch ſweets, &c. and "alſo every other *forfeiture* or *forfeitures* which, from and "after, &c. ſhall or may be made by virtue or in purſuance "of any act or acts whatſoever, relating to the duties of "exciſe, or to any other duty or duties, under the manage- "ment of the commiſſioners of exciſe, ſhall, and may be, "proceeded upon, heard, examined into, adjudged, and de- "termined by the ſame ways and means, and in the ſame "manner and form as is, and are, herein and hereby pre- "ſcribed, directed, or appointed to be done, upon ſeizure of "brandy, arrack, rum, ſpirits, or ſtrong waters, not exceed- "ing as aforeſaid; and that ſuch proceedings thereon, ſhall "not be liable to any appeal, or appeals, or *to be removed by* "*certiorari*, any thing in this preſent act contained, or any "law, ſtatute, or proviſion, to the contrary thereof notwith- "ſtanding." Theſe words are, certainly, very comprehen- ſive, and ſeem large enough to include the preſent caſe: for this is *a forfeiture of double* duty. In the information, it is ſtated, that the ſaid *Whitbread* hath forfeited double the value of the ſaid rates and duties of exciſe; and the adjudication is, that he *do forfeit*. But, beſides, that is the natural conſtruc- tion of the words of the clauſe itſelf; ſuch conſtruction is greatly corroborated by the ſtatute of 1 *Geo.* 2. ſt. 2. c. 16. ſ. 3. which was made expreſsly for the purpoſe of obviating ſome doubts that had ariſen upon the general penning of the act of 6 *Geo.* 1. This third ſection of 1 *Geo.* 2. c. 16. after men- tioning the 22d ſection of the former ſtatute, proceeds thus: "in which clauſe, ſome general words are mentioned con- "cerning *other forfeitures* to be made from, and after, &c. "by virtue, or in purſuance of, any act or acts, upon which "words a doubt hath ariſen, whether by the generality "thereof, the right and liberty of appealing to the commiſ- "ſioners of *appeals*, from judgments given by the commiſ- "ſioners of exciſe, in cauſes and proſecutions on account of "forfeitures and *offences relating to the duties of exciſe*, and "the juriſdiction and power of the commiſſioners of appeals "to hear and determine ſuch appeals; and alſo, the right and liberty

" liberty of appealing to the quarter-ſeſſions, in caſes where " judgment be given by two juſtices, in proſecutions before " them, for forfeitures and *offences* relating to the duties on " malt, &c. be not taken away and repealed. Now, for " preventing and avoiding all ſuch doubts and queſtions, and " declaring and *re-eſtabliſhing* the right and liberty of appeal- " ing, in the reſpective caſes before mentioned, be it enacted, " that neither the ſaid act, nor any clauſe, matter, or thing, " therein contained, did, or doth, extend to take away, re- " move, or alter, the right and liberty of *appealing*, in the " reſpective caſes before mentioned, or in any of them; and " ſuch right and liberty of appealing ſhall continue, &c."— It is obſervable, on this clauſe of the ſtatute of *Geo.* 2. that in ſpeaking of the doubts, whether the right of appeal was not taken away, from judgments by the commiſſioners, in caſes of *forfeitures*; it adds, and *offences relating to the duties of exciſe*, which ſhews, that the legiſlature did not mean *ſpecific* forfeitures only, but alſo *pecuniary* forfeitures; and by mentioning *appeals* only, and not *certiorari*'s (which are ſpoken of in the ſame breath in the act of *Geo.* 1. and if there was a doubt about the one, there muſt have been the ſame about the other), it ſeems plain, that the legiſlature intended, that *certiorari*'s ſhould be taken away, and that the right of appeal only ſhould remain; that it was thought ſuch a diſtinction was proper; and that one appeal ought to be preſerved, in caſes where the *certiorari* was taken away, is plain; becauſe, with regard to hides and malt, reſpecting which, the appeal is ſaved by the ſtatute of *Geo.* 2. the *certiorari* is expreſsly taken away by 9 *Ann.* c. 11. ſ. 47. and 12 *Ann.* ſt. 1. c. 2. ſ. 37. We are, therefore, all of opinion, that in this caſe a *certiorari* does not lie: but if it did, it muſt be granted upon cauſe ſhewn. And as the affidavits, in ſupport of the preſent application, do not proceed upon any alleged want of juriſdiction, but contain objections to the conviction on the merits, the Court would not grant the *certiorari*, if they had power to do it; for thoſe objections are, more properly, the ſubject matter of an appeal, and the defendant has not choſen to reſort to that remedy.—Rule diſcharged.

But a *certiorari* will lie to remove a conviction under the ſtat. 11 *Geo.* 1. c. 30. ſ. 16. for harbouring tea and ſpirits, either by juſtices of the peace or commiſſioners of exciſe. This was a conviction by two juſtices, upon the ſtat. 11 *Geo.* 1. c. 30. ſ. 16. for harbouring tea and ſpirits; on the affidavit of the defendant and another perſon, a rule was obtained for the two juſtices, to ſhew cauſe why a writ of *certiorari* ſhould not iſſue, directed to them to remove into this Court, all records of conviction before them had on the 17th of June, againſt the defendant, for the forfeiture of eight bags of bohea tea, two bags of congo tea, twenty caſks of

The King v. Frances Abbot, Mic. Ter. 21 Geo. 3. B R. 2 *Doug.* 532. (*n.* † 113.)

Geneva, and one cask of brandy, and treble the value thereof by her incurred, for, or by reaſon of her harbouring, keeping, or concealing the ſame: on ſhewing cauſe againſt the rule it was contended, 1ſt. That as the affidavit on which the rule was obtained, went only on the merits denying the truth of the charge, the Court, if they had the power of granting a *certiorari*, would not do it, an enquiry into the merits being properly the ſubject-matter of an appeal, and not competent to this Court: 2dly, That no *certiorari* would lie in this caſe; the offence was created by 11 *Geo.* 1. c. 30. ſ. 16. and by ſ. 39. of the ſame ſtatute it is enacted, "That all fines, penal-"ties, and forfeitures, by this act before impoſed, of and "concerning the ſuing for recovering and dividing whereof "other directions are not herein given, ſhall be ſued for, re-"covered, levied, or mitigated, by ſuch ways, means, and "methods, as any fine, penalty, or forfeiture is, or may be "ſued for, recovered, levied, or mitigated, by any law or "laws relating to his majeſty's revenues of exciſe, or any "of them, or by action, &c." and it was contended, that theſe general words have the ſame operation as if the ſpecific clauſes relative to matters of juriſdiction contained in the *former exciſe laws*, had been re-enacted verbatim in this, and were adopted merely to avoid unneceſſary repetition. That by the ſtat. of 10 *Geo.* 1. c. 10. it is expreſsly enacted, ſ. 42. "That the judgment which ſhall be given in *purſuance of* "*that act*, by the commiſſioners of exciſe, and juſtices of "the peace, reſpectively ſhall be final, and *not liable to be re-*"*moved by certiorari* into any of the Courts at Weſtminſter." By ſ. 21, of the act of 6 *Geo.* 1. c. 21. the *certiorari* is *expreſsly* taken away as to the forfeitures created by that ſection; and by ſ. 22. *generally*, "as to every other forfeiture "which ſhall or may be made, by virtue or in purſuance of "any act or acts whatſoever, relating to the duties of ex-"ciſe, or any other duties under the management of the "commiſſioners of exciſe." THE COURT, after argument, took time to conſider, and afterwards Lord MANSFIELD delivered himſelf to the following effect: This caſe has been argued on the part of the proſecutor on two grounds, viz. 1ſt. That by law a *certiorari* is not grantable: 2dly, That if there were a power in the Court in their diſcretion to grant it, they ought not to do it upon the preſent occaſion; becauſe the objection is upon the merits, and not to the juriſdiction; and the caſe of *Rex* v. *Whitbread*, has been cited as in point: on the other ſide, it is ſaid that it does not apply, becauſe the conviction there was by the commiſſioners. But we are all clearly of opinion, that there is no diſtinction in that reſpect. The juriſdictions by all the acts relative to the exciſe, are diſtinct in their limits; that of the commiſſioners is within the bills of mortality; that of juſtices in all other places;

places; but in every other point of view their powers are the ſame, and wherever the ſtatutes take away the *certiorari* in the caſe of convictions before the commiſſioners, they alſo do ſo as to convictions before juſtices. However, notwithſtanding this, we think the caſe of *The King* v. *Whitbread*, is not an authority to govern this caſe: that was a conviction on a ſtatute long prior to 6 *Geo.* 1. viz. 12. *Car.* 2. c. 24. ſuppoſing it therefore clear that the act of 6 *Geo.* 1. takes away the *certiorari* in the caſe of all penalties and forfeitures created before that time, it does not neceſſarily follow, that it is taken away in caſes of forfeitures and penalties introduced ſince. On the behalf of the proſecutor it was contended, that the general words of ſ. 39. of the ſtat. 11 *Geo.* 1. c. 30. re-enact thoſe of 10 *Geo.* 1. c. 10. ſ. 42. as much as if they had been expreſsly repeated: this is certainly true, as to the form and mode of proſecution and conviction; but it is not a conſequence that it is equally true, as to what ſhall or may be done after conviction. If this is not clear, and we think it is not, then the old general rule applies, viz. that nothing but expreſs negative words ſhall take away the juriſdiction of this Court, we are therefore all of opinion, that the *certiorari* is not taken away in the preſent caſe.—But the motion has been made not on an objection to the juriſdiction, but on the merits, and in *The King* v. *Whitbread*, the Court thought that would have been a ſufficient reaſon for not granting a *certiorari*; if it had been otherwiſe competent, we all adhere to that opinion.—Rule diſcharged.

A *certiorari* cannot be ſued out as of courſe, and without laying a ſpecial ground before the court, to remove proceedings from the courts of the counties palatine. —In this caſe, a rule was obtained to ſhew cauſe, why an attachment ſhould not iſſue againſt the prothonotary of the court of Common Pleas for the county palatine of Lancaſter, for not obeying a writ of *certiorari*, which had been directed to him, to remove the proceedings in this cauſe from that court into this. Afterwards, another rule was granted to ſhew cauſe, why a ſuperſedeas to the writ of *certiorari* ſhould not iſſue: the writ of *certiorari* out of this court, was directed to the chancellor of the county palatine, and commanded him, that "by our writ under the ſeal of our ſaid county palatine," he ſhould command the prothonotary to certify the ſaid plaint to him, "that you may certify the ſame to us at Weſtminſter." In obedience to this a writ was made out, directed to the prothonotary in the nature of a *certiorari* (but called a mandate in the language of that court), under the ſeal of the county palatine, but in the king's name, commanding him to certify the plaint, &c. "*to us*, ſo that the ſame may appear to us at Weſtminſter, &c." Neither of the writs *aſſigned any particular ground*, but only ſaid, "*we being willing*," for

Zink v. Langton, Tr. Ter. 21 Geo. 3 B. R. 2 *Doug.* 748.

certain reaſons, to be certified on a certain plaint, &c. Lord MANSFIELD, There is no doubt but this Court may, under particular circumſtances, as in a caſe which calls ſtrongly for a trial at bar, grant a *certiorari* to remove proceedings from a county palatine. But ſuch a writ cannot be ſued out, without laying a ground for it (1); and as the writ was ſued out in this caſe without laying any ground, it iſſued improvidently, and muſt be ſuperſeded.—Rule for an attachment diſcharged, and for the ſuperſedeas abſolute.

Williams *v.* Thomas *et al.* Ea. Ter. 22 Geo. 3. B. R. 2 *Doug.* 750. (*n.* 2.)

So in this caſe, a rule was obtained to ſhew cauſe why a writ of *certiorari* which had been ſued out *by the defendant as of courſe, and without any application to the court*, to remove the proceedings in an action depending in the court of great ſeſſions for the county of Pembroke, ſhould not be ſuperſeded. *Lord Mansfield*, after cauſe ſhewn, ſaid, that the writ was not of courſe, and as it had been ſued out in this caſe without laying any ground before the court, it muſt be ſuperſeded.

Rex *v.* Micklethwayte, Hil. Ter. 10 Geo. 3. B. R. 4 *Burr.* 2522.

The defendant had been convicted on the act of parliament, 32 *Geo.* 2. c. 54. for repairing and widening the road from Dewſbury to Ealand, in the weſt riding of the county of York, of an offence againſt that ſtatute; whereby he forfeited five pounds. He appealed to the quarter-ſeſſions, and they confirmed the conviction; *ſubject to the opinion of the court of King's Bench*, upon the facts ſtated in the order of ſeſſions. Theſe orders had been removed by *certiorari*; and the conviction ſtood in the crown-paper, for argument. But for the proſecution, it was objected "that the *certiorari* "ought not to have iſſued; the act of parliament having "*expreſsly excluded* the juriſdiction of this or any other "court of Weſtminſter-hall." This objection was well-founded; and THE COURT being of opinion, that they were excluded by the clauſe which takes away the *certiorari*, and that the juriſdiction was given ſolely to the juſtices of peace, they made the like rule as they had done in the caſe of *Wakefield and others* (1 Burr. 489), namely, that the writ of *certiorari* be *ſuperſeded, quia improvidè emanavit*; the return taken off the file, and the orders remanded.

The King *v.* Sparrow and Urquhart, Mic. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 196. (*n.a.*)

A *certiorari* had been granted to remove the proceedings before the juſtices into this court, and a rule was afterwards obtained to ſhew cauſe, why it ſhould not be quaſhed.—One *Aldred* had been committed by them as a vagrant, to the next ſeſſions, againſt which commitment he had appealed; and that appeal was then pending. *The Court* were all of opinion, that no *certiorari* could iſſue then, and therefore that it muſt be quaſhed; for the magiſtrate had committed to the

(1) See Rex *v.* Eaton, in p. 551. *infra*.

ſeſſions,

ſeſſions, and the vagrant had appealed: ſo that both parties had agreed that there ſhould be an appeal to the ſeſſions, and therefore the *certiorari* ought not to iſſue till the ſeſſions had determined the caſe. It was then ordered that *Aldred* might be bailed, which was refuſed.

The King *v.* King *et al.* Commiſſioners of the Land-Tax for the Tower Diviſion of the City of London, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 234.

The Court will not grant a *certiorari* to remove the aſſeſſment of the land-tax. But if an information be moved for againſt the commiſſioners of the land-tax, the Court will admit an atteſted copy of the aſſeſſment as evidence, inſtead of the original.—A *certiorari* having been obtained to remove all and ſingular the aſſeſſments of the land-tax in this diſtrict for the year 1787; it was underſtood, that the purpoſe of this motion was, to found an application for an information againſt the commiſſioners, by whom the aſſeſſments were made. It was therefore now moved to quaſh the *certiorari*. Ashhurst, J. If we have in any inſtance departed from the general rule (not to grant an information againſt the magiſtrates for improper conduct, till all the proceedings relative to the ſubject are returned into this court, on account of the great public inconvenience which would neceſſarily follow from adhering to the general rule) it ſeems to me that that reaſon holds in the preſent caſe. For the aſſeſſments of the land-tax are public proceedings; every perſon is entitled to take copies; ſo that no injury can ariſe to the party from our refuſing a *certiorari*; but, on the contrary, very great public inconvenience would enſue from permitting it to iſſue. And for that reaſon, the Court have refuſed the writ in the caſe of a poor-rate (1); for the poor would remain unprovided for in the mean time if it were otherwiſe. So here, at leaſt, as many inconveniences, or perhaps more, may be foreſeen from eſtabliſhing a precedent for removing the aſſeſſments of the land-tax by *certiorari*. But if we quaſh the *certiorari* on the grounds of public inconvenience, we muſt take care, at the ſame time, that the party who applied for it, ſhall not ſuffer any inconvenience by quaſhing it. And therefore if an application be made to the Court for an information againſt the commiſſioners, we will admit an atteſted copy of the aſſeſſment inſtead of the original. Per Cur.—Rule abſolute.

The King *v.* the Inhabitants of Seton, Tr. Ter. 37 Geo. 3. 7 *Ter. Rep.* 373.

The defendants were indicted for not repairing a road; *and after verdict and judgment at the quarter-ſeſſions*, a *certiorari* was *ſerved* to remove the record here. It being moved to quaſh the *certiorari quia improvidè emanavit*, on the ground that the party who now wiſhed to remove the record could only do ſo by writ of error. Lord Kenyon, Ch. J. In the caſe of ſummary proceedings, orders and convictions

(1) *Vide* 2 *Str.* 932. 975.

before magiſtrates, the proceedings may be removed by *certiorari* after judgment, becauſe ſuch proceedings can only be removed by *certiorari*; but where a judgment has been given on an indictment, the record muſt be removed by writ of error. If any fraud or miſconduct had been imputed to the magiſtrates in proceeding, notwithſtanding the iſſuing of the *certiorari*, that might have been a ground for a criminal proceeding againſt them; and I believe there are inſtances in which a criminal information has been granted againſt magiſtrates acting in ſeſſions. In this caſe, if the party, who ſued out the *certiorari*, wiſhes to object to the proceedings, he muſt remove the record by writ of error; but this writ muſt be quaſhed. PER. CUR.—Rule abſolute.

The King *v.* D. Jackſon, Hill Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 145.

The defendant, having been convicted at the ſeſſions on an indictment for extortion, removed the record here by *certiorari between the verdict and the judgment*, and then obtained a rule calling on the proſecutor to ſhew cauſe why the judgment ſhould not be arreſted for ſome objections to the indictment. The caſe ſtood in the paper for argument to-day; but when it was called on, Lord KENYON, Ch. J. ſaid, that though there were inſtances in which the proceedings had been removed from inferior juriſdictions in this ſtage, it was a practice that ought to be diſcouraged, becauſe it was attended with great expence and many inconveniences. That in caſes where the puniſhment is diſcretionary, and this Court ſhould be of opinion, after hearing the caſe argued, that the judgment ought not to be arreſted (and ſuch an opinion could not be reviſed on a writ of error), a *procedendo* muſt be awarded, and the party ſent back again to the inferior juriſdiction to receive judgment. That in *R.* v. *Potter* (1), this Court in a ſimilar caſe refuſed to go into the objections made in arreſt of judgment, and awarded a *procedendo*. And his Lordſhip added, that he thought the Court ſhould adopt the ſame mode in this inſtance; obſerving, that the defendant might bring a writ of error after judgment, if he were adviſed that the record was erroneous.—A *procedendo* ordered.

Proſecution of a Certiorari.

Rex *v.* Nicholls, Hil. Tr. 25 Geo. 3. B. R. 6 *Ter. Rep.* 281.

It is neceſſary to give notice of the intention to move for a *certiorari* before the rule to ſhew cauſe is applied for.—In this caſe a *certiorari* was moved for on behalf of the defendant, to remove a conviction on the ſtat. 11 *Geo.* 1. c. 30. ſ. 2. & 39. for obſtructing exciſe officers in the execution of

(1) 2 Lord *Raym.* 938.

their

their duty, on an affidavit that the officers were not ſworn in the defendant's preſence, and that only his ſervant was charged with the obſtruction. The Court granted a rule to ſhew cauſe, and no cauſe being ſhewn, the rule was made abſolute. Afterwards it was moved to quaſh the *certiorari*, becauſe ſufficient notice had not been given to the juſtices; no notice having been given to them before the application for the rule to ſhew cauſe. And *the Court* ſaid, after cauſe ſhewn, that it had been the practice to give notice before the rule was firſt applied for (1); and they made the rule abſolute for quaſhing the *certiorari*.

The King v. the Inhabitants of Penderryn, Hil. Ter. 28 Geo. 3. 2 *Ter. Rep.* 260.

It is no objection to a *certiorari* to remove a preſentment of a road made by a juſtice of peace under the 24th ſection of 13 *Geo.* 3. c. 78. that it is proſecuted by another than the juſtice preſenting, if it is by his conſent.—A road lying within the diſtrict of Penderryn, had been preſented on 13 *Geo.* 3. c. 78. ſ. 24. by Mr. *Bevan*, a juſtice of the peace, as out of repair; which preſentment had been removed into this Court, on the part of the proſecutor, by *certiorari*. On ſhewing cauſe why the writ of *certiorari* ſhould not be quaſhed, it was alleged as a ground that one *Morris* had ſued out the *certiorari*, and was in truth the proſecutor, which was not allowed by the act, the only proſecutor recognized by the 24th ſection, being the juſtice himſelf who made the preſentment; and that it was not in his power to ſubſtitute any other in his ſtead. On the other ſide there was produced an affidavit made by *Bevan*, that *Morris* proſecuted with his full conſent and approbation. Per Cur. The juſtice is the perſon to whom the Court look as the proſecutor; he has avowed the preſentment. If he conſents to the acts of any other perſon conducting the proſecution, he takes on him all the reſponſibility, and is anſwerable for all the coſts, if the preſentment ſhould turn out to be improper.—Rule diſcharged.

The King v. Eaton, Mic. Ter. 28 Geo. 3. B. R. 3 *Ter. Rep.* 285.

On a motion to quaſh a return of a juſtice of peace, to remove a conviction on the Deer Act (2); which return was, that the defendant, after the conviction, having entered into a recognizance to try his appeal at the next quarter ſeſſions, he, the juſtice, had returned the record of the conviction to the ſeſſions, where it is filed of record, but he had annexed a copy to the writ. It was contended, that the original ought to have been returned. Per Cur. This return is ſufficient; for upon the defendant's entering into a recognizance to try the appeal, it was the duty of the juſtice to return the original record of the conviction to the ſeſſions: and beſides, a *certiorari* in this inſtance was improper, the party having appealed to the ſeſſions, and thereby made his

(1) See Rex v. Juſtices of Glamorganſhire, in p. 484, *ante*.
(2) 16 *Geo.* 3. c. 30.

election according to the terms of the act. And, indeed, where an act gives a general form of conviction, as in this inſtance, the party can have no benefit from a *certiorari*, becauſe the proceedings or examinations need not be returned, but the conviction only, which being general, cannot exhibit the error on the proceedings; and BULLER, J. added—That a juſtice of peace ought, in every inſtance, to return a conviction by him to the ſeſſions, whether the party appeals or not, or whether an appeal is or is not given, that the crown may not be deprived of its ſhare of forfeitures.—Rule diſcharged.

Daniel *v.* Phillips, Hil. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 499.

On ſhewing cauſe againſt a rule for quaſhing a *certiorari*, which had iſſued to remove a cauſe from the borough court of Caermarthen into this Court. Two objections had been made to the iſſuing of the writ: 1ſt. That it was directed to the mayor, commonalty, and burgeſſes, which was the name of incorporation; whereas, it ought to have been directed to the mayor, recorder, and town-clerk, before whom the Court was holden. PER. CUR. Although the proper parties, in whoſe keeping the record was, might have objected to make any return of it on account of the writ of *certiorari* being improperly directed, yet having in fact returned the record into this Court, no ſuch objection can be ſtarted by third perſons. THE SECOND objection was, that the damages were laid under 40*s.* and therefore this Court would not take cognizance of it. PER CUR. However that may have been held as an objection in general caſes, where the action was brought to recover a debt under 40*s.* yet this is an action for an aſſault, brought againſt exciſe officers, who can not have an impartial trial there.—Rule diſcharged.

The King *v.* Boughey *et al.* Ea. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 281.

A *certiorari* to remove a conviction muſt, by 13 *Geo.* 2. c. 18. ſ. 5. be applied for within ſix months after the date of conviction; and the party proſecuting a *certiorari* to remove a conviction, &c. *muſt himſelf enter into a recognizance with two other perſons*, to proſecute it with effect, &c. by the 5 *Geo.* 2. c. 19. ſ. 2.—On the 7th of July, 1790, the defendants were convicted in certain penalties, under the conventicle-act (1); on the 14th of July, the magiſtrate iſſued a ſummons or order, requiring them to pay the penalties. On the 11th January, 1791, two perſons, having entered into a recognizance to proſecute with effect, &c. obtained a *certiorari* to remove the conviction into this Court, to ſet aſide which writ a rule was obtained on two grounds; firſt, that the defendant had not given the ſecurity required by the 5 *Geo.* 2. c. 19. ſ. 2. which enacts, that no *certiorari* ſhall be

(1) 22 *Car.* 2. *c.* 1.

allowed

allowed to remove any judgment or order of juſtices, *unleſs the party proſecuting ſuch certiorari, before the allowance thereof, ſhall enter into a recognizance with ſufficient ſureties, &c.* in 5*l.* with condition to proſecute the ſame without delay, and to pay coſts if the judgment or order be confirmed. And ſecondly, becauſe the *certiorari* was not moved for within the time allowed by the 13 *Geo.* 2. c. 18. ſ. 5. which directs that no *certiorari* to remove convictions, &c. before juſtices of the peace, ſhall be iſſued, unleſs it be applied for within ſix calendar months next after ſuch conviction, judgment, order, or other proceedings, ſhall be ſo had or made. *The Court* thought that both the objections were well founded. Firſt, that the words of the 5 *Geo.* 2. c. 19. were poſitive, and could not be diſpenſed with. And, ſecondly, that the *certiorari* ought to have been applied for within ſix months after the conviction.—Rule abſolute.

The King *v.* Robert Chamberlayne, Hil. Ter. 26 Geo. 3. B. R. 1 *Term. Rep.* 103.

Under the 3d ſection of 5 *W.* and *M.* c. 11. for regulating the removal of indictments from the ſeſſions by *certiorari*, the repreſentatives of the proſecutor are entitled to the coſts taxed during his life, *though no perſonal demand were ever made by him.* For though it takes away the remedy by attachment, it does not affect the debt; the coſts when taxed, becoming a *debt*.—Cauſe was ſhewn againſt a rule, which had been obtained, that the defendant's recognizance in this caſe might be diſcharged. The fact appeared to be, that *the defendant having been indicted at the general ſeſſions* for an aſſault, *the indictment was removed into this court by certiorari*; and on the trial the defendant was found guilty, and afterwards ſentenced to pay 6*s.* 8*d.* which he paid. The proſecutor is ſince dead, and no perſon hath adminiſtered to his eſtate and effects. And no demand having been made by the proſecutor in his lifetime for the coſts, this motion was made upon the ſuppoſition, that they never could be demanded now; the words of the ſtatute 5 *W.* and *M.* c. 11. ſ. 3. being, "That *the proſecutor* for the recovery of ſuch coſts ſhall, *within ten days after demand made of the defendant*, and refuſal of payment on oath, have an attachment granted againſt the ſaid defendant." THE COURT conſidered theſe *coſts* as a *debt* actually *veſted*, and diſcharged the rule. Afterwards, adminiſtration having been granted of the proſecutor's effects, it was moved, that the defendant's recognizance might be aſſigned, to entitle the perſonal repreſentatives of the proſecutor to the coſts. BULLER, J. When the coſts are taxed, they become a debt; and the demand, which muſt be made under this act of parliament, is only as to the remedy. The remedy given is by attachment; and to bring a party into contempt, he muſt come within the letter of the law; therefore, there muſt have been a demand of ten days on the defendant before an attachment could have gone againſt him. But here

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the costs were taxed in the life-time of the prosecutor; they became a debt vested, and will go to his personal representatives. PER CUR.—Rule absolute.

The King v. Jenkinson, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 82.

But no costs are due on a *certiorari*, removing summary proceedings, unless a recognizance be entered into at the time of removing the proceedings.—*The defendant*, having been convicted before two justices, in a penalty under the lottery-act, *removed the proceedings into this court by certiorari*. On an application to the master to tax the costs of the *certiorari*, he doubted whether he had a power to do so; on which a motion was made for the direction of the Court to the master to tax them. PER LORD MANSFIELD, Ch. J. (after cause shewn), By the rule of law, the king neither receives nor pays costs. We are aware of the mischiefs of granting *certioraris* for vexatious purposes; and it is discretionary in the Court whether they will grant them or not. For the future, we will oblige the party applying for a *certiorari*, to enter into a recognizance to pay costs; but we are not authorized to grant them by the 13 *Geo.* 2. c. 18. without a recognizance.—Rule discharged.

Rex v. Midlam, and Idem v. Eundem, Tr. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1720.

Where a *certiorari* to remove a conviction under a penal statute is brought, not for vexatious purposes, but to enable the defendant to plead the conviction in an action founded on the same offence, the prosecutor is not entitled to costs upon his own affirmation of the conviction.—On behalf of the prosecutors, cause was shewn against a rule which had been made to shew cause, "Why the master of the Crown-"Office should not be directed by the Court *to forbear*, and "*not to proceed* to tax the prosecutor his COSTS in these causes, "relative to the affirmance of the convictions against the de-"fendant in these causes;" and also, "Why the *bond* entered "into by, or on the behalf of the defendant, on allowing the "*certiorari*, should not be delivered up to the said defendant, "or his clerk, in Court, to be *cancelled*." This *certiorari* was brought for removing a *conviction* upon the *game-laws*; and the present rule was grounded on an affidavit of hardship and oppression upon the defendant; namely, that *although the defendant had paid the forfeiture on the conviction, yet an action had been brought against him for the same offence; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it; and he was obliged to remove it by* certiorari: *and the prosecutor set it down in the paper, and got it affirmed;* and then the prosecutor became nonsuited in the action. On behalf of the prosecutor, it was insisted, that the act of 5 *Ann.* c. 14. s. 2. directs full costs to be paid upon removing these convictions, in case the conviction be *affirmed*. And this is *general*; and they must be paid in *all* cases where the conviction is affirmed, be the *certiorari* brought "upon ANY *pretense whatsoever*;" (for, so the act of parliament is expressly

expreſsly worded.) And this conviction *was* affirmed: that therefore the Court *could not*, upon this man's *own affidavit*, enter into the *cauſe* or *occaſion* of the removal of the conviction by this *certiorari*. Lord MANSFIELD, This is *not* a caſe *within the intention* of the act of parliament of 5 *Ann.* c. 14. ſ. 2. for, *this certiorari* was *not* brought for vexation, or out of obſtinacy or perverſeneſs; nor to *over-hale* or *object* to the conviction: but an action being brought for the ſame offence, the defendant in that action could not obtain (though he ought to have had it) a *copy of the conviction* from the juſtice of peace who made the conviction; and therefore he was *obliged* to bring a *certiorari* to remove it; and he removed it for *that* purpoſe *only*. The proſecutor had no occaſion, therefore, to be at *any expence* about it; for, the defendant did not object to it. But the *proſecutor* ſet it down in the paper, only to increaſe expence, and merely for vexation; ſuppoſing, "That the *defendant* would have been obliged to "pay for it." The plaintiff in the action was nonſuited; and I think the *defendant* (inſtead of *paying* coſts) ought to have an *allowance* of the coſts he was put to in removing the conviction; as it was a *neceſſary part of his defence*. Therefore the preſent rule ought undoubtedly to be made abſolute. WILMOT, J. was extremely clear, that this was not a caſe within the intention of the ſecond ſection of the 5 *Ann.* c. 14. and he thought (as Lord *Mansfield* alſo did) that the juſtice ought to have given the defendant a *copy of the conviction*, without putting him to the trouble and expence of bringing a *certiorari* to remove it. The bringing the action for the *ſame* offence was a groſs oppreſſion. Mr. Juſtice YATES alſo concurred. The juſtice ought to have given the defendant *a copy of the conviction*; for it was a *record*; and the defendant was *intitled* to it. And he ought to have been *allowed the expence* of his *neceſſarily* bringing this *certiorari*, in *coſts* upon the nonſuit: for it was *neceſſary to his defence* in the action. He did not remove the conviction, in order to object to it; on the contrary, he had ſubmitted to it, and had paid the penalty. He removed it out of *neceſſity*; it was neceſſary to his defence in the action. He thought this proceeding of the proſecutor to have been a very oppreſſive one, in every ſtage of it; and that the bringing the *certiorari*, under the circumſtances of the preſent caſe, did not entitle the proſecutor to his coſts upon affirmation of the conviction.—Rule abſolute, and the proſecutor to pay the coſts out of pocket of this application.

Where a defendant hath removed an indictment, entered into recognizance, been convicted and fined, and the proſecutor has received one-third thereof, ſo much ſhall be deducted out of the coſts.—This indictment had been removed into this

Rex v. Oſborne, Tr. Ter. 7. Geo. 3. B. R. 4 *Burr.* 2125.

this court, by a *certiorari*; and the uſual recognizance was thereupon entered into (1). The defendant was convicted, and fined 50*l.* and the proſecutor had got a third part of it, by an order of two judges, purſuant to the privy ſeal. On a motion for directions to the maſter, to tax the proſecutor's coſts under the recognizance entered into upon the *certiorari*, THE COURT, after cauſe ſhewn, were of opinion, that the proſecutor could *not* have *both* theſe advantages; namely, the coſts under the recognizance, *and* alſo the one-third of the fine. They therefore made a rule "to tax the coſts upon "the recognizance, according to the direction of the act of "parliament; and that ſo much as the proſecutor had re-"ceived for the one-third of the fine ſhould be *deducted* out "of the ſum allowed."

Rex v. Pickerſgill, Ea. Ter. 23 Geo. 3. B. R. *Cald.* 297.

A return to a *certiorari* need not be under hand and ſeal, though the writ be directed to the juſtices, to make a return *under ſeal*; for it is not neceſſary or uſual, on returns to writs of inquiry, or the return of a coroner's inqueſt.

Church.

William Sellon, clerk, *v.* Roger Parry, clerk, Tr. Tr. 21 Geo. 3. B. R. 5 *Burr.* 2762.

The words, *dues, and profits*, in ſtat. 10 *Ann.* c. 11. ſ. 16. for dividing of pariſhes, includes ſurplice fees, as well as ſtrict fees. —This was an action of treſpaſs on the caſe, brought by the plaintiff againſt the defendant for money had and received to the plaintiff's uſe; to which the defendant pleaded "*Non aſſumpſit*;" and thereupon iſſue was joined. On the trial of the cauſe, the following caſe was agreed to between the parties: The plaintiff was curate in the perpetual curacy of St. James', Clerkenwell, and claimed certain ſums of money, received by the defendant as ſurplice fees for marriages, baptiſms, churchings, and burials, in the pariſh of St. John. The defendant had received 10*l.* for marriages, baptiſms, churchings, and burials, in the pariſh of St. John, Clerkenwell. There was an inſtrument or deed inrolled in the high court of chancery, whereby it appears, that the commiſſioners under the act for building fifty new churches did, in the year 1723, purchaſe a chapel in the pariſh of St. James', Clerkenwell, and deſcribe a diſtrict and diviſion out of the ſaid pariſh; which chapel was afterwards conſecrated, and the ſaid chapel and diſtrict were named and called by them, St. John's church and pariſh. But the commiſſioners proceeded no further in the diviſion of the ſaid pariſh, and no agreement or ſettlement had been made by the patrons of the pariſh of St. James' for ſettling the right of patronage and advowſon of St. John's, and for more effectually dividing and ſeparat-

(1) *Vide* 5 & 6 *W.* & *M.* c. 11. ſ. 2, 3. made perpetual by 8 & 9 *W.* 3. c. 33.

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ing the ſaid pariſh. The jury found a verdict for the plaintiff, ſubject to the opinion of the Court upon this queſtion—"Whether, under the circumſtances of this caſe, the plaintiff is not intitled to recover?" And if the plaintiff is not entitled to recover, then a nonſuit to be entered. The arguments turned upon the ſtatute of 10 *Ann.* c. 11. and the plaintiff relied upon the 16th proviſo—"That the act ſhall "not deprive the ſucceſſors of the rectors or vicars of the "pariſh-churches out of which any part ſhall be taken, of "any tithes or other profits, *until* ſuch agreement for divid-"ing the pariſh be made and inrolled." Lord MANSFIELD, It ſays—"But that the ſucceſſors of the preſent incumbents, "*till* ſuch agreements and ſettlements be made and take effect, "ſhall and may have, hold, and enjoy, the ſaid reſpec-"tive rectories, vicarages, and curacies, and the tythes, "dues, and profits thereof, in as ample manner as if this act "had not been made, and as the preſent rectors, and other "eccleſiaſtical perſons, who are to hold and enjoy the ſame, "during their reſpective incumbrances, are of right to hold "and enjoy the ſame (1)." This is poſitive and in general words: which general words take in every thing, all profits, as well as tythes and dues. It cannot admit of a doubt, that ſurplice-fees are included, as well as ſtrict dues. The fact is, that the old rector has taken the fees for what he has done in the *old* church and church-yard; and the new curate has taken the fees for what *he* has done in the *new* church and church-yard. The plaintiff muſt have the poſtea.—POSTEA to the PLAINTIFF.

Butterworth and Barker, v. Walker and Waterhouſe, Ea. Ter. 5 Geo. 3. B. R. 4 *Burr.* 1689.

On ſhewing cauſe againſt a *prohibition* to ſtop the prerogative Court of York from proceeding to grant a faculty for an *organ* in the church of Halifax. It appeared, that the cauſe below was for obtaining a faculty for it; and there was a citation of the pariſhioners and inhabitants to appear, and to "ſhew cauſe why an organ ſhould not be erected in their pariſh-church." They did ſo; and their objection was, "That the plaintiffs below had not the conſent of the pariſh." The anſwer was, "but we have the conſent of the *church-*"*wardens*; and there is alſo ſo large a *ſubſcription* for erect-"ing and maintaining it, that it will *never be chargeable to* "*the pariſh.*" And they alſo allege the conſent of a ſelect meeting or veſtry. The other ſide deny that the pariſh in general is *bound* by the conſent of this ſelect meeting or veſtry. Whereupon the applicants for the faculty allege, "that *for* 20, 30, *or* 40 *years*, it has been uſual to collect the ſenſe and conſent of the pariſhioners about all parochial matters, at ſuch ſelect meetings or veſtries; and that the whole pariſh

(1) *Vide* f. 16.

are,

are, and *for all the time allegate* have been bound by the acts and conſent of ſuch ſelect meetings or veſtries. Upon which, theſe pariſhioners who oppoſed the organ, moved for a prohibition. THE COURT obſerved, that the very *ground* of applying for the faculty, is, "That the pariſh are *not* to be burthened with the expence of this organ;" the very *condition* of praying it is, "That it is to be *maintained by a ſubſcription.*" Mr. *Wedderburne*, who was for the prohibition, ſaid, that no matter of ſplendor or ornament in the church can be done *without the conſent of the pariſh.* Mr. Juſtice WILMOT aſked him what authority he had for this poſition. He ſaid, *he* knew no ſuch doctrine.—It was then obſerved, that if the eccleſiaſtical courts allow the evidence of ten, twenty, thirty, or forty years, to be a proof of a cuſtom, the alleging an uſage for ſuch a time only, without alleging it to be immemorially, would be only an artifice to *elude* prohibitions to hinder them from trying immemorial cuſtoms. And if ornaments can be *impoſed* upon the pariſh by the ordinary, without the conſent of the pariſh, the pariſh will be bound to *maintain* them. Mr. Juſtice WILMOT thought they were proceeding below, upon a *miſtake.* The citation muſt be intended to have been iſſued, for the pariſhioners to ſhew "whether they have "any *temporal rights* that will be *injured* by ſetting up an "organ." But the *conſent* of the whole pariſh can not be eſſentially neceſſary to the ordinary's ſetting up an organ; nor would the pariſh be bound to repair it, when ſet up. Now if the conſent of the pariſh is *not* neceſſary, then all theſe proceedings below are *nugatory.* It ſeems as if they did think ſuch conſent to be neceſſary: and I own, that if *the conſent of the pariſh were neceſſary*, I ſhould think the prohibition ought to go: becauſe the conſent of the *veſtry* can not bind the *whole pariſh* without *immemorial* uſage. Mr. Juſtice YATES alſo thought that a prohibition ought to go, *if* there were any temporal right to be determined. For an uſage of thirty or forty years is not ſufficient; it can be no valid cuſtom, unleſs it has been uſed *time out of mind.* This ſuit, he ſaid, below, ſeems to me to be totally *nugatory. Pariſhioners can not be charged with new ornaments, without their conſent, as well as that of the ordinary.* The citation might be intended only to prevent injury being done to the property of their private ſeats in the church. Both ſides here ſeem to have thought the conſent of the pariſh neceſſary; which it is *not.* Mr. Juſtice ASTON. If proper trial of the cuſtom is eluded by alleging an uſage of forty, thirty, or twenty years, I ſhould think the obſervation to be right. The pariſh may be uſed to meet and conſider of neceſſary repairs; but they can not preclude the eccleſiaſtical court from ordering an organ, or any thing elſe within their cognizance.

nizance. This organ is ſtated to be provided by *voluntary contribution*. The citation was iſſued in order to receive reaſons againſt injuries that might happen to the private property of the pariſhioners. But the eccleſiaſtical court does not encroach upon or interrupt the meetings of the church-wardens about ſuch things as belong to *them*; nor draw the cognizance of them to a different *forum*. Lord MANSFIELD, The ground we go upon is, "That a prohibition *will not be material*."—Rule diſcharged.

Churchwardens.

Lis pendens is not a good return to a mandamus to ſwear in churchwardens, though accompanied with very ſpecial circumſtances.—Upon a MANDAMUS to *admit and ſwear* CHURCHWARDENS of St. Olave's, Southwark. THE MANDAMUS was directed to Dr. HARRIS, commiſſary of the conſiſtorial and epiſcopal court of the biſhop of Wincheſter, for the parts of Surrey; ſetting forth that *Henry Griffith* and *Thomas Garner* were in Eaſter week then laſt paſt duly nominated and elected churchwardens of the pariſh of St. Olave, Southwark, in Surrey; and that they had often offered themſelves to the doctor, to take their corporal oath as churchwardens, and requeſted to be by him ſworn and admitted into the ſaid place and office; which oath the ſaid doctor refuſes to adminiſter to them: the writ, therefore, commanded him, without delay, to ſwear and admit, or cauſe to be ſworn and admitted, the ſaid *Henry Griffith* and *Thomas Garner*. A like *mandamus* was alſo directed to him, to ſwear and admit *David Griffin*, *Philip Cox*, *Iſaac Applebee*, and *William Strickland*, into the SAME *office*. He returned, that there were two cauſes depending before him, which had been afterwards conſolidated into one; in which it was diſputed, "WHO were elected churchwardens;" the former, on the promotion of *Griffin*, *Cox*, *Applebee*, and *Strickland*, aſſerting *themſelves* to have been duly elected, and praying to be ſworn; the latter, on the promotion of *Griffith* and *Garner*, and two others, *againſt Griffin*, *Cox*, *Applebee*, and *Strickland*; and the parties on each ſide reciprocally denied the others to be duly elected. By reaſon whereof he could not, *conſiſtently with his duty, and the law and practice of the epiſcopal court*, ſwear or admit, or cauſe to be ſworn and admitted, the ſaid *Henry Griffith* and *Thomas Garner*, into the place or office of churchwardens of the pariſh of St. Olave, Southwark, UNTIL *it ſhall have*

Rex. *v.* Doctor Harris, Tr. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1420. 1 *Black. Rep.* 430.

have been judicially determined, in the cauſe then depending before him, according to allegations given and proofs made thereon, "that the ſaid *Henry Griffith* and *Thomas* "*Garner* WERE DULY ELECTED into ſuch office." The return to the other writ of *mandamus* at the inſtance of *David Griffin*, *Philip Cox*, *Iſaac Applebee*, and *William Strickland*, was the ſame *(mutatis mutandis)*; only that it added at the end (after the words "were duly elected into "ſuch office") "*by a majority of legal votes.*" Lord MANSFIELD, This is an indecent return. He has no right to try the queſtion; he can not try the legality of the votes. The king's writ commands him to admit and ſwear; and he muſt obey it. It was then obſerved, that there were two *croſs mandamuſes*; and that the doctor did not know *which* to obey. Lord MANSFIELD and Mr. Juſtice WILMOT, He ought to obey *both*. It is *without prejudice to the right* of either claimant. Lord MANSFIELD, All the caſes prove *this* return to be *wrong*. It would be ſo, *even if* he *could* try it; (which he *can not* do:) he can not try the *legality of the votes*. Mr. Juſtice WILMOT, Theſe writs give no *right*; and he *can not* try the *legality of the votes*. PER CUR. The RETURN muſt be DISALLOWED; and a PEREMPTORY MANDAMUS go. THE COURT propoſed, and the parties conſented, to *try the right* in a *feigned iſſue* (1); and the *execution* of the peremptory *mandamus* to be *ſuſpended* till after the trial; and then the peremptory *mandamus* to go, "to ſwear in the "victors at the trial;" *unleſs* the judge who tries it, ſhall declare himſelf diſſatisfied with the verdict.

The King *v.* Shepherd *et al.* Mic. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 381.

The Court will not grant a *quo warranto* information, to try the validity of an election to the office of churchwarden; for it is not an uſurpation on the rights or prerogatives of the crown, for which only the old writ of *quo warranto* lies; and an information, in nature of a *quo warranto*, can only be granted in ſuch caſes. *The Court*, therefore, were of opinion, that they ought not to liſten to ſuch an application; it was deſtitute of every legal principle: and that, in this caſe, even a rule to ſhew cauſe ought not to be granted, leſt it ſhould be hereafter drawn into precedent.—Rule refuſed.

Leman *v.* Goulty *et al.* Hil. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 3.

The ſpiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges.—This was a rule, calling on the plaintiff, and the Rev. *G. Sandby*, D. D. vicar-general and official principal of the epiſcopal conſiſtorial court of the biſhop of Norwich, to ſhew cauſe why a writ of prohibition ſhould not iſſue, to pro-

(1) On the trial of the feigned iſſue, both elections were found to be void; ſo that in the end no peremptory *mandamus* iſſued. 1 *Black. Rep.* 432.

hibit that court from holding further plea of the matters there depending between the parties. The defendants, who were churchwardens of St. Andrew's, Norwich, were cited, on the 26th of March, 1788, in the biſhop's court, to exhibit, on oath, a true account of all ſums of money which they had received, and paid, in the execution of their office, from Eaſter, 1787, to that time. At a ſubſequent court, held the 29th of April following, they gave in their accounts, verified by oath. On the 18th of June, objections were taken to two articles of the account; one of 6*l.* 11*s.* 6*d.* for lettering and gilding the pew-doors; and the other 6*l.* 10*s.* charged as paid to the chief conſtable, and not relating to the office of churchwarden; which were diſallowed. Then they were admoniſhed to pay 12*l.* 1*s.* as the balance of their accounts, and 13*s.* 4*d.* as coſts: and for not appearing at a ſubſequent court, on the 23d of October, 1788, and obeying the monition, the judge pronounced them contumacious, and excommunicated them. At a court, held on the 1ſt of Auguſt, 1788, it was alleged, that the plaintiff was preſent at a veſtry meeting of the pariſhioners of St. Andrew's, on the 12th of March, 1788, when the churchwardens' accounts were produced and allowed; and that the plaintiff, and the reſt of the pariſhioners, had ſince paid the ſums rated on them; and that the ſum, charged to have been paid to the conſtable, was an annual ſum which the churchwardens, for the time being, appeared to have regularly paid. The ſuggeſtion ſtated, that it appeared to the judge of the ſpiritual court, by the account delivered in by the defendants, on the 29th of April, that it had been allowed and approved at the veſtry meeting. On ſhewing cauſe, it was admitted, that the judge of the ſpiritual court had done wrong in pronouncing the ſentence which he had given; but then it was inſiſted, that that was a matter of appeal, and not a ground for a prohibition. Lord KENYON Ch. J. When the churchwardens had delivered in their accounts, they had done every thing which the ſpiritual court had a power of enforcing. There was then an end of the juriſdiction of that court; it was *functus officio*. The general grounds of a prohibition to the eccleſiaſtical courts, are either a defect of juriſdiction, or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at iſſue, that court has no juriſdiction to try it, becauſe it cannot proceed according to the rules of the common law; and in ſuch caſe, a prohibition lies. Or, where the ſpiritual court has no original juriſdiction, a prohibition may be granted after ſentence. But where it has juriſdiction, and gives a wrong judgment, it is the ſubject-matter of appeal, and not of prohibition (1). Now, in this caſe, with reſpect to the

(1) See *Symes v. Symes*, 2 *Burr.* 813.

compelling of a production of the churchwardens' accounts, the ſpiritual court had excluſive juriſdiction; but there their authority ceaſed; and every thing which they did afterwards was an exceſs of juriſdiction, for which, a prohibition ought to be granted. ASHHURST, J. agreed. BULLER, J. This is a motion for a prohibition after ſentence, in which caſe, we cannot go out of the proceedings to ſee whether the ſpiritual court had any juriſdiction. But, I think, it does appear, on the face of theſe proceedings, that the court below had no authority to give the ſentence which they have given; and, upon that ground, a prohibition ought to be granted. If the eccleſiaſtical judge give a wrong ſentence on the merits, where he has juriſdiction, that is only the ſubject-matter of appeal, and not of a prohibition. But where it appears, on their own proceedings, that they had no juriſdiction, there a prohibition is the proper remedy. GROSE, J. of the ſame opinion.—Rule abſolute.

Turner *v.* Baynes, Mic. Ter. 36 Geo. 3. C. B. 2 *Hen. Black.* 559.

Thoſe who are admitted and ſworn into the office of churchwardens, and act as ſuch, may maintain an action againſt a former churchwarden, for money received by him for the uſe of the pariſh, although they may neither have been duly appointed to the office, nor be the immediate ſucceſſors; for the former churchwarden being a wrong doer, in withholding the money, ſhall not be permitted to deny their right to bring the action; and the churchwardens being a corporation for the purpoſe of taking care of the goods of the church, the right to ſue for money withholden from the pariſh paſſes from one ſet to the other, it being perfectly immaterial whether the immediate or any other ſucceſſors of the defaulter bring the action, which is not founded in privity between them.

Coin.

The King *v.* Varley, Ea. Ter. 10 Geo. 3 2 *Black. Rep.* 682.

The defendant had counterfeited the impreſſion of a half-guinea, on a piece of gold, which was previouſly hammered, and was not round, nor would paſs in the condition it then was: the judge who tried the priſoner (*Gould*, J.) doubted whether this was high-treaſon, and reſpited the judgment, in order that the caſe might be laid before all the judges; who (*abſente* Baron *Adams*) were unanimouſly of opinion, that the crime was incomplete, and that he ſhould be recommended to his majeſty for a pardon.

The King *v.* Lennard, Ea. Ter. 12 Geo. 3. 2 *Black.* 807.

The defendant was indicted for high-treaſon, for "having "in his cuſtody and poſſeſſion, *one mould, made of lead*, on which was impreſſed the figure of the head-ſide of a ſhilling." The ſtatute 8 and 9 *Will.* 3. c. 25. enacts: "that no ſmith, "founder,

" founder, engraver, or other perſon (not authorized, &c.) " ſhall, knowingly, *make* or *mend* any puncheon, counter- " puncheon, matrix, ſtamp, dye, *pattern or mould*, of ſteel, " iron, ſilver, or other metal or metals, or other materials " whatſoever, in or upon which there ſhall be, or be made " or impreſſed, or *which will make or impreſs* the figure, " ſtamp, reſemblance, or ſimilitude of both or either of the " ſides or flats of any gold or ſilver coin; nor ſhall, know- " ingly, make or mend any edger or edging tools, &c. nor " any preſs for coinage, nor any cutting engine, &c.; nor " ſhall, knowingly, buy or ſell, hide or conceal, or (without " lawful authority, &c.) knowingly have in his, her, or their " houſes, cuſtody, or poſſeſſion, any ſuch puncheon, coun- " terpuncheon, matrix, ſtamp, dye, (1) edger, cutting-engine, " *or other tool or inſtrument before mentioned*, on pain of high- " treaſon." The defendant being found guilty on the trial, the judge reſpited the judgment till the opinion of the judges ſhould be had on the following points: 1ſt, Whether the mould found with the priſoner was compriſed under the general words of the ſtatute, *other tool or inſtrument before mentioned*, ſo as to make the cuſtody thereof, without lawful authority or excuſe, amount to the crime of high-treaſon? 2dly, If it be ſo compriſed, Whether it ſhould not have been laid in the indictment to be a tool or inſtrument mentioned in that ſtatute? THE JUDGES (*abſente* DE GREY, Ch. J.) were unanimouſly of opinion, 1ſt. That this mould was a tool or inſtrument mentioned in the former part of the ſtatute; and, therefore, compriſed under theſe general words: and 2dly, That as it was expreſsly mentioned by name in the firſt clauſe, with reſpect to the *making* or *mending*, it need not be averred to be a tool or inſtrument ſo mentioned.

This caſe was again conſidered by all the judges, on a freſh doubt that aroſe—Whether the mould, which was found in the priſoner's cuſtody, having only the reſemblance of a ſhilling inverted; the convex parts of the ſhilling being concave in the mould, and *vice verſâ*, the head or profile being turned the contrary way of the coin, and all the letters of the inſcription reverſed; was not properly an inſtrument that would *make and impreſs* the reſemblance, ſtamp, &c. of the current coinage, rather than an inſtrument on which the ſame *were made and impreſſed* as laid in the indictment: the ſtatute ſeeming to diſtinguiſh between ſuch as will make or impreſs the ſimilitude, &c. as a matrix, dye, or mould;—and ſuch, on which the ſame is made or impreſſed, as a puncheon, counterpuncheon, or pattern: BUT a great majority of the

The King *v.* Lennard, Tr. Ter. 12 Geo. 3. 2 *Black.* 822.

(1) Omitting in this laſt clauſe the words *pattern* or *mould*; which was in the firſt part.

judges were of opinion, that this evidence ſufficiently maintained the indictment; becauſe the ſtamp of the current coin was certainly impreſſed on the mould, in order to form the cavities thereof; though they agreed, that the indictment would have been more accurate, had it charged, that "he had in his cuſtody a mould, that would make and impreſs the ſimilitude, &c." and in this opinion, ſome, who otherwiſe doubted, acquieſced.

Commitment.

Rex *v.* Evered, Tr. Ter. 17 Geo. 3. B.R. *Cald.* 26.

A warrant of commitment muſt be certain, and not in the diſjunctive. In this caſe it was objected to a warrant of commitment, that it was uncertain, viz. "as an apprentice OR ſervant, for diſobeying his intentures OR articles:" AND the Court ſaid, that the objection muſt undoubtedly prevail.

The King. *v.* E. M. Deſpard, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 736.

A commitment for *treaſonable practices* is legal.—The defendant was brought up in the cuſtody of the governor of the houſe of correction, by virtue of a writ of habeas corpus, and it was now moved, that the warrant of commitment, returned and produced in court, might be read; which being done, it appeared that the defendant had been committed "*for treaſonable practices*," by a warrant of the Duke of Portland, one of his majeſty's principal ſecretaries of ſtate. An act was paſſed in the preſent ſeſſion of parliament, 38 *Geo.* 3. c. 36. for ſuſpending the habeas corpus act, whereby it is enacted, "that every perſon or perſons that are, or ſhall be, impriſoned within the kingdom of Great Britain, at or upon the day on which the act ſhould receive the royal aſſent, or after by warrant of his majeſty's moſt honourable privy-council, ſigned by ſix of the ſaid privy-council, for high-treaſon, ſuſpicion of treaſon, *or treaſonable practices*, or by warrant ſigned by any of his majeſty's principal ſecretaries of ſtate, for ſuch cauſes as aforeſaid, may be detained in cuſtody, without bail or mainprize, until the 1ſt of February, 1799; and that no judge, or juſtice of the peace, ſhall bail or try any ſuch perſon or perſons ſo committed, without order from his majeſty's privy-council, ſigned by ſix of the ſaid privy-council, till the ſaid 1ſt of February, 1799." *The attorney-general* firſt moved, to quaſh the writ *quia improvide emanavit*; becauſe, he ſaid, this was a caſe within the above ſtatute of the 38 *Geo.* 3. by which the Court could neither bail nor diſcharge the defendant; and, therefore, the writ itſelf ought not to have been granted. BUT THE COURT refuſed to quaſh the writ; ſaying, that it did not follow that, becauſe

becauſe they might neither diſcharge nor bail the defendant after hearing the caſe argued; therefore, the writ was improvidently iſſued. Thereupon, the return being filed, it was moved, that the defendant ſhould be diſcharged for the inſufficiency of the warrant of commitment, it being for *treaſonable practices* generally, without ſpecifying the particular nature of them. The caſe was very elaborately argued.—Lord KENYON, Ch. J. Though experiments of this kind have been frequently made in courts of juſtice, they ſeldom ſucceed. I remember when a doubt was made, whether or not the Houſe of Commons had the power of committing to priſon. On that occaſion, a gentleman of great character and fortune, Sir *J. Phillips*, who had retired from the bar, appeared in this court for the purpoſe of moving, that the perſon, who had been committed by the Houſe, might be diſcharged: the Court heard him patiently, and the public, perhaps, were gratified with hearing the queſtion diſcuſſed; and though the motion was unſucceſsful, I believe the public were ſatisfied that juſtice was properly adminiſtered. Many other caſes of this kind have been agitated in this court, where they have met the ſame fate. That every queſtion, concerning the liberty of the ſubject, is important, I admit: but it does not follow that, becauſe it is important, it is difficult to decide. The counſel, who moved to diſcharge this defendant, threw in a doubt, *Whether or not a ſecretary of ſtate has a right to commit?* for his expreſſion was, "*the power aſſumed by the ſecretaries of ſtate:*" but if we are to learn from the records in courts of juſtice, and from the received practice at all times, what is the law of the land, I have no difficulty in ſaying, that *the ſecretaries of ſtate have a right to commit.* This right was not even doubted by Lord *Camden*, who expreſſed as great anxiety for the liberty of the ſubject as any man; indeed, it has been thought, by ſome perſons eminent in our profeſſion, who have conſidered the point ſince, that he rather overſtepped the line of the law in the caſe of *R.* v. *Wilkes*; and certainly, if that judgment can be ſupported, many other caſes, that have been ſolemnly determined, cannot be reconciled with it.—In this caſe, two queſtions have been made: ONE, *Whether the late act of parliament authoriſed any new form of commitment?* but that queſtion was at reſt almoſt as ſoon as it was raiſed; the attorney-general very properly admitted, that that act made no alteration in the form of commitments. THE OTHER QUESTION IS, Whether or not this commitment be good at common law? To one argument, uſed by the defendant's counſel, I cannot aſſent; namely, that no point is to be conſidered as law, unleſs it has been made and judicially decided: if that were true, farewel to the common law of the land. If it were aſked, in what caſe it was determined that a limitation to *A.* and his heirs,

gives a fee ſimple, I ſhould be as unable to anſwer as Lord *Hale* was when the queſtion was put to him. It is ſufficient, if the point has been acknowledged to be law at all times: the law of the land ſtands on precedents. I will not ſay, whether or not the number of caſes from the ſecretary of ſtate's office, conſtitutes the law upon this ſubject, but the courſe of office, and variety of precedents acted upon, have been conſidered, by very able judges, as evidence of what is the law of the land. The commitments prior to the revolution were complained of as grievances; and, probably, they gave riſe to the habeas corpus act. If the inſtances of commitments, which have been mentioned on the part of the crown, had happened in the reigns of *Charles* the ſecond, or *James* the ſecond, I ſhould not have relied much upon them: but the caſes that have been cited, happened ſince the revolution; a time, that Mr. *J. Foſter*, and other great men, conſidered as an auſpicious period for this country; and when the liberties of the ſubject were well underſtood, and nobly aſſerted.—Then, let me ſee what was conſidered to be the law of the land at and after the revolution, and particularly in the time of that great man, Lord *Holt*. Out of the many caſes that have been mentioned, I have ſelected nine that cannot be diſtinguiſhed from the preſent caſe, where the *commitments were for* "TREASONABLE PRACTICES" *generally*, and where Lord *Holt*, and the reſt of the Court, were bound, by their oaths, to diſcharge the defendants, if the commitments were illegal; and yet the Court did not diſcharge them. Finding theſe caſes, I will not now inquire whether or not Lord *Holt* decided rightly; I have no ſources of intelligence from which I could make the inquiry: the records of the court furniſh me with the law of the land. Lord *Holt* was a man above all praiſe; and he was aſſiſted by able judges, one of whom was Mr. Juſtice *J. Powell*, who fell little ſhort of Lord *Holt* himſelf. I will not overturn the law of the land, as it has been handed down to me: it is not for the judges, who are to watch over the law, to overſet it. Therefore, on the authority of the precedents, nine of which are preciſely in point, I am clearly of opinion, that if we were to yield to this application, we ſhould forget the duty we owe to the public. ASHHURST, J. The concurrence of men of ſuch talents as Lords *Nottingham*, *Somers*, *Holt*, and *Cowper*, when acting on warrants of this kind, is nearly equal in authority to an expreſs deciſion on the very point. It is rather an extraordinary poſition of the defendant's counſel, in this caſe, that nothing is to be conſidered as law but what has been ſolemnly decided; for a point may be ſo clear, that it was never doubted; and yet, if this poſition were well founded, it would not be law. GROSE, J. The ground, on which it is now contended, that the priſoner ought to be bailed or diſcharged,

discharged, is, that the warrant does not specify what are the treasonable practices of which he is accused. Now, it is admitted, that a person may be committed for treason, or suspicion of treason, without specifying the particular kinds of treason; and it now appears, that there are precedents of warrants of commitment, for treasonable practices, precisely in the form of this warrant, from the year 1694 to the present time: then came the late act of parliament, which says, that persons detained under warrants of commitment, for *treasonable practices*, in the very words of this warrant, shall not be bailed; and yet, we are desired to discharge this prisoner against the positive directions of the act of parliament. I am glad, however, that the habeas corpus was granted, because the parties have had an opportunity of canvassing this point of law; and magistrates will know how to regulate their future practice by this decision. LAWRENCE, J. The case, relied on by the defendant's council, in *Bulstrode* (1), is not law; for in a subsequent case, Dr. *Grenville* v. the College of Physicians (2), it was holden, that the censors of the college were the sole judges whether or not a person within their jurisdiction had been guilty of malpractice in physic. With regard to the precedents cited of warrants like this, I think they are decisive of the present case. They are not to be compared to warrants signed by magistrates, who are not of the profession of the law, for some of them were signed by persons of the greatest eminence in the law, and therefore they are intitled to have great weight. Besides which, it appears, that several of the persons committed by those warrants have been, at different times since the revolution, brought up here, and that this Court thought they ought to be remanded, unless they could give security. I cannot express myself better, on this occasion, than *Parker*, Ch. J. did in Sir *William Wyndham*'s case (3), where he said, "It has been urged that some particular species of treason must be expressed, and that it must have so much certainty as to appear to be high-treason to the Court. I think this opinion is not to be maintained. We presume a magistrate does right, until the contrary appears; and it has never been holden necessary to express the overt act in the commitment." So in cases of this sort, it is not necessary to express in the warrant the particular species of treasonable practices.—PER CUR. Let the prisoner be remanded.

(1) 2 *Bulstrode* 259, was a commitment of Dr. *Alphonso*, for ill practising physic.
(2) 12 *Mod.* 386. (3) 1 *Str.* 3.

Rex. v. Frances York and Jane Fielding, Mic. Ter. 11 Geo. 3. B. R. 5 *Burr.* 2684.

But a warrant of commitment in execution, after conviction, muſt ſhew before whom the conviction was, and the authority to convict.—The defendants being brought up by *habeas corpus*, it appeared from the return of the governor of Tothil-fields bridewell, that the defendants were committed by Sir *John Fielding*, knt. ONE OF HIS MAJESTY'S JUSTICES OF THE PEACE *for the city and liberty of Weſtminſter*, by a warrant, in the words and figures following: "WESTMIN-"STER, to wit—To the governor of Tothil-fields bride-"well, or his deputy. Receive into your cuſtody the bodies "of *Frances York* and *Jane Fielding*, and others herewith "ſent you; brought *before me* by *Wm. Manning*, and other "conſtables, and [&] CONVICTED upon the oath of *Wm.* "*Haliburton*, one of the conſtables of the pariſh of St. Paul, "Covent-Garden, for being *looſe, idle, diſorderly* perſons, of "*evil fame*, and *common night-walkers*, againſt the ſtatute, "&c. them to hard labour, UNTIL *the next general quarter* "*ſeſſions* of the peace, therefore ſafely keep in your cuſtody; "*or until* they ſhall be diſcharged by due courſe of law. "Given under my hand and ſeal, this 23d day of November, "1770." The return did not add *any name at all*, ſubſcribed at the bottom of the commitment; but the name "*J. Field-*"*ing*," was ſet in the *margin* over the *locus ſigilli*, and ſo it was in the *original* warrant. Three exceptions were taken to the warrant of commitment. 1ſt. That it did not deſcribe the offence with ſufficient exactneſs and particularity; the epithets of looſe, idle, and diſorderly, uſed in the preſent warrant of commitment being too looſe and indefinite. 2dly. That the commitment was alſo illegal, as to the *time* during which they were to be kept in cuſtody, as it might go beyond *a month*; whereas, it ought to have been for a time *not exceeding one month*, according to the vagrant-act, 17 *Geo.* 2. c. 5. ſ. 1. 3dly. That the warrant of commitment did not ſhew that Sir *John Fielding*, who made it, was a juſtice of peace, or had power to commit theſe perſons. Lord MANSFIELD (after the caſe had been argued), obſerved, that this was upon a conviction; and it ought to be ſhewn, that the perſon convicting had *authority* to convict. It is a commitment in *execution*; and the authority of the perſon committing them ought to be ſhewn; whereas, here it does not even appear *by whom* they were convicted; it is only ſaid in the warrant, "brought before me and convicted." The not ſhewing before whom they were convicted, is a groſs defect. Let them be diſcharged.—Defendants diſcharged.

Rex v. Horner, Ea. Ter. 23 Geo. 3. B.R. *Cald.* 295.

The long-eſtabliſhed practice of the court of King's Bench, upon an application to bail a party committed on a charge of felony, is, that even if the commitment be regular, the Court will look into the depoſitions to ſee if there be a ſufficient ground laid to detain the party in cuſtody, and if there be

be not, to bail him; and ſo if the warrant of commitment be irregular, and a ſerious offence be ſhewn to have been committed, they will not diſcharge or bail the priſoner, without firſt looking into the depoſitions, to ſee whether there is ſufficient evidence to detain him in cuſtody.

Common.

Approvement.

Duberley v. Page *et al.* Ea. Ter. 28 Geo. 3. B R. 2 *Ter. Rep.* 391.

The lord has no right under the ſtatute of *Merton* (1) to encloſe and approve the waſtes of a manor where the tenants of the manor have a right to dig gravel on the waſte, or take eſtovers there.—Treſpaſs for breaking and entering a cloſe, lately part of a waſte in the manor. *The defendants pleaded* not guilty, and alſo ſeveral juſtifications; one, under a right of common, to which *the plaintiff replied a right of approving in the lord*, leaving a ſufficiency of common; another, under *a right of digging ſand or gravel upon the waſte*, which was traverſed by the replication. *The defendants alſo pleaded* a cuſtom within the manor, that if any perſon has been deſirous to approve or encloſe any part of the waſte of the manor, obtaining the conſent and licence of the lord, he might be preſented by the homage of the court baron at a general court; and if the homage thought that ſuch encloſure would be of no prejudice to any of the tenants, &c. of the manor, it hath been the cuſtom to preſent that ſuch perſon, ſo obtaining the conſent and licence of the lord, might encloſe the ſaid parcel of the ſaid waſte, and a fine or rent hath been ſet on ſuch perſon by the homage; the plea then ſtated, that the homage had not preſented any ſuch perſon, &c. *Replication*, that the lord had a right to encloſe the ſaid parcel under the ſtatute of Merton, and did approve the ſame, there being left common ſufficient for all perſons having a right, &c. To this the defendants demurred ſeverally, and joinder by the plaintiff. Judgment was given for the plaintiff on the demurrers. ASHHURST, J. The right of the lord of the manor in this caſe, is a common law right, and not dependent upon any cuſtom. Every cuſtom muſt be conſtrued according to the ſubject-matter of it. Here it is only applicable to the tenants of the manor. It gives them a right of encloſing under certain reſtrictions, which they would not otherwiſe have been entitled to do at all. But the right here exerciſed by the lord is ſuperior to the cuſtom, and derived from the common law. BULLER, J. Theſe cuſtoms are in favour of the tenants of the manor, but by no means abridge the common law right of the lord. For by the com-

(1) 20. *Hen.* 3. c. 4.

mon

mon law he alone had a right to encloſe, and this privilege has been extended to the tenants under certain reſtrictions; and in this inſtance, the previous ſteps neceſſary to be taken were intended as a benefit to the lord, and not as a reſtraint on him; for before any perſon can encloſe or take any ſteps towards it, he muſt firſt obtain the conſent of the lord. The words are, "any perſon being deſirous of encloſing, may apply to the Court, &c. *firſt obtaining the conſent of the lord.*" Therefore, in no inſtance can the tenant encloſe without ſuch conſent. GROSE, J. was of the ſame opinion.—Judgment for plaintiff.

Shakeſpear v. Peppin, Tr. Tr. 36 Geo. 3. B. R. 6 *Ter. Rep.* 741.

The lord of a manor, or his grantee, may encloſe and approve part of a common againſt tenants having common of paſture, notwithſtanding they have alſo ſome other right on the common, as a right to dig ſand, &c. if he leave ſufficient common of paſture.—Replevin for taking the plaintiff's cattle in Sharp Thorne Common, otherwiſe Walton Common, in Surrey. AVOWRY, that the place where, &c. was formerly part and parcel of the ſaid common, but was lately incloſed and ſeparated from the reſt of the common, and is the ſoil and freehold of the defendant; and becauſe the plaintiff's cattle were doing damage there, the defendant avows the taking, &c. as a diſtreſs. PLEA IN BAR, that the *locus in quo* has been immemorially part of Walton Common, and lying within and parcel of the manor of Walton-upon-Thames; that four cloſes of land called Floyſters Roydens, have been immemorially within, and parcel, and a cuſtomary tenement of that manor, &c. that the lords of the manor in 1789, by copy granted this cuſtomary tenement with the appurtenances to the plaintiff; and that there is a cuſtom for the tenants of this cuſtomary tenement, to have paſture on Walton Common, for which reaſon the defendant in his own right put his cattle on the ſaid common to depaſture, and the defendant wrongfully took them, &c. REPLICATION, that the lords of the manor in 1794, and before the plaintiff's cattle were put in, &c. by leaſe and releaſe conveyed the *locum in quo* to the defendant in fee, to the intent that he might incloſe and approve the ſame; that he did ſeparate and divide the ſame from the reſt of the common by fences, &c. leaving in the reſidue of the common ſufficient common of paſture for all the commonable cattle of the plaintiff, and of all other perſons having right, &c. REJOINDER, that there is a cuſtom within the manor for the tenants of Floyſters Roydens tenement, to have as well the liberty and privilege of *digging for, and carrying away ſand, loam, and gravel*, in and from the common, as common of paſture there; that, becauſe the *locus in quo* was ſo incloſed by fences, &c. that the plaintiff could not enjoy his right and liberty of digging for ſand, &c. on the common,

common, in ſo ample and beneficial a manner as he ought, he pulled down the fences that ſeparated the place in queſtion from the reſt of the common, and the fences being ſo pulled down, and the place in queſtion remaining open and undivided from the reſt of the common, he put in his cattle to depaſture, &c. SURREJOINDER, that at the time of the incloſure and approvement by the defendant, there was left in the reſidue of the common ſufficient ſand, &c. for the plaintiff, and all others having the ſame right, &c. and that the place in queſtion remained ſeparated and divided from the reſt of the common, until the plaintiff of his own wrong pulled down the fences, and put in his cattle to depaſture, &c. To the ſurrejoinder there was a GENERAL DEMURRER. On the argument, the queſtion was, whether when the tenants of a manor have a right to dig for ſand, loam, and gravel, on a common within the manor, the lord can incloſe and approve under the ſtatute of *Merton*, 20 *Hen.* 3. c. 4.—The cauſe was very ably argued, and was ordered to ſtand over for a ſecond argument; but when it was called on, Lord KENYON, Ch. J. read Lord Ch. J. Willes's manuſcript note of the judgment delivered by him in *Fawcett* v. *Strickland*, of which only a ſhort note appears in *Com. Rep.* 577, and which the Court thought deciſive in favour of the defendant in this caſe. That note being communicated to the counſel for the plaintiff, he acknowledged, that he could not get over the authority of that caſe, and accordingly judgment was given for the defendant. [The pleadings in *Fawcett* v. *Strickland*, are correctly abſtracted in *Com. Rep.* 577. The parts of Ld. Ch. J. *Willes*'s judgment, as applicable to this caſe, are as follow: "But what the Court goes upon is, that this is an action brought by the plaintiff for chaſing and driving away his cattle, put into the defendant *Strickland*'s incloſure, to uſe and enjoy common of paſture; and therefore we think that, conſidering the nature of the plaintiff's action, and the wrong which he complains of therein, the common of turbary is quite out of the caſe. For though a lord cannot, by virtue of the ſtatute of *Merton*, 20 *Hen.* 3. c. 4. encloſe and approve againſt a common of turbary, and ſo it is expreſsly laid down by Lord *Coke*, in 2 *Inſt.* 87. in his comment on this ſtatute, which we admit to be good law, yet we are of opinion, that where there is common of paſture, and common of turbary in the ſame waſte, the common of turbary will not hinder the lord from incloſing againſt the common of paſture, for they are two diſtinct rights. Suppoſing one man has common of paſture, and another has common of turbary in the ſame waſte, he that has common of paſture cannot juſtify throwing down the lord's incloſure, provided there be ſufficient common of paſture left, becauſe another perſon has common of turbary in the ſaid

common.

common. And wherever rights are in their nature diſtinct, as common of paſture and common of turbary certainly are, we think it will be juſt the ſame, though they happen to concur in one and the ſame perſon, as they do in the preſent caſe. If it were otherwiſe, it would be juſt the ſame in common of piſcary or common of eſtovers, for Lord *Coke* ſays, that the ſtatute does not extend to either of them. And yet it would ſeem to be abſurd to ſay, that a lord cannot incloſe againſt common of paſture, becauſe his tenants, or ſome other perſons, have common of piſcary, or common of eſtovers, in the ſame waſte; whereas, his incloſure may be no interruption to their enjoyment of their common of piſcary or eſtovers, nay probably, their common of eſtovers may be better for ſuch incloſure. If, indeed, by ſuch incloſure, their common of piſcary, or their common of eſtovers were affected, or they were interrupted in the enjoyment of either of theſe rights, they might certainly bring their action, and the lord (to be ſure) in ſuch caſe could not juſtify ſuch incloſure in prejudice of theſe rights. And ſo may the plaintiff in the preſent caſe, if he be interrupted in the enjoyment of his common of turbary; but by his preſent action he does not complain of any ſuch interruption, nor does he inſiſt upon any ſuch matter in his replication. As, therefore, his only complaint is of an interruption of his common of paſture, and as, by the ſtatute of *Merton*, the defendant *Strickland* might certainly incloſe part of the common, notwithſtanding the plaintiff's right of common of paſture, if he has left ſufficient common of paſture, which in the preſent caſe is admitted by the pleadings, we are of opinion, that the right of common of turbary, inſiſted upon by the plaintiff in his replication, is no anſwer to the defendant's plea; that therefore the replication is bad in ſubſtance; and that judgment, ſo far as the demurrer goes, muſt be for the defendants."]—Judgment for the defendant.

Intereſt of the Commoner.

Hall v. Harding *et. al.* Ea. Ter. 9 Geo. 3. B. R. 4 *Burr.* 2426. 2 *Blaſk. Rep.* 673.

In the caſe of an abſolutely ſtinted common, in point of number, one commoner may diſtrain the ſupernumerary cattle of another.—This was an action in *replevin*, for diſtraining fifty-one of the plaintiff's ſheep, upon a waſte or paſture, called Whitmanſlie Down, in the pariſh of Odiam, in Hampſhire. The defendants avow the diſtreſs; becauſe the defendant *Harding*, was intitled to a right of common, in reſpect of ten acres of land in his poſſeſſion, for two ſheep for every acre of thoſe ten; and becauſe the ſheep were doing damage

damage to that right, the defendants diſtrained them. The plaintiff pleaded (by leave) four pleas in bar; alleging different rights of common to himſelf: upon three of which pleas there are iſſues joined. In the fourth of them, the plaintiff derives a right of common to himſelf, as tenant of eight acres of land in that pariſh, with the like limitation, that is, *for two ſheep for every acre*; and being poſſeſſed of thoſe eight acres, he put ſixteen ſheep into the common; and in *that* right they continued thereon, till the defendants wrongfully diſtrained them. To this plea in bar of the avowry, the defendants (the avowants), after admitting the plaintiff's right of common as pleaded by him, reply, that at the time of the diſtreſs the plaintiff had ſixteen ſheep upon the common, *over, above, and beſides* the ſixteen which the defendants diſtrained; and that the defendants left the firſt-mentioned ſixteen to uſe the common; and only diſtrained the *ſupernumerary* ſixteen with which the plaintiff had *overcharged* it of his own wrong, and which were doing damage to *Harding*, in manner and form as alleged in the avowry: (which allegation in the avowry concluded—"So that *Harding* could not enjoy his common in ſo large and ample a "manner as he ought.")—To this replication the plaintiff demurred. Lord MANSFIELD delivered the opinion of the Court. Upon this demurrer the point inſiſted on, for the plaintiff, was, that the defendant *Harding*, having no greater intereſt in the place in which, &c. than a *mere right of common*, he could not lawfully *diſtrain* the cattle of *another commoner*, for any *ſurcharge* whatſoever; but that his proper remedy muſt be either by a writ of *admeaſurement* of common, or by the uſual *action on the caſe*. On the other hand, it was contended, for the defendants, that this being a *ſtinted* right of common, the defendants might lawfully diſtrain the overplus. To deduce this concluſion it was, in the firſt place, alleged, as a general and eſtabliſhed propoſition, "That a commoner may "undoubtedly diſtrain the cattle of a STRANGER;" and then it was argued, that in all *ſtinted* rights of common, the *ſupernumerary* cattle have *no colour of right* to depaſture upon the common; and therefore may properly be conſidered as the cattle of a mere ſtranger; and, *as ſuch*, may be diſtrained by any of the commoners. For this purpoſe an authority was cited from the year-book of the 46th of *Edw.* 3. fo. 12. where, in replevin, the defendant pleaded firſt, "that the "taking was in another place;" and, in order to have a re-"turn, alleged, "that the plaintiff had common for ſo "many beaſts only; and that he put in *more* than he ought; "and therefore the defendant took the *overplus* damage-"feaſant." But from that caſe, no clear concluſion can be drawn; becauſe, as *Lutwyche* obſerves, in the caſe of *Dixon* v. *James*,

v. *James*, (1) *that avowry* was for damage-feasant *generally* (that is, without saying "for a damage to the plaintiff's "*right of common*;") and therefore it is more probable that it was the *owner of the soil*, who made that avowry; for, a *commoner* must avow *more specially*. Another case was cited from *Yelverton* 129. (the case of *Kinrick* v. *Pargiter*), where the defendant distrained the cattle of the *lord*; suggesting a custom "for the lord to enjoy the place in which, &c. "solely to himself *till Lammas-day*, but *after* that day it "should be common for the tenants, and the *lord should put* "*in only* three horses;" and because the lord had put in *more* than three horses, the defendant (a commoner) distrained the overplus, as damage-feasant. They were at issue upon the custom; and the issue was found *for* the custom against the lord. *Yelverton* moved in arrest of judgment, "That "the defendant, *being only a commoner*, could not distrain the "cattle of the lord in the lord's own soil." But according to that report, *Fenner*, *Williams*, and *Crook*, held the distress to be good; because by that custom the lord was *excluded* except for his stint, and all the vesture and benefit of the soil belonged to the commoners; and that they had no other remedy to preserve their interest in feeding their cattle there, in case of the lord's offending against the custom; and that the *custom* made the lord, in *that* respect, as mere a stranger as any other person; and clearly a commoner might distrain the cattle of a *stranger* damage-feasant. But the Chief Justice and *Yelverton* doubted; and thought that the defendant ought to have alleged a particular custom "to distrain "the cattle of the lord." This case is also reported in *Cro. Jac. Ro.* 208. But in 2 *Ro. Abr.* 267. (2) where the same case is mentioned, it is said to be determined, "that this prescrip-"tion was bad; for that the lord can not be so stinted." What the real and ultimate determination of that case was, does not certainly appear: and therefore no decisive conclusion can be drawn from it. The chief argument to maintain it was, by considering the commoners as possessed of the whole vesture of the land, after *Lammas-day*; subject only to the lord's privilege of putting three horses there; that is, by turning the tables upon the lord, and considering him in the light of a commoner, and themselves as possessed of the soil and vesture during the time prescribed for. But as the lord had the land entirely to himself at all other times of the year, and even in the commoning season was not *totally* excluded, the commoners could hardly have a right to distrain any cattle of the lord's, when he was clearly intitled to put *some* cat-

(1) 2 Lutw. 1241. (2) Title "Prescription;" letter L. pl. 2.

tle

ſle there, and (though he exceeded his number) had a *colour* of right. In the caſe of *Trulock* v. *White*, 1 *Ro. Abr.* 405, 406. where the lord's cattle were diſtrained by a commoner, the land was by the cuſtom, to be *entirely freſh* every ſecond year, till *Lady-day*; and therefore, during that ſeaſon, the lord was *totally excluded*, and had *no colour* for putting any cattle there at all. But where there is *no ſuch excluſion*, it is an eſtabliſhed (1) rule, "that a commoner *can not diſtrain* the cattle of the *lord*, "for overcharging the common." In the caſe of *Hoddeſdon*, v. *Greſil*, *Yelv.* 104. it was agreed by all the judges, "that if the lord ſurcharges the common, "the commoners *can not drive the lord's beaſts out*; but they "may diſtrain the cattle of a *ſtranger*, or may drive them "out of the common." And the reaſon there given is this, "for a ſtranger has not any *colour* to have his beaſts there." But if there be *no cuſtom to exclude the lord totally* during the commoning ſeaſon, his property in the ſoil would at leaſt give him a *colour* for putting his cattle there: and though he overcharged the common, no cattle of the lord's can be deemed *treſpaſſers*, or the *lord a ſtranger* in his own ſoil. The commoners, therefore, could have no authority in themſelves to take an immediate and ſummary execution againſt the cattle of the *lord*, by diſtraining them damage-feaſant, as they may the cattle of a *ſtranger* who has no pretence or colour of right. From *theſe caſes*, therefore, which were cited for the defendants, no argument can be drawn to the preſent point. The caſe of *Dixon* v. *James* (which is in 2 *Lutw.* 1238. and *Freeman* 273.) was mentioned on both ſides. The right of common, in that caſe, was for all cattle *levant and couchant* upon the eſtate; and the queſtion was, "Whether one commoner can diſtrain the cattle of another "commoner, for overcharging." There was a rule to ſhew cauſe why the judgment ſhould not be arreſted, upon the objection, "that the commoner could not diſtrain a fel-"low-commoner's cattle." But *Freeman*'s report of that caſe was cited for the defendants; becauſe it is there ſaid to be agreed, "that where a commoner was entitled to com-"mon for a *certain number* of cattle (as for ten, or any other "*certain* number), there if he ſurcharged, another com-"moner *might diſtrain*." It is unneceſſary to give any opinion as to the commoner's right of diſtraining where the number is *abſolutely certain*; that is, where the other commoner's claim is for ten, twenty, or thirty, *without* any relation to the *quantity of land*. For, in the preſent caſe, the preſcription is for "*two ſheep* for EVERY ACRE *of land?*" And therefore the whole number is *not* abſolutely certain *in itſelf*, but *depends* upon the *number of acres* which the commoner is poſſeſſed of. Andthere is this eſſential diſtinction

(1) *Vide* Danver's Abr. vol. 1. pl. 6. in margin; and the caſes there referred to.

between

between the two caſes—that in the former, the overcharge is *clear and ſelf evident* (for, it requires no judgment or proof to decide whether twenty are more than ten); and in *ſuch* a right of common, there would be no *colour* of right for the overplus number: but in the latter caſe, where the number of cattle to be paſtured *depends on the number of acres* which the commoner is poſſeſſed of, it requires a *medium* to determine the proper proportion or number of cattle, that is, an *admeaſurement* of the commoner's land. And when the queſtion depends upon a *collateral fact*, or upon a matter of *judgment*, the party intereſted can never be a competent judge in his own cauſe. The *ancient* remedies for a commoner, when the common was overcharged, were theſe two (1). If the ſurcharge was by the *lord*, the remedy was by *aſſiſe:* if by another *commoner*, the relief was by a writ of *admeaſurement*. But in *Robert Mary*'s caſe (9 *Co* 112.), it was determined, "that "an *action on the caſe* would lie." And that action may be maintained, either againſt the *lord*, or againſt a *fellow-commoner*. But in *all* thoſe remedies, as the lord, or the other commoners, have a *colour* of right, the queſtion, "Whether he has *exceeded* that right?" muſt be determined by an indifferent and competent juriſdiction, and not by the commoner himſelf. The commoner, therefore, could not lawfully *diſtrain:* for, that would be making himſelf his own judge, in a matter that was uncertain in itſelf; and taking an immediate execution, upon his own judgment. The *levancy and couchancy*, where *that* is the meaſure of the commoner's right, muſt be tried and determined by a *jury*. And in the preſent caſe, where the number of cattle to be put on depends upon the number of the commoner's *acres*, the ſame juriſdiction muſt decide between them, "*What number of acres* "the commoner is really poſſeſſed of?" It is, in effect, the *ſame* object of inquiry, as levancy and couchancy: and it is now eſtabliſhed, "that where the right of common is, for "cattle, *levant and couchant*, one commoner *can not diſtrain* "the cattle of another, for a ſuppoſed overcharge." Upon THE WHOLE, the right of *diſtraining* ſeems to turn upon this:—That *wherever there is a colour of right for putting in the cattle, a commoner can not diſtrain*; becauſe it would be judging for himſelf, in a queſtion that depends upon a more competent inquiry: *but where cattle are put upon the common, without any colour or pretence of right, the commoner may diſtrain them*; and, therefore, he may diſtrain the cattle of a *ſtranger*. But here, the plaintiff *had a* COLOUR for putting in his cattle; though, in fact, he might exceed the due number. He might put them in under the idea or pretence of having *more acres* of land, than he *really* had. And though, in the pleadings, he has *ſtated* his number of acres to be only eight; yet the

(1) *Bracton*, lib. 4. p. 222. F. N. B. 125.

queſtion,

queſtion, as to the *right of diſtraining*, depends on the *nature of the common*, and not on the particular facts. In caſes where a writ of *admeaſurement* lies between commoners, one *can not diſtrain* the other: he can not, for his own benefit, admeaſure the right of the other. Therefore, we are all of opinion, that this diſtreſs was illegal and bad: and the plaintiff muſt have judgment.—Judgment for the plaintiff.

How v. Strode, Mic. Ter. 6 Geo. 3. C. B. 2 *Wils.* 269.

There is no ſuch thing as common, *without ſtint*, belonging to land: *common belonging to land* can only be for cattle *levant* and *couchant* thereon: alſo, if there be a cuſtom for the commoner to incloſe, and any of them do, by virtue of ſuch cuſtom, incloſe, the land remaining unincloſed is thereby freed and diſcharged from ſuch perſons former right of common therein.—This was REPLEVIN for taking the cattle of the plaintiff: AVOWRY, that the defendant took the cattle damage feaſant: PLEA in bar, that the place in which, &c. is part of Eaſtfield: that plaintiff is ſeiſed of ten acres of land in *B.* and claims common of paſture in Eaſtfield, when the ſame hath been ſown with corn, and it is cut and carried away, until it be reſown; and at a proper time put in her cattle. REPLICATION to the plea in bar, that there are in *B.* two fields, eaſt and weſt fields; and that the owners thereof intercommon, while they lay not incloſed, for a certain time; and that there hath been an ancient cuſtom to incloſe, and ſuch incloſure is freed from common of any other perſon; and that the perſon ſo incloſing, thereby frees and diſcharges all the unincloſed land from all common, in reſpect of ſuch land ſo incloſed; that he incloſed the place in which, &c. to which he had a right of common before, whereby all the unincloſed lands were freed from his ſaid right of common; and that the place incloſed ought to be free from common of any other perſon. Plaintiff REJOINS, that ſhe put in the cattle till the defendant took them of his own wrong, and traverſes the cuſtom to incloſe, &c. the defendant SURREJOINS, and takes iſſue on the traverſe.—On the trial of this cauſe, the iſſue lying upon the defendant to prove the cuſtom, it was reported, by the judge, that the defendant produced five very old deeds, and ſeveral other deeds, which *proved the cuſtom to incloſe*; he alſo called ſeven old witneſſes: three of the oldeſt proved the cuſtom to incloſe, of their own knowledge, for a great number of years; and that they had been told (when they were young), by very old perſons then living, that it was the cuſtom for the land-owners in theſe fields to incloſe; and ſaid, that they thought any man might incloſe his land. As to the right of common, whilſt the lands laid unincloſed, ſome of the witneſſes ſaid, that ſuch owners of the unincloſed lands had a right of common without ſtint; *but that after any of them had incloſed his land, ſuch perſon had no right of common at all in the ſaid fields*,

or either of them. Another witneſs ſaid, if a man incloſed all his lands in the fields, he loſt his right of common totally; but that if he left any bit, only an acre unincloſed, he uſed to enjoy his common in regard to that acre unincloſed, juſt as before, and uſed to put in any number of cattle without ſtint. Several other old witneſſes ſwore to the ſame effect; and here the defendants reſted their caſe; whereupon, the judge was of opinion, that the defendant had not proved the cuſtom which, he ſaid, was intire; that ſeveral of the witneſſes had proved, that if a man incloſed nineteen acres out of twenty, it was the cuſtom for him, in reſpect to the one acre not incloſed, to put on to the unincloſed lands, as many cattle as he pleaſed, *without ſtint*, and as he had done before he incloſed the nineteen acres; and, therefore, the judge told the jury, that he thought the defendant had not proved the cuſtom intirely; and that if they believed the land incloſed in queſtion was diſcharged and freed from any perſon having a right of common thereon, they ſhould find for the defendant; if not, that they ſhould find for the plaintiff: whereupon, the jury gave a verdict for the plaintiff.—IT WAS NOW MOVED FOR A NEW TRIAL, for the miſdirection of the judge: 1ST, For that the cuſtom to incloſe was fully and clearly proved: and 2DLY, That the right of common, before incloſure made, was for cattle *levant* and *couchant*, upon each perſon's unincloſed lands: and this matter is not at all at iſſue, but is admitted, on the pleadings on both ſides; the right of incloſure, with its conſequence, viz. its being freed from any perſon's former right of common thereon, was the only matter in iſſue; the other was a legal conſequence, and not traverſeable: (to wit) that the owner of ſuch incloſed land is barred of any future right to common on the unincloſed land in theſe fields: and what ſome of the witneſſes ſaid of common, without ſtint, is nothing to the purpoſe; for there is no ſuch thing as common, without ſtint, belonging to land; common belonging to land, can only be for cattle *levant* and *couchant* thereon: that the cuſtom to incloſe was clearly proved, as appears by the evidence before ſtated; and *when the land is incloſed, it is freed and diſcharged from any perſons former right of common therein:* AND OF THIS OPINION WERE THE WHOLE COURT; who ſaid, 1ſt, That the parties agree, by the pleadings, that while the lands in their open fields are unincloſed, all have a right of common for cattle, *levant* and *couchant*. 2DLY, The cuſtom to incloſe, and that the land, as ſoon as, and while incloſed, is free from common, is fully proved. 3DLY, The third matter is a conſequence in law, and wanted no proof, viz. that as ſoon as any perſon has incloſed, he has excluded himſelf from any right of common on any of the unincloſed lands; and any judgment given upon this record, cannot be a bar to any other party who may

may claim common in theſe fields, without *levancy* and *couchancy*. PER TOT. CUR. The verdict muſt be ſet aſide for miſdirection of the judge; and there muſt be a new trial.

If the lord of the manor plant trees on a common, a commoner has no right to abate them.—This was error from the court of King's-Bench (1). *The declaration* there was in treſpaſs for cutting down the trees of the plaintiff below, growing in the pariſh of South Moreton, in the county of Berks. Plea: that the trees grew in a certain common field, and that the defendant was intitled to common of paſture for his ſheep, *levant*, and *couchant*, throughout the ſaid common field; and becauſe the ſaid trees, at the time when, &c. had been wrongfully planted, and were wrongfully growing upon the ſaid common field, incumbering the ſame, and damaging, &c. ſo that the defendant below could not, without cutting down the ſame, enjoy his common of paſture *in ſo ample and beneficial a manner as he otherwiſe might and ought to have done*; he, the defendant, cut down the ſaid trees, &c. Replication: that the ſaid common field, whereon the trees were growing, was parcel of the contiguous manors of Sandeville and Bray, in the county of Berks, and of the waſtes thereof; and that the plaintiff below was *lord of the manors*, and that he planted the ſaid trees, &c.: to which, there was a general demurrer and joinder; and judgment for the plaintiff below. EYRE, Ch. J. pronounced the judgment of the Court: A tree is not an erection on the ſoil; it is the very fruit and produce of the ſoil; it is part of the ſoil and freehold itſelf: And does it not paſs as ſuch? In public ways, you might abate a tree, becauſe it would *neceſſarily* be a nuiſance. But in caſes like the preſent, it will be a nuiſance or not, according as it injures the eaſement or not. This caſe has been argued as if it were a caſe of approvement under the *ſtatute of Merton*; but, in fact, it is no ſuch thing. The right here exerciſed by the lord, is an original right in the ſoil, prior to that of common, which is only concurrent with it. But where there is a right of common, the lord's right muſt be ſo exerciſed as not to injure the commoner. *If the lord ſo uſe it as to* DESTROY *the eaſement, ſuch an act would be conſidered as a nuiſance, and abatement.* If the eaſement be injured to a certain degree only; or if it may be a queſtion, whether injured or not, in the nature of things, it cannot be a ſubject of abatement. The eaſement in queſtion, is a right of paſture over the whole ſoil, conſiſtent with a free warren in the lord, and, as I think, with a right to plant. If the eaſement be injured, the commoner may bring his action, and have ſatisfaction in damages. Even where the right of common is totally deſtroyed, and the commoner may, gene-

Kirby *et al. v.* Sadgrove, in Error, in Ex. Ch. Ea. Ter. 37 Geo 3. 1 *Pul.* et *Boſ.* 13.

(1) See this caſe alſo in vol i. p. 213.

rally ſpeaking, abate the nuiſance; yet, if he cannot abate it without interfering with the right of ſoil in the lord, he muſt not purſue that remedy. Abatement ought to be allowed in very few caſes; for the abator is judge in his own cauſe. The juſt meaſure of damages ſuſtained will be beſt found by an action. Unleſs the cleareſt analogies compel us to pronounce in favour of abatement, there can be no reaſon to ſtrain a point in order to give that remedy. It is a remedy, in addition to that given by action, and ought to be allowed but ſparingly.—Judgment affirmed.

Scholes *v.* Hargreaves, Mic. Ter. 33 Geo. 3. B R. 5 *Ter. Rep.* 46.

Common for cattle, *levant* and *couchant*, cannot be claimed by preſcription, as appurtenant to a houſe without any curtilage or land.—This was an action upon the caſe, for diſturbing the plaintiff's right of common. At the trial, it appeared that the plaintiff, who claimed the right of common in right of a *meſſuage*, for all commonable cattle, *levant* and *couchant*, was the owner of *a ſmall houſe*, wherein he carried on the trade of a butcher. *The houſe had neither land, curtilage, or ſtable belonging to it, but under the ſhop window was a ſheep-hold, which could contain four or five ſheep at a time, but neither horſe or bullock could be kept there.* About ſixty years ago, the plaintiff's father, who occupied the ſame houſe, exerciſed the right of common claimed; but he always occupied ſome land contiguous, together with the houſe in queſtion. The preſent plaintiff occupied nothing but the houſe, but he had alſo uſed the common, by turning out upon it, till the morning, ſuch ſheep as he did not kill the preceding day. The diſturbance was proved. But Lord *Kenyon* being of opinion, that no *levancy* and *couchancy* were proved, as ſtated in the declaration, which he held to be neceſſary, and that the plaintiff could not claim ſuch *a right of common in reſpect of a houſe only, without land*, nonſuited the plaintiff. A rule having been obtained, to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and cauſe ſhewn, Lord KENYON, Ch. J. I have always underſtood, that the *levancy* and *couchancy* muſt be proved, by ſhewing that the party, claiming the right, was in poſſeſſion of ſome land, whereon the cattle might be *levant* and *couchant*. *Levancy* and *couchancy* are a mode of admeaſuring the common: but how can the number be aſcertained, where common is claimed, as in this caſe, for all commonable cattle (1)? On that ground, I nonſuited the plaintiff, and I ſee no reaſon now to alter that opinion. It was a mere hole.

(1) In *Richard* v. *Squibb*, 1 Lord *R.* v. 726. it was ruled, by *Holt*, that if a man preſcribe for common, *for a certain number* of cattle, as appurtenant, &c. it is not neceſſary or material to ſhew they were *levant* and *couchant*, becauſe it is no prejudice to the owner of the ſoil, *for that the number is aſcertained*; and *Vid. Dand* v. *Harſſ*, 2 *Lev.* 67.

The

The right of common was claimed for all cattle; and it was expreſsly proved, that no horſe or bullock could poſſibly be kept there. BULLER, J. The only queſtion is, What is meant, in the caſes, by the words *meſſuage* and *cottage*, annexed to which was the right of common claimed? For in all of them, the Court ſay, that they will intend that *land was included therein.* And that it is neceſſary there ſhould be ſome land annexed to the houſe, is clear, from conſidering what is meant by *levancy* and *couchancy*; it means, the poſſeſſion of ſuch land as will keep the cattle claimed to be commoned during the winter; and as many as the land will maintain in the winter, ſo many ſhall be ſaid to be *levant* and *couchant.* It was ſo determined by Lord *Coke*, as appears in *Noy* 30. In *Emerton* v. *Selby*, the Court held the preſcription good, for common appendant to a cottage, *becauſe a cottage containeth a curtilage*; and to make it a lawful cottage within the 31 *Eliz.* c. 7 (1). there muſt be four acres laid to it, So, in the caſe in *Brownlow*, the Court ſaid, "it ſhall be intended, that there was a curtilage belonging to the houſe; and the *levancy* and *couchancy* ſhall be intended thoſe beaſts which are nouriſhed and fed upon the land, and may there lie in ſummer and winter." Indeed, in *Vaugh.* 253. it was ſaid, that common cannot be claimed for cattle, *levant* and *couchant on a meſſuage.* That is right, if by *meſſuage* he meant only a *houſe:* but all the other caſes proceed on the ground, that after verdict, land ſhall be underſtood to be included in the term meſſuage (2). GROSE, J. of the ſame opinion.—Rule diſcharged (3).

In caſe for a ſurcharge of common, the plaintiff need not ſhew that he turned on any cattle of his own, at the time of the ſurcharge; but only, that he *could not* enjoy his common ſo beneficially as he ought.—On the trial of an action on the caſe, there was a verdict for the plaintiff, ſubject to the opinion of the Court: the plaintiff declared on a right of common for his ſheep, *levant* and *couchant*, but that the defendant, on the 1ſt of January, 1777, wrongfully turned 3000 ſheep on the common, whereby the plaintiff could not enjoy the benefit of his common, in ſo ample a manner, &c. There was a ſecond count, in which the plaintiff preſcribed for his ſaid right of common: and a third and fourth, in which the defendant was charged with *ſurcharging* the common with more ſheep than he ought to have done.—The plaintiff proved, that his farm conſiſted of three hundred acres: that the defendant's farm conſiſted of thirty-two acres only: that the plaintiff, and thoſe whoſe eſtate he had, uſed

Wells v. Watling, Mic. Ter. 19 Geo. 3. C.B. 2 *Bla. k. Rep.* 1233.

(1) But that ſtatute has been ſince repealed by ſtat. 15 *Geo.* 3. c. 32.
(2) *Vid. Heckley* v. *Lamb*, 1 Lord *Raym.* 726.
(3) *Vid. Bull, N. P.* 59.

to turn on from one hundred to three hundred ſheep every year, *but there was no evidence given whether he turned on any in* 1777; but it was proved, that the defendant turned on above one thouſand ſheep beſides lambs. De Grey, Ch. J. It is material for the plaintiff, and he muſt ſhew, that he could not exerciſe his right *tam amplo modo*, &c. This has been both laid in the declaration, and alſo proved by conſequence; for every unlawful ſurcharge is *pro tanto* a diminution of the right and profit of every commoner. It is certainly neceſſary, that the plaintiff receive ſome actual injury, in order to maintain this action; but it is laid down in *Mary*'s caſe, 9 *Co.* 113. that the plaintiff muſt ſhew the injury to be ſuch *quod non potuit habere:* the queſtion is merely upon the nature of the defendant's act, and the greatneſs or ſmalneſs of it, not on the plaintiff's exerciſe of his right: *it is ſufficient if the right be injured, whether it be exerciſed or not.* Gould, J. The injury conſiſts in preventing the enjoyment of the common, *tam amplo modo.* It appears from 2 *Brownl.* 140. that an action lies for this damage, let it be ever ſo minute. Blackstone, J. An action on the caſe lies by one commoner againſt another, for a great and exorbitant ſurcharge, which is proved to be the preſent caſe. It amounts to a kind of *diſſeiſin*, and probably was ſo in the preſent caſe; for when the defendant had ſo groſsly ſurcharged, the profit of the common was gone; and it was in vain for the plaintiff to turn in afterwards. Any act that will ground a *per quod*, and leſſen the profit of the common, will ſupport an action againſt the commoner; any act that totally deſtroys the herbage, as feeding a common with rabbits, will ſupport an action againſt the lord: nor do I ſee any thing ſingular or repugnant to this in *Mary*'s caſe; the commoner, ſays the book, muſt ſhew, that "*proficium communiæ ſuæ per totum id tempus amiſit*, "or that he could not have his common in ſo beneficial a "manner as before." It is not neceſſary, that he ſhould have loſt his common, but only the profits of his common; that is, that he could not take them ſo well as before.—Nares, J. In the caſe of *the Dippers at Tunbridge-Wells*, 2 *Wils.* 422. it was held, that a probable damage is a ſufficient injury on which to ground an action.—Per tot. Cur. Judgment for the plaintiff.

Common-Law.

Miller v. Taylor, Ea. Ter. 9 Geo. 3. B. R. 4 *Burr.* 2343.

The common law, now ſo called, is founded on the law of nature and reaſon. Its grounds, maxims, and principles, are derived from many different fountains, ſays Judge Doddridge,

dridge (1), in his Engliſh Lawyer: from natural and moral philoſophy, from the civil and canon law, from logic, from the uſe, cuſtom, and converſation among men, collected out of the general diſpoſition, nature, and condition of human kind. He ſtates, the ſeveral maxims and grounds, and the particular heads from whence they are divided: and he places under the head of moral philoſophy, a maxim of the common-law as borrowed from thence, *quod tibi fieri non vis, alteri ne feceris.* That which is now called the common-law of England, was made up of a variety of different laws, enacted by the ſeveral Saxon kings reigning over diſtinct parts of the kingdom; which ſeveral laws affecting thoſe only parts of the Engliſh nation, were reduced into one body, and extended equally to the whole nation by king Alfred, and it is therefore properly called the common-law of England, becauſe it was done *ut in jus commune totius gentis tranſiret.* But it had an ancienter original than Edward the Confeſſor; and was at firſt called the *folc right*, or people's right (for it is plain it could not be called the common-law in Edward the Confeſſor's time, for then they ſpoke Saxon; nor in William the Conqueror's time, for then they ſpoke French), but it received this name when the language came to be altered; and Lord *Coke* ſays (2), "the common-law is ſometimes called right, common right, common juſtice." The common-law, ſo formed and named, is univerſally comprehenſive—*jubens honeſta*; *prohibens contraria*: its precepts are in reſpect to mankind, *honeſte vivere, alterum non lædere*; *ſuum cuique tribuere.* The common-law being founded on ſuch principles, a remedy by action upon the caſe is given for any wrong or grievance that the ſubject may ſuffer from a ſpecial invaſion of his right; for that ſort of action varies, ſays Lord *Coke* (3), according to the variety of the caſe.

Conſignment.

Where ſeveral bills of lading have been ſigned of different imports, no reference is to be had to the time when they were ſigned by the captain; but the perſon who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. And where ſuch bills of lading, though different upon the face of them, are conſtructively the ſame, and the captain has acted *bonâ fide*, a delivery according to ſuch legal title will diſcharge him from them all.—This was trover for fifty hogſheads, and one hundred and twenty tierces of ſugar, and thirty puncheons of rum.—On a motion to

Caldwell *et al.* *v.* Ball, Ea. Ter. 26 Geo 3. B.R. 1 *Ter. Rep.* 205.

(1) P. 154 to 161. (2) 1 *Inſt.* 142. (3) *Sir.* 48, *a.*

ſet aſide the verdict which had been given for the defendant in this cauſe, and to grant a new trial. The judge before whom the cauſe was tried, made the following report —The queſtion ariſes upon two bills of lading, ſigned by the defendant, who was captain of the ſhip Tyger, under one of which bills of lading the plaintiffs claim.—*Thompſon*, the ſhipper of the goods in queſtion, was a conſiderable planter in the iſland of Jamaica, and correſponded with *Fairbrother*, a merchant reſiding at Liverpool. Previous to the 19th of Auguſt, 1784, *Fairbrother* had acted as the *general agent* or conſignee of *Thompſon*, but from that time his *general agency* ceaſed, in conſequence of a power of attorney to *Dorothy Thompſon* and *Bromfield*, which ſuperſeded his authority. From that time, whatever act was done by *Fairbrother* on behalf of *Thompſon*, was by virtue of a ſpecial order or commiſſion for that ſpecific purpoſe.—The above-mentioned power of attorney to *Dorothy Thompſon* and *Bromfield*, authoriſed them *to raiſe money for the uſe of Thompſon*, whoſe affairs were then much involved, *and to make a mortgage upon his eſtate in Jamaica*. It likewiſe empowered them to enter into any contract that they ſhould think fit *for conſigning and ſhipping any ſugar or produce made on any of the plantations*. —At the time that this power arrived in England, *Thompſon* was indebted to the houſe of *Caldwell* and Company, the preſent plaintiffs, who were merchants of Liverpool, in the ſum of 4000*l*. By way of a ſecurity for this debt, *Dorothy Thompſon* and *Bromfield* gave the plaintiffs a mortgage, dated the 20th of March, 1785, for 7000*l*. upon the plantations in *Jamaica*, and likewiſe entered into a *covenant for the future conſignment of* Thompſon's *ſugars to them*.—By a ſubſequent indenture, dated 10th of May, 1785, and executed between the ſame parties, after reciting the above-mentioned mortgage, it was declared, " that whereas the ſum of 4000*l*. or " thereabouts, part of the *ſaid ſum of* 7000*l*. *at the time of* " *the execution of the ſaid indenture*, was actually owing by " the ſaid *T. P. Thompſon* to the ſaid *C. Caldwell* and Com- " pany, for which they have the bond of the ſaid *T. P.* " *Thompſon* and others, and the further ſum of 100*l*. has been " alſo advanced to the ſaid *T. Bromfield*, as the attorney of " the ſaid *T. P. Thompſon*, and the remainder of the ſaid ſum " of 7000*l*. was intended to have been ſo advanced; but " doubts having ariſen as to the force and validity of the " power of the ſaid *T. Bromfield*, to charge with effect the " ſaid plantation and premiſes, and it being uncertain what " ſum of money the ſaid plantation and premiſes are already " mortgaged for, and what other circumſtances affect the " ſame, it has been agreed, that the ſaid indentures of leaſe " and releaſe (meaning the before-mentioned mortgage) ſhall " be ſent out to Jamaica, to the correſpondent of the ſaid

" *Charles*

" *Charles Caldwell* and *Thomas Smyth*, to be recorded in the " ſaid iſland, and for information how the ſaid eſtate is af- " fected by former incumbrances; and that ſo ſoon as the " ſaid plantation, lands, and premiſes, are effectually made " liable to the payment of the ſaid ſum of 7000*l.* and in- " tereſt, according to the terms of the ſaid indenture of re- " leaſe, and the ſaid *Charles Caldwell* and *Thomas Smyth*, are " well ſatisfied that the ſame are good and ſufficient ſecurity " for the ſaid ſum of 7000*l.* and intereſt, and *are alſo ſatiſ-* " *fied that the ſaid* Thomas Pepper Thompſon *will conſign the* " *produce of the ſaid plantation to the ſaid* Charles Caldwell *and* " Thomas Smyth, *according to the terms of the ſaid indenture* " *of releaſe*, then, and not until then, the ſaid *Charles Cald-* " *well* and *Thomas Smyth* are to advance unto the ſaid *Thos.* " *Bromfield*, as attorney for the ſaid *Thomas Pepper Thompſon*, " the remainder of the ſaid ſum of 7000*l.*; and in the mean " time, no intereſt for more than is, or may be actually ad- " vanced, is to be charged or payable. But it is fully under- " ſtood amongſt the parties, that the ſaid *Charles Caldwell* and " *Thomas Smyth* are not to be under any obligation of ad- " vancing any more money than they have done already, " until they are fully ſatisfied with the propriety thereof, and " are content to do ſo."—At the time this indenture bore date, the houſe of *France* and Company, merchants at Liverpool, were alſo creditors of *Thompſon* to the amount of 3000*l.* for money advanced to him ſome time before through the hands of their agents in Jamaica, Meſſrs. *Coppell* and *Goldwin*; and *Thompſon*, to diſcharge this demand, had drawn two bills of exchange, bearing date the 28th of July, 1784, upon *Dorothy Thompſon* and *Thomas Bromfield*, payable at ninety days ſight, in favour of Meſſrs. *Coppell* and *Goldwin*, who indorſed the ſame to the order of *France* and Company.—On the 6th of December, 1784, *Thompſon* wrote a letter to *Fairbrother*, from Jamaica, wherein he ſays, " I have " the moſt pleaſing proſpect of a crop, which, avoiding ac- " cidents, I hope will enable me to take up *theſe heavy* " *bills* when due, which my ſiſter *(Dorothy Thompſon)* will " inform him of, and for which *I ſhall ſhip* 200 *caſks on the* " *Tyger, Capt. Ball*, who expects to ſail in all next month." —On the 23d of Jan. 1785, *Thompſon* wrote another letter to *Fairbrother*, from Jamaica, wherein he ſays, " We are " making fine ſugar, and a large quantity of it. *I hope you* " *will make Meſſrs.* Caldwell *and Company ſatisfied, until I* " *have the pleaſure of ſeeing them.*"—On the 15th of March, *Thompſon* wrote to *Fairbrother*, from Jamaica, " I ſhall have " on board the Tyger one hundred and ſeventy hogſheads " and tierces, and thirty puncheons, moſt of which are al- " ready on board. She will ſail the beginning of April.— " *N. B.* With reſpect to inſuring what I ſhall have on board " the

" the Tyger, I ſhall leave it to your own option. Should " ſhe be long on her paſſage, you might get inſurance for " 2000*l.* as we could not well bear a loſs juſt now."—On the ſame day on which the laſt-mentioned letter from Jamaica was written to *Fairbrother*, he, being applied to by Meſſrs. *Caldwel* and Company for payment of *Thompſon*'s debt, wrote the following anſwer to them: " Meſſrs. *Caldwell* and Co. " in conſequence of your application to me for money on " account of Mr. *Thompſon*, I am ſorry to inform you, that " I have nothing wherewith to pay. A letter from that " gentleman acquaints me, that *he will ſhip two hundred caſks* " *of ſugar and rum on board the Tyger, Capt. Ball.* I will " be obliged to you if you will order inſurance on theſe " goods. Liverpool, 15th of March, 1785."—On the 18th of March, 1785, the defendant ſigned the *bills of lading* in queſtion.—One of theſe bills of lading for the whole cargo, which was acknowledged to have been the firſt ſigned by the defendant, was to deliver to Meſſrs. *Thompſon* and *Fairbrother*, or their aſſigns; this was indorſed by *Thompſon* in Jamaica, and ſent by him to *Fairbrother* in England, where it arrived on the 20th of May, incloſed in the following letter: " Ja- " maica, 18th of March, 1785; I ſend you incloſed a bill " of lading for what goods I have got on board the Tyger. " This will acquaint you of my being obliged to aſſign the " other bills of lading to *Coppell* and Company, for the ſe- " curity of the payment of the bills drawn in their favour, " &c."—A ſhort time after the receipt of this letter, *Fair-brother* indorſed the bill of lading above-mentioned to Meſſrs. *Caldwell* and Company, the preſent plaintiffs, who, after they were in poſſeſſion of it, advanced two ſums, amount-ing together to 219*l.* 13*s.* 8*d.* for the uſe of *Thompſon*.—The other two bills of lading for different parts of the cargo, making up the whole together, were to deliver to the order of the ſhipper or his aſſigns, and indorſed by *Thompſon*, as follows: " Deliver the within to Meſſrs. *Thompſon* and *Fair-* " *brother*, provided they engage to pay the net proceeds to " Meſſrs. *France* and nephew, otherwiſe deliver them to the " order of *James France*, and nephew, on account of *Coppell* " and *Goldwin*."—Theſe laſt bills of lading had been deli-vered into the hands of *Coppell* and *Goldwin*, by *Thompſon*, at the time when he wrote the letter of the 18th of March, 1785, to *Fairbrother*, as appeared by that letter, and were afterwards received by *France* and Company, on the 6th of June, 1785, in a letter from Meſſrs. *Coppell* and *Goldwin*, dated the 16th of April.—Captain *Ball*, the defendant, ar-rived at Liverpool on the 19th of June, 1785, having on board his ſhip the goods in queſtion.—The day after his ar-rival, the plaintiffs demanded the goods of him, when he ac-knowledged the bill of lading, but ſaid that he could not de-

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liver the goods without the conſent of the owners of the ſhip, who were *France* and Company.—On the next day, the plaintiffs ſaw *France*, and repeated their demands, tendering at the ſame time all charges of freight, &c. *France* ſaid, that neither he nor the captain would deliver the goods, unleſs upon a promiſe that the net proceeds ſhould be paid to him. This was refuſed by the plaintiffs.—THE JUDGE then obſerved, that on the trial ſeveral points had been made by the plaintiffs;—1ſt, That the captain had no right to retain the goods in queſtion, for that he was liable in an action of trover on the bill of lading ſigned by him.—But in anſwer to that, he had conſidered this in reality as an action between the plaintiffs and *France* and Company, and that the defendant, who was captain of the ſhip, was merely a truſtee for one or the other, and was indemnified in the mean time. That he was in a ſimilar ſituation to a ſheriff, when contrary demands are made by the aſſignees of the bankrupt and a creditor claiming under an execution.—2dly, It was inſiſted that the defendant had done wrong, in refuſing to deliver the goods according to the firſt bill of lading ſigned, by which he had bound himſelf.—As to this point, he had left it to the jury to conſider under the particular circumſtances in which all the parties ſtood. He had repreſented to them, that the defendant was maſter of *France* and Company's ſhip, and was charged to deliver the goods to them by *Coppell* and *Goldwin*.—That the conduct of *Fairbrother* was, in ſome degree, culpable, in aſſigning the bill of lading over to the plaintiffs immediately after he had received it, againſt what he knew to be the deſign of his principal.—And that as the plaintiffs, and *France* and Company, were both fair creditors, and *bonâ fide* holders of the bills, he who had firſt got poſſeſſion by a legal title ought to be preferred; and that for this purpoſe the poſſeſſion of *Coppell* and *Goldwin* was to be conſidered as the poſſeſſion of *France* and Company.—3dly, It was objected that *France* and Company were not creditors of *Thompſon*, becauſe the bills of exchange were not due, and therefore that they had no equitable lien on the goods.—But that was anſwered by ſaying, that the conſideration for theſe bills had actually been advanced by *France* and Company.—4thly, It was inſiſted that the conſignment of theſe goods was bound by the mortgage to the plaintiffs, executed by *Bromfield*, under the power of attorney.—This was anſwered, by ſaying that the mortgage did not affect this tranſaction, being ſubſequent in point of time. That at all events, it was only a covenant which bound the covenantor perſonally.—Under theſe directions, the jury had given their verdict for the defendant, of which he had no reaſon to diſapprove.—On ſhewing cauſe againſt the rule, the counſel for the defendant directed their arguments to two grounds, on one of which they ſuppoſed that the

the plaintiffs meant to rely.—1ſt, That the bill of lading indorſed to them, being actually *ſigned* before the other, veſted ſuch a property in them, as enabled them to maintain this action.—Or, 2dly, That under the agreement to conſign to them in the mortgage-deed, they had a right to theſe goods. —PER CURIAM. There is no reaſon for ſaying that either the plaintiffs or *France* and Company are not equitable holders of the ſeveral bills of lading; and when equity is equal between the parties, a legal title muſt prevail. This reduces the queſtion to a mere point of law.—THE FIRST OBJECTION taken was, That the defendant had no right to withhold the goods after demand made by the holder of the bill of lading.—The anſwer given to it was, that he was indemnified, and that it ought to be conſidered as an action between the plaintiffs and *France* and Company. But the doctrine of indemnity does not apply to ſuch caſes as theſe. Beſides, it always applies againſt a defendant, and not for him. If it appear that a defendant ſtands in the place of a third perſon, he ſhall not be permitted to avail himſelf of any objection againſt the merits of the caſe, which ſuch third perſon could not have availed himſelf of.—THE SECOND OBJECTION was, That as there were different bills of lading, the defendant was bound to deliver the cargo according to the firſt bill of lading actually ſigned, which being the real point of the caſe, we ſhall reſerve it till laſt.—THE THIRD OBJECTION was, That as the plaintiffs and *France* and Company were *bonâ fide* holders of theſe bills of lading, they who firſt got poſſeſſion, as between theſe parties, were to be preferred.—But bare poſſeſſion conveys no title, as between perſons claiming under different rights. The queſtion here is, who has the legal title? For the perſon who firſt gets poſſeſſion under the legal title muſt prevail.—THE FOURTH OBJECTION was, That *France* and Company were not creditors to *Thompſon* at the time that the bills were indorſed to them. But that is not ſo. For they ſtood in the ſituation of payees of the bills of exchange, for which they had given a valuable conſideration.—THE LAST OBJECTION was, That the plaintiffs were entitled under the covenant contained in the mortgage to conſign to them. The anſwer given to that was right; that the mortgage had nothing to do with this queſtion. It was ſubſequent to the tranſaction; and beſides, it was only a covenant to conſign, which could not bind third perſons.—NOW AS TO THE PRINCIPAL POINT. It is material to conſider the nature of a bill of lading. It is an acknowledgment under the hand of the captain, that he has received ſuch goods, which he undertakes to deliver to the perſon named in that bill of lading. It is aſſignable in its nature; and by indorſement the property is veſted in the aſſignee. It is now clearly ſettled that

that goods at ſea may be ſo aſſigned,. This doctrine is laid down in *Evans* and *Marlett*, 1 Lord *Ray.* 271. and is recognized by Lord MANSFIELD in *Wright* and another v. *Campbell* and another. 4 *Burr.* 2051. (1).—It is argued that the captain muſt be anſwerable at all events in this action, becauſe he ſigned the firſt bill of lading to the order of *Thompſon* and *Fairbrother*, who indorſed it to the plaintiffs. But it is very material to conſider who *Fairbrother* was. He had no intereſt in theſe goods; and he was known to all the parties to be the agent of *Thompſon*. Then *Fairbrother* muſt be conſidered as *Thompſon* himſelf. The bills of lading were all to the order of *Thompſon*. he had then the abſolute controul over the goods, and might have unſhipped them if he had ſo pleaſed. So that they are not like goods conſigned to a third perſon, for they remained under the power of *Thompſon* all the time till he indorſed the bills of lading. If *Thompſon* and *Fairbrother* are to be conſidered as the ſame perſon, it is the ſame as if the bills of lading were to the order of *Thompſon* alone. Then the queſtion is, who has the prior right under him?—It was ſaid by the plaintiffs counſel, that the defendant was the agent of *France* and Company, and that they muſt be taken to know what he did; but that makes againſt the plaintiffs; for at the time when *Thompſon* aſſigned the two bills of lading to *Copell* and *Goldwin*, the defendant knew that he had the other in his hands, and could not therefore have aſſigned it to any other perſon. The defendant then acted fairly, and it could only happen by the ſubſequent miſconduct of *Thompſon*, namely, by his afterwards indorſing one of the bills of lading to another party, that any difficulty could ariſe.—Then the queſtion is, Whether this bill of lading, being made in favour of *Thompſon* and *Fairbrother* jointly, can be diſtinguiſhed from one made in favour of *Thompſon* only? I think it cannot, becauſe *Fairbrother* was known to the parties to be the agent of *Thompſon*.—As therefore this tranſaction is to be conſidered in the ſame light as if all the bills of lading had been made to the order of *Thompſon* alone, how does the queſtion ſtand as between the plaintiffs and *France* and Company? Both parties claim under *Thompſon*: but *France* and Company have the firſt *legal right*; for two bills of lading were firſt indorſed to them, and the letter which conveyed the other bill of lading to *Fairbrother* apprized him at the ſame time of this indorſement. (2) Rule diſcharged.

The indorſement and delivery of a bill of lading to a creditor *primâ facie*, conveys the whole property in the goods from

Hibbert *et al.* v. Carter, Ea Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 745.

(1) See this under Title FACTOR.

(2) *Vide poſt. Hibbert* v. *Carter*, and *Lickbarrow* v. *Maſon*, *ante*.

from the time of its delivery. But if the intention of the parties appear to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser, after such indorsement, is good. —This was an action upon a policy of assurance on goods on board the ship Devonshire, at and from Jamaica to London; which insurance was stated upon the head of the policy to be made "*on account of* Robert Kerr, *esq.*" The plaintiffs were merchants in London, and the general consignees of *Kerr*, who was a planter in the island of Jamaica. They were in the constant habit of procuring insurance upon his goods as soon as they received advice of their being shipped. On the 23d of December, 1782, the plaintiffs received advice from *Kerr* of his having shipped ten hogsheads of sugar on board the Devonshire; in which letter, dated 18th of October, 1782, was contained a general direction to insure whatever goods were shipped by him. The insurance was immediately effected; but in the month of November, between the time when the order was sent and the time when the defendant subscribed the policy, *Kerr had indorsed the bill of lading to one* Dellprat *in Jamaica*, to whom there was an arrear of interest due upon mortgage on *Kerr*'s estate in that island. *The plaintiffs had notice of this indorsement, after the insurance was made*, by a letter from *Kerr* to them, wherein he informed them, that he had been obliged to assign the bills of lading for the net proceeds to *Dellprat*. *The bill of lading, as it originally stood, expressed the sugars to be shipped on account and risk of the shipper*, and directed the delivery to his order, or that of his assigns; the indorsement was in the following terms: "*deliver the above sugars* to Mr. *John Hodgson*, for account of *S. Dellprat*," signed "*Robert Kerr.*" The ship was lost in the course of the voyage. At the trial of the cause at the last sittings at Guildhall, before BULLER, J. the plaintiffs rested their case here, and contended that upon these facts they were entitled to a verdict for the amount of the insurance. On the other hand it was objected, that *Kerr* having assigned the bill of lading before the insurance was actually effected, the averment in the declaration, that these sugars had been insured *on his account*, was not true, for he had not then any insurable interest remaining in him, the entire property in the goods having passed out of him by the assignment of the bills of lading, which operated in this instance as a payment. The judge being of this opinion, upon the general ground, that the indorsement of a bill of lading passed the whole property, would have nonsuited the plaintiffs; but it appearing that the defendant had neglected to pay the premium of twenty guineas into court, the plaintiffs took a verdict for that sum. Upon a motion on the part of the plaintiffs in this term for a new trial, it was contended, that the verdict ought to have been taken for the whole sum

ſum inſured. *The Court*, upon this occaſion, were all clearly of opinion, that where a bill of lading is taken by a creditor as a ſecurity for his debt on his own account, the whole property paſſes by the delivery, and is to be conſidered as a ſatisfaction of the debt *pro tanto*. That the parties were always at liberty to vary from the general rule, by entering into any particular agreement between themſelves; but that it muſt be ſhewn in order to take advantage of it. And they conſidered the caſe of *Caldwell* and *Ball* as deciding the general queſtion. They therefore refuſed the rule. But afterwards on a ſubſequent day the motion was renewed by leave of the Court, on an affidavit ſtating the particular tranſaction between the parties; *That* Kerr *had no intention whatever of paſſing the whole property by the indorſement of the bill of lading; his intention being no more than to bind the conſignment of the goods in England*; to which purpoſe he had ordered his correſpondents to pay the *net proceeds* to *Dellprat*, as appears by the letter before-mentioned; and that ſince that time *Kerr*'s executor had actually accounted to *Dellprat* again for the amount of the ſugars which had been loſt, a demand having been made on them to that purpoſe. A rule was now granted to ſhew cauſe why there ſhould not be a new trial; which was afterwards made abſolute without hearing either ſide (1).

Conſpiracy.

The quarter-ſeſſions has a juriſdiction over conſpiracy; and it is ſufficient whether the conſpiracy be to charge a man with criminal acts, or ſuch as only may affect his reputation.— In this caſe a motion was made to arreſt the judgment on an indictment, found and tried at the Weſtminſter quarter-ſeſſions, which charged that the defendants "did conſpire, &c. "falſely to charge and accuſe one *J. C.* that he had then "lately taken out of a bag a quantity of human hairs, &c." The exceptions taken were, 1ſt, That the juſtices at quarter-ſeſſions have no juriſdiction over conſpiracies, any more than perjury, uſury, and forgery; it not being ſpecified in

The King v. Riſpal *et ux.* Ea. Ter. 2 Geo. 3. B R. 1 *Black* 368.

(1) On the ſecond trial, the ſame clear evidence of the intention of the parties being given, as had been ſet forth in the affidavit laid before the court, Mr. Juſtice *Buller* was of opinion, that the plaintiff was entitled to recover the amount of the inſurance. He ſaid the general doctrine was clear, that *the indorſement of a bill of lading* primâ facie *transferred the whole property in the goods; but this was ſubject to be controlled by the evident intention of the parties.* Here advice was ſent by the conſignor to his correſpondents at home, that he had been obliged to give the bill of lading to *Dellprat* for the *net proceeds*, and the amount of the goods was actually accounted for again by *Kerr*'s executors to *Dellprat* after the loſs was known. And beſides, what was material to be obſerved, no value had been put upon the goods at the time, which ſhewed that *Dellprat* was only to have the *net proceeds*.—Verdict for the plaintiffs.

their

their commiſſion, nor given them by any ſpecial ſtatute. 2dly, That the indictment did not charge them to have conſpired to fix any crime on the proſecutor, but only taking hairs out of a bag, which might be a lawful act. PER CURIAM, No authority has been cited to ſhew either that the juſtices at ſeſſions have not a juriſdiction over conſpiracies, or that they have; it muſt therefore be determined upon general principles: the caſes of perjury, forgery, and uſury, ſtand upon their own ſpecial grounds; and it has been determined that the juſtices have no juriſdiction there: but this offence of conſpiracy is a treſpaſs, and treſpaſſes are indictable at ſeſſions, though not committed *vi et armis*; they tend to the breach of the peace as much as cheats or libels, which are eſtabliſhed to be within the juriſdiction of the ſeſſions: as therefore there is no authority to the contrary, it ſeems that the juſtices had a juriſdiction here.—As to the other exception; the crime laid is an unlawful conſpiracy; and this, whether it be to charge a man with criminal acts, or ſuch as only may affect his reputation, is fully ſufficient; the whole amounts to an indictable offence; viz. the getting money out of a man by conſpiring to charge him with a falſe fact.—Rule diſcharged.

The King *v.* Parſons *et al.* Mic. Ter. 3 Geo. 3. B. R. 1 *Black.* 392.

There is no occaſion, on the trial of an indictment for a conſpiracy, to prove the actual fact of conſpiracy, but it may be collected from collateral circumſtances.

Conſtable.

Who may be choſen.

Rex *v.* Genge, Hil. Ter. 14 Geo. 3. B. R. *Cowp.* 13.

One who is a reſiant within a private leet within the hundred is not, therefore, exempt from ſerving the office of *conſtable of the hundred*; and a cuſtom to elect ſuch a one conſtable, is good.—The defendant was indicted for that he, at a court-leet holden in and for the hundred of Whitchurch, in the county of Dorſet, was by the jury of the court elected conſtable of the hundred, &c. but had refuſed to be ſworn into, or execute, the office: on the trial, the jury found a ſpecial verdict, ſtating in ſubſtance, that there had been immemorially a court-leet within and for the hundred of Whitchurch; that at ſuch court-leet, two perſons being *reſiants* within the hundred, have been immemorially choſen by the jury annually, to ſerve the office of conſtables of the ſaid hundred; that the manor of Wooton Abbots extends into and comprehends *two tythings*, one of which hath been immemorially within the hundred of Whitchurch; that there had been immemorially a court-leet within the manor of Wooton Abbots, at which court *the reſiants* within the two tythings

ings have done ſuit and ſervice, *and have been choſen tythingmen of the ſaid tythings*; that by *ancient cuſtom* the reſiants of the tything of *Wootton Abbots* have been choſen and ſerved as jurymen in the leet of the hundred, and have been elected by the jury of the court-leet of the hundred, to be conſtables of the hundred. THE QUESTION for the opinion of the Court was, Whether the defendant was exempt from ſerving the office of conſtable of the hundred of Whitchurch, by reaſon of his then being a reſiant, and inhabitant of and within the tything of Wootton Abbots, being a private leet within the leet of the hundred of Whitchurch? LD. MANSFIELD, There is no authority or *dictum* whatſoever, by which it is held that a reſiant within a leet, within the hundred, is excuſed from ſerving the office of conſtable of the hundred. Again, where there is a cuſtom of the ſort ſtated in this ſpecial verdict, there is no authority which ſays, that ſuch a cuſtom is not good; on the other hand, there is an expreſs authority of a caſe of *Rex* v. *King*, reported in two books, 3 *Keble*, 230, *Freeman*, 348, each of which ſtates the caſe in the ſame way: it has been objected, however, that theſe are books of no authority; but if both the reporters were the worſt that ever reported, if ſubſtantially they report a caſe in the ſame way, it is demonſtration of the truth of what they report, or they could not agree. Here they agree in Ld. Chief Juſtice *Hale*'s ſaying, "that the choice of a conſtable is no article of the "buſineſs of the leet;" and that it is no excuſe that the party is within the juriſdiction of another leet. Another authority in 11 *Mod.* 125. which is very particular, and ſtrong, lays down the ſame doctrine: and further, Ld. *Hale*, according to *Keble*, 230, adds, that if generally excuſed, yet by cuſtom one may be liable. Here a cuſtom is found by the verdict, for the words *ancient cuſtom*, muſt mean ſuch cuſtom as is before mentioned, which is *immemorial*. ASHTON, J. agreed, and ſaid, As to the party being exempt from ſerving one office, on account of his obligation to diſcharge the other, it is only meant, that he is not liable to do it in the ſame manner, at the ſame time, in the ſame reſpect. But the office of *conſtable of the hundred*, according to *Hale*, is not an article within the juriſdiction of the leet. WILLES, J. and ASHHURST, J. agreed.

A younger brother of the corporation of the Trinity-Houſe is not exempt from ſerving the office of headborough. The King v. Thomas Clarke, Ea. Ter. 27 Geo. 3. B.R. 1 *Term Rep.* 679.

Alſo the office of conſtable may be ſerved by deputy.

And the crown may grant exemptions from ſerving offices of this ſort, provided a ſufficient number of perſons be left to ſerve them.

The defendant, who was deſcribed as a merchant, was indicted at the Middleſex ſeſſions, 1787, for refuſing to

take upon him the office of headborough for St. Mary Matfellon, otherwiſe Whitechapel, when the jury found a ſpecial verdict, which ſtated in ſubſtance, *inter alia*, That the defendant was an inhabitant of Whitechapel, in the county of Middleſex, and was a fit and proper perſon to ſerve the office of headborough for the ſame pariſh; and that on the 28th of March, in the 25th year, &c. within the ſaid pariſh and county, at an aſſembly of the inhabitants of the ſaid pariſh, held for the purpoſe of chooſing an headborough and conſtables for the ſaid pariſh, according to the ancient cuſtom, &c. he was elected and choſen by the inhabitants of the ſame pariſh into the office of headborough for the ſpace of one year; that the defendant had due notice of his being ſo elected, but that he afterwards refuſed to take upon him the ſaid office. The verdict then ſtated a charter of 6 *Hen.* 8. whereby he created the corporation of the Trinity-Houſe. It then ſtated a charter of 36 *Eliz.* by which ſhe granted to the maſter, wardens, and aſſiſtants of the Trinity-Houſe, and to their ſucceſſors for ever, the laſtage and ballaſtage in the river Thames, betwixt London-bridge and the main ſea. It then ſtated a charter in 17 *Car.* 2. whereby to the end that neither the maſter, wardens, and aſſiſtants of the Trinity-Houſe aforeſaid, and their ſucceſſors, deputies, ſervants, or aſſigns, or any of them, might be hindered or letted in the managing of the work of ballaſting of ſhips, and cleanſing of the river, his ſaid majeſty did (amongſt other things) ſtrictly charge, will, require, and command, all and every his officers and miniſters whomſoever, and all others, to whom it ſhould or might appertain, that they, and every of them, ſhould forbear to arreſt, preſs, or take for the ſervice of his majeſty, his heirs, &c. or PERSONALLY TO SERVE IN ANY OFFICE OR PLACE, MILITARY OR CIVIL, any perſon or perſons being members of the ſaid corporation, or any of the officers, factors, workmen, or ſervants, or any the boats, lighters, or other veſſels of the ſaid maſter, warden, or aſſiſtants, or their ſucceſſors, deputies, or aſſigns, or any of them employed, or to be employed, in and about the ſaid ballaſting of ſhips. It then ſtated a charter of 1 *Jac.* 2. by which he granted and directed that there ſhould be one maſter, four wardens, eight aſſiſtants, eighteen elder brethren (beſides the maſter, wardens, and aſſiſtants), and a clerk of the guild, to be ſeverally elected as is therein mentioned; and that all the reſt of the ſeamen and mariners of, and belonging to, the ſaid guild, and their ſucceſſors, &c. ſhould be called younger brethren; and that the ſaid maſter, wardens, and aſſiſtants, or the greater part of them, together with the major part of the ſaid elder brethren, might at all times thereafter, at their will and pleaſure, admit, receive, and take in whatſoever perſon or perſons, his majeſty's natural ſubjects, who ſhould be deſirous to be of the ſaid guild, as brothers

brothers of the ſaid corporation, who ſhould be called younger brothers. And the charter, after reciting that as the maſter, wardens, and aſſiſtants, being oftentimes to be employed at one hour's warning in his ſaid majeſty's ſervice at ſea, &c. could not give their due attendance therein, by reaſon that they were many times compelled to bear armour, or to contribute to the charge thereof for land ſervice, as alſo to ſerve upon inqueſts and juries at aſſizes, ſeſſions, courts-leet, courts-baron, before the coroner, and in all other courts, commiſſions, and places of juriſdictions, to the great vexation and burthen of the ſaid corporation, and to the peril of the ſaid ſervice of the ſea, &c. therefore his majeſty did grant, by the ſaid charter, that they and every of them, and all and every other brother and miniſters of the ſame, BEING MARINERS *and ſeafaring men*, and their ſervants and apprentices, ſhould be diſcharged and exempted from the bearing armour, &c. to, for, or with, any manner of land ſervice. It further ſtated, that the defendant, at the time that he was ſo elected and choſen into the ſaid office, was a younger brother, and member of the ſaid guild, fraternity, or brotherhood, regularly and duly choſen and admitted as ſuch: but whether, &c. ASHHURST, J. Theſe grants of exception from ſerving common law offices ought to be conſtrued ſtrictly; and unleſs the exemption be granted in the moſt explicit terms, it ought not to be allowed. Now apply that rule to the preſent caſe: it does not appear that the exemption is explicitly granted to that deſcription of perſons under which the defendant claims. Had this part of the corporation exiſted at the time of granting the charter of *Charles* the Second, I ſhould have thought that the exemption did extend to them, becauſe the words are very comprehenſive, though the meaning is rather awkwardly expreſſed; for it ſays, "they ſhall not be *arreſted, preſſed, or taken*," &c. But at all events that charter can only extend to the perſons named therein. The appointment of the preſent defendant is under a new power granted by the charter of *Jac.* 2. which enables the maſter, wardens, and elder brethren, "to admit, receive, and take in whatſoever perſon or perſons ſhould be deſirous to be admitted, as younger brothers." Therefore the charter of *Charles* the Second, not taking notice of younger brethren, they cannot claim any exemption under that charter. BULLER, J. As to the power of the crown to exempt from ſerving offices of this nature, I thought that had been clearly ſettled by ſome late caſes; and particularly by that of the *King* v. *Pugh* (1). *The crown undoubtedly has the power of granting the exemption, but then the*

(1) *Dougl.* 179.

common law engrafts ſome qualifications on it. For the crown may exempt from ſerving particular offices, provided there be a ſufficient number of perſons left to ſerve the office (1). And therefore, in order to compel a perſon to ſerve the office, who claims an exemption under a grant from the crown, it is incumbent on the party diſputing the claim to ſhew that it is abſolutely neceſſary, for the ſake of the public, that he ſhould ſerve. However, it is not neceſſary to decide that now. For taking it for granted that the crown has ſuch a power, the queſtion here is, Whether perſons of the defendant's deſcription are exempted. The queſtion ariſes on two charters, one of *Charles* the Second, the other of *James* the Second; both of which are material in order to decide this point. By the charter of *James* the Second, *elder and younger brethren* were firſt appointed. The defendant claims as a younger brother of this corporation, and it does not appear that he had any previous qualification before his election. But, on the conſtruction of the charter of *Charles* the Second, I think a previous qualification was neceſſary. It ſeems from the general power in all theſe charters that the crown intended only to incorporate ſea-faring men, who were likely to render ſome ſervice to the public: but it is true that others may be admitted; for the charters extend to "all perſons." The charter of *James* the Second, which ſpeaks of elder and younger brethren, expreſsly ſays, that "all the reſt of the ſeamen and mariners of and belonging to the ſaid guild ſhall be younger brethren." It is not ſtated that the preſent defendant is a ſeaman or mariner; and we cannot preſume that he is. Then can he claim any exemption under the charter of *Charles* the Second? The clauſe does not extend to him. In the firſt place, he does not come within the reaſon on which the exemption in that charter is founded, namely, that perſons belonging to the Trinity-Houſe might not be hindered in their works. In the next place, the exemption is not granted to the corporation; but it is a charge to the king's officers not to arreſt, preſs, or take them, without applying to the crown. But if the king does chooſe it, they are not exempted; and this is a proſecution ſet on foot by the crown; the crown now calls on the defendant for his ſervices. It is not neceſſary to decide whether any officer of the crown, who ſhould take the defendant without the conſent of the crown, would be liable to puniſhment. But the queſtion here is, Whether the defendant is perſonally entitled to be diſcharged or exempted? I think not. It appears from the words of this charter that the crown has the power of exemption in caſes where the per-

(1) *Vide Tradymock* v. *Perryman*, Cro. Car. 260. 2 *Inſt.* 129. 1 *Sid.* 272.

ſonal

ſonal ſervice of the man is required; the reaſon of which is, that they ſhould not be prevented from doing this work: *But that does not extend to the office of conſtable, becauſe perſonal ſervice is not neceſſary* (1). GROSE, J. This is an indictment againſt the defendant for refuſing to take upon him an office, to which he appears on the face of the indictment to have been legally elected. Now the office of a conſtable is an office under the crown; and, whether he be choſen by the pariſh, or at a court-leet (which is a court of the crown), it makes no difference. It being ſuch, the crown may exempt any perſon, or whole bodies corporate, from ſerving that office, provided the exemption be not extended ſo far as to prevent the exiſtence of the office in any particular place. A power, exerciſed to ſuch an extent, would be illegally exerciſed: But it is undoubtedly competent to the crown, ſubject to this reſtriction, to exempt certain perſons from ſerving the office of conſtable. Then the queſtion is, whether the crown has ſo exempted this defendant? If it were the apparent intention of the crown that he ſhould be exempted, I ſhould hold that he was ſo. Then we muſt conſider, whether on the face of this record the defendant was intended to be exempted by the charter of *Charles* the Second. It is clear that the command contained in the clauſe, under which the exemption is claimed, is merely to forbear to arreſt, preſs, or take for his ſervice, &c. or *perſonally to ſerve*, &c. This contains no exemption from the office generally; it is only an inhibition to the officers of the crown not to take the members of the corporation to ſerve perſonally. *It contains no exemption from any offices which may be ſerved by deputy; the exemption (if it be one) is only from thoſe offices which require perſonal ſervice.* And this is corroborated by the charter of *James* the Second; for that gives only a protection from perſonal ſervice. Then the queſtion is, Has this defendant been choſen to an office where he is perſonally to ſerve? We all know the office of conſtable may be ſerved by deputy, and therefore he is not exempted under theſe charters.—Judgment for the proſecutor.

A conſtable of manor, including a pariſh, is not exempt from ſerving this office, by having a ſtatutable certificate of exemption from all ward offices. The defendant was indicted for refuſing to take upon himſelf the office of conſtable of and for the manor of Birmingham, having been duly nominated and elected thereto. On the trial, it appeared upon the evidence, that the facts laid in the indictment were true; and that the defendant was a fit perſon to be nominated and elected, and liable to ſerve the office of con-

Rex v. Darbyſhire, Tr. Ter. 1 Geo. 3. B R. 2 *Burr.* 1182.

(1) *Vide* 3 *Burr.* 1262.

ſtable, *unleſs diſcharged or exempt therefrom by reaſon of the certificate and aſſignment thereof hereinafter mentioned:* alſo, that the uſage at Birmingham has been, "annually at the "court-leet there, to elect two conſtables for the manor of "Birmingham generally, and one conſtable for the hamlet "of Deritend (a diſtinct vill within the ſaid manor) parti-"cularly." That the manor of Birmingham extends itſelf into, and comprehends the whole town and pariſh of Birmingham, and alſo the ſaid hamlet of Deritend. That the conſtables ſo elected for the ſaid manor of Birmingham generally, have juriſdiction and authority, as conſtables, not only throughout the ſaid town and pariſh of Birmingham, but alſo within and throughout the ſaid hamlet of Deritend. That the conſtable of Deritend is elected out of the inhabitants of Deritend only: and the conſtables ſo elected for Deritend particularly, and the ſaid conſtables ſo elected for the ſaid manor of Birmingham, have ſeverally equal and concurrent juriſdiction within the ſaid hamlet of Deritend. That the defendant had a certificate according to the ſtat. of 10, 11 *W.* 3. c. 23. diſcharging one *Plowden Jennett* from all pariſh offices within the pariſh of Birmingham; and an aſſignment thereof, ſigned and executed on the ſeveral and reſpective days of the dates thereof reſpectively: and the ſame was duly inrolled according to the ſtatute; and had not been before aſſigned. Upon this caſe, the queſtion reſerved for the opinion of his majeſty's court of King's Bench is, "Whether the ſaid *John Darbyſhire*, upon the circum-"ſtances of this caſe, is, notwithſtanding the certificate, "guilty on the indictment, or not guilty." Lord MANSFIELD, The only queſtion upon this caſe is, "Whether the "conſtable of the manor of Birmingham is a *pariſh-officer* "of the pariſh of Birmingham." This term "*pariſh-officer*," does not include every office exerciſed in the pariſh; if it did, it might even take in the office of high-ſheriff of the county. A pariſh-officer is relative to the pariſh, and confined to the pariſh only. A conſtable of a pariſh may be called a pariſh-officer: but this man has a much larger juriſdiction than the pariſh only; for he has a juriſdiction over the whole manor, which extends much beyond the pariſh; and the pariſh is only a part of that diſtrict over which it is to be exerciſed. And the act does not intend the certificate to be a diſcharge from an office, whereof the functions are to be exerciſed out of the limits of the pariſh. This man cannot be eſteemed a pariſh-officer, either from the origin of his office, or the nature, or the exerciſe, of it. DENISON, J. If it had been ſtated, "that the manor of Birmingham, and "pariſh of Birmingham, were co-extenſive," this certificate might have been a ſufficient diſcharge. But it is ſtated quite otherwiſe; this is not an office of conſtable in and for the pariſh, but in and for the manor, which is more extenſive

ſive than the pariſh is: and a different ſpecies of diviſion too, one being eccleſiaſtical, the other civil. WILMOT, J. alſo concurred, and ſaid, The act of parliament means thoſe certificates to be exemptions from ſuch offices only, the functions of which are confined within that ſort of diviſion which is now called a pariſh; which is not a civil, but an eccleſiaſtical diviſion. No ſuch ſpecies of diviſion was known at common law; the temporal or civil diviſion was into vills, not into pariſhes.—Judgment for the crown.

But a naturalized foreigner is not eligible into the office of conſtable.—The defendant ſtood indicted for refuſing to take upon himſelf the office of conſtable, being thereunto duly elected. And the queſtion was, Whether he be eligible to that office, being a foreigner, naturalized by a private act of parliament? It came before the court, upon a ſpecial verdict, and was twice argued. After the ſecond argument, THE COURT took time to adviſe. And on a future day Lord MANSFIELD delivered their opinion: which was, that as the office of conſtable is clearly a civil office of truſt, and the legiſlature have expreſsly incapacitated the naturalized foreigner from taking any civil office of truſt (1), generally and without exception, it is not in the power of the Court to make an exception which the legiſlature have not, in the preſent caſe, thought fit to make.—Judgment for the defendant.

Rex *v.* Ferdinand de Mierre, Tr. Ter. 11 Geo. 3 B. R. 5 *Burr.* 2787.

The Authority of a Conſtable.

No conſtable can act under a warrant out of his diſtrict.—This was an action of treſpaſs for entering the plaintiff's houſe. The defendant had acted under a warrant from a juſtice of peace to ſearch for nets; the warrant on being produced, was directed to "the conſtable of Shipborne, to "*Samuel Carter*, and to all other officers of the peace in the "county of Kent." Evidence was given that the defendant was borſholder of the hundred of Little Peckham, which adjoined to the hundred of Shipborne, in which the plaintiff's

Blatcher *v.* Kemp, Maidſtone Summer Aſſizes, 1782. 1 *Hen. Black.* 15.

(1) See 12 & 13 *W.* 3. c. 2. by which it is enacted, that no perſon born out of the kingdoms of England, Scotland, or Ireland, or the dominion thereunto belonging, although naturalized (except ſuch as are born of Engliſh parents), ſhall be capable to enjoy any office of truſt. And 1 *G.* 1. c. 4. to explain and amend that of 12 & 13 *W.* 3. which after reciting the clauſe, and the doubts that had ariſen concerning the conſtruction of it, enacts, that no perſon ſhall be thereafter naturalized, unleſs there ſhall be a clauſe or particular words inſerted to declare, that ſuch perſon ſhall thereby be enabled to be of the privy council, or a member of either houſe of parliament, or take any office or place of truſt, either civil or military, &c. Alſo 1 *G.* 1. c. 13. wherein is a proviſo that this ſhall not extend to the office of any tythingman, headborough, &c. or any like inferior civil office.

houſe was ſituated; the counſel for the defendant contended, that he was conſtable for the county, and came within the warrant, which was directed to all officers of the peace in the county of Kent. Lord MANSFIELD, No conſtable can act under a warrant, out of his diſtrict; it is certainly to be taken, *reddendo ſingula ſingulis*. This warrant is directed "to the "conſtable of Shipborne, to *Samuel Carter*, and to all other "peace officers;" the defendant is neither conſtable of Shipborne, nor *Samuel Carter*, and the general direction is to be taken to each within his diſtrict. Therefore, as the warrant was not directed to the defendant, he cannot juſtify under it, and the plaintiff muſt have a verdict for 1*s*.

Contracts.

Macbeath v. Haldimand, Ea. Ter. 26 Geo. 3. B. R. 1 *Ter. Rep.* 172.

An officer appointed by government, treating as an agent for the public, is not liable to be ſued upon *contracts* made by him in that capacity.—Upon the trial of this action, which was upon promiſes againſt the defendant, as agent for work and labour, &c.—A verdict was found for the defendant by the direction of the judge. And upon a motion for a new trial, the leading facts appeared from the report to be as follows: In the year 1779, the defendant, being governor of Quebec, appointed Captain *Sinclair* to the command of a fort called Michilimakinac, ſituated upon the lake Huron, in the province of Canada, and tranſmitted ſeveral inſtructions to him reſpecting the government of the fort; directing him alſo to draw bills of exchange for defraying the contingencies incident to that poſt. For ſome time *Sinclair* employed one *Grant* to diſtribute preſents among the Indians, and to procure military ſtores, &c. for the uſe of the garriſon; and, to defray theſe and other expences, drew bills of exchange upon the governor, according to his inſtructions. When theſe accounts came to the defendant, he made objections to ſeveral of the articles as unneceſſary and exorbitant; and ſoon after *recommended the plaintiff* to *Sinclair*. The defendant alſo ſent a letter to the plaintiff, wherein he ſtates, that he had "thought it fit to direct lieutenant-governor *Sin-* "*clair*, to employ him in ſupplying ſuch articles, as ſhould "be wanted for the uſe of the crown, in conſequence of "his offer to furniſh the ſame at the rate of 10*l. per cent.* "on the coſts and charges; and therefore directed him to "make applications from time to time to *Sinclair*." Several ſpecial orders were proved from *Sinclair* to the plaintiff for ſupplying particular articles. And in purſuance of theſe orders the plaintiff furniſhed articles to a conſiderable amount. *But when his bills, at the top of which was prefixed,* "GOVERNMENT

"VERNMENT DEBTOR TO GEORGE MACBEATH FOR "SUNDRIES PAID BY ORDER OF LIEUTENANT-GOVER- "NOR SINCLAIR," were ſent to the defendant at Quebec, he made objections to ſeveral of the articles as being unreaſonable, and furniſhed contrary to ſubſequent inſtructions. Afterwards, on an examination of the account, it was propoſed, that the ſum of 21,981*l.* 14*s.* 11½*d.* New York currency ſhould be paid; and as all the bills which *Sinclair* had drawn in favour of the plaintiff were drawn on the defendant as governor and commander-in-chief, were to a much greater amount than the abovementioned ſum, and would not be accepted by the defendant, he received a partial payment from him, with a proviſo, that it ſhould not prejudice his claim for the remainder; to recover which was the object of the preſent action. It was acknowledged, that all the accounts had been ſubmitted to a board of officers by the defendant, for them to examine and report what charges ought to be allowed, and that the ſum adjudged by them to be due, which fell very ſhort of the plaintiff's demand, had been paid by the Treaſury. BULLER, J. after reporting the above facts, ſaid, That he had been of opinion at the trial, that the goods in queſtion having been ſupplied for the uſe of government, and the defendant not having perſonally undertaken to pay, the plaintiff ought to be nonſuited. That it appeared to him that the plaintiff had acted with the defendant ſolely in the character of commander-in-chief, conſidering him as the agent of government. But the plaintiff's counſel appearing for their client when he was called, he left the queſtion to the jury, telling them that they were bound to find for the defendant in point of law. And upon their aſking him whether, in the event of the defendant's not being liable, any other perſon was, he told them that was no part of their conſideration; but, being willing to give them any information, he added, that he was of opinion, that if the plaintiff's demand were juſt, his proper remedy was by a petition of the right to the crown. On which they found a verdict for the defendant. The rule for granting a new trial was moved for on the miſdirection of the judge upon two points. 1ſt, That the defendant had, by his own conduct, made himſelf perſonally liable, which queſtion ſhould have been left to the jury.—2dly, That the plaintiff had no remedy againſt the crown by a petition of right, on the ſuppoſition of which the jury had been induced to give their verdict. Lord MANSFIELD, Ch. J. upon this report obſerved, That great difference had ariſen ſince the Revolution, with reſpect to the expenditure of the public money. Before that period, all the public ſupplies were given to the king, who in his individual capacity contracted for all expences. He alone had the diſpoſition of the public money. But ſince that time, the ſupplies have been

been appropriated by parliament to particular purpoſes, and now whoever advances money for the public ſervice truſts to the faith of parliament.—That according to the tenour of Lord *Somers*'s argument (11 Stat. Tri. 159) in the Bankers' caſe, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the Bankers' caſe; and parliament was afterwards obliged to provide a particular fund towards the payment of thoſe debts (1). Whether, however, this alteration in the mode of diſtributing the ſupplies had made any difference in the law, upon this ſubject, it was unneceſſary to determine; at any rate, if there were a recovery againſt the crown, application muſt be made to parliament, and it would come under the head of ſupplies for the year. After his lordſhip had made theſe obſervations, cauſe was ſhewn—PER Lord MANSFIELD, Ch. J. The only queſtion before the Court is, Whether the defendant be liable or not in this action? If he be, the plaintiff muſt recover; if not, no conſideration reſpecting the plaintiff's remedy againſt any other party can induce the Court to make him ſo. There is no colour to ſay that he is liable in his character of commander-in-chief. In a late caſe which was tried before me, where one *Savage* brought an action againſt Lord *North*, as firſt lord of the treaſury, in order that he might be reimburſed the expences which he had incurred in raiſing a regiment for the ſervice of government, I held that the action did not lie. So in another caſe of *Lutterloh* v. *Halſey*, which was an action brought againſt the defendant, who was a commiſſary, for the ſupply of forage for the army, and by whom the plaintiff had been employed in that ſervice, the commiſſary was held not liable. In the preſent caſe it was notorious that the defendant did not perſonally contract; the plaintiff knew, at the time that he furniſhed the ſtores, that they were for the uſe of government; and he afterwards made government debtor in his bills. But it has been argued, that the defendant made himſelf liable after the debt was contracted. In my opinion there is no ground for ſuch an argument; the evidence does not warrant it. Then it was objected, that whether the defendant had made himſelf liable or not, was a queſtion which ought to have been left to the jury to decide. But there was no evidence which was proper for their conſideration; for the evidence conſiſting altogether of written documents and letters which were not denied, the import of them was matter of law, and not of fact. Therefore the verdict muſt ſtand. WILLES, J. If the defendant were liable, his perſon

(1) The ſtat. 12 & 13 *W.* 3. c. 12. ſ. 15. provides, that in lieu of the annuities granted to the bankers, and all arrears, the hereditary exciſe ſhall, after the 26 December, 1701, be charged with annual ſums equal to an intereſt of 3 *per cent.* till redeemed by payment of one moiety of the principal ſums.

and

and property would be ſubject to an execution, and he muſt afterwards apply to government for a reimburſement, which would be no ſatisfaction to him for the inconvenience he had been put to. Though I conſider the faith of government as pledged for the acts of the defendant, yet I cannot conſider him as perſonally anſwerable. As to the objection that this ſhould have been left to the jury, it is deciſive that this queſtion comes before the Court on a motion to ſet aſide the verdict, and not a nonſuit. There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. *The conſtruction of deeds is a matter of law, but that of letters is proper for the conſideration of the jury.* ASHHURST, J. In great queſtions of policy we cannot argue from the nature of private agreements. But even in theſe caſes the queſtion muſt be, What was the meaning of the parties at the time of entering into the contract? A perſon acting in the capacity of an agent may, undoubtedly, contract in ſuch a manner as to make himſelf perſonally liable; and that brings it to the true queſtion here, namely, Whether, from any thing that paſſed between the parties at the time, it was underſtood by them that the plaintiff was to rely upon the perſonal ſecurity of the defendant? But nothing appears from the evidence in this caſe to warrant ſuch a concluſion. Great inconveniences would reſult from conſidering a governor or commander as perſonally reponſible in ſuch caſes as the preſent. For no man would accept of any office of truſt under government upon ſuch conditions. And, indeed, it has frequently been determined, that no individual is anſwerable for any engagements which he enters into on their behalf. There is no doubt but the crown will do ample juſtice to the plaintiff's demands if they be well founded. BULLER, J. I *do not agree with my brother* WILLES *as to the conſtruction of letters.* If they be written in ſo dubious a manner, as to be capable of different conſtructions, and can be explained by other tranſactions, the whole evidence muſt be left to the jury to decide upon; for they are to judge of the truth or falſehood of ſuch collateral facts which may vary the ſenſe of the letters themſelves: but if they be not explained by any other circumſtances, then, like deeds or other written agreements, the conſtruction of them is a mere matter of law. Where a man acts as agent for the public, and treats in that capacity, there is no pretence to ſay that he is perſonally liable. Rule diſcharged.

This was an action of covenant on a charter-party; and the declaration ſtated the charter-party, made the 23d of November, 1781, at St. Helena, between the defendant, by the name and addition of captain *Wolſely*, COMMANDER OF HIS MAJESTY'S SHIP Magnanime, and ſenior officer of his majeſty's

Unwin *v.* Wolſeley, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 674.

majeſty's ſhips and veſſels at St. Helena (there being no commiſſary for priſoners there), ON ACCOUNT OF HIS MAJESTY, of the one part, and the plaintiff, by the name and deſcription of *G. Unwin*, one of the agents of his majeſty's ſhip Hannibal, of the other part, ſealed, &c.; wherein it was agreed between the plaintiff and the defendant, reſpecting the taking the prize-ſhip Le Seviere to be employed as a cartel to carry French priſoners to Europe, *that as ſoon as ſentence of condemnation ſhould have paſſed upon her, ſhe ſhould proceed with the French priſoners taken by the Hannibal to the firſt port in France.* That the defendant, ON ACCOUNT OF THE KING, ſhould put on board a commiſſion officer, to have charge and command of her, and a midſhipman to aſſiſt him, &c. That the defendant, ON ACCOUNT OF THE KING, further conſented and agreed, that if any accident ſhould happen to the ſaid cartel, either by fire, being ſtranded or loſt by any other unavoidable accident, whilſt employed on that ſervice, government ſhould be anſwerable for the ſum of 1500*l.* for the ſole uſe and benefit of the captors, &c. &c. &c. The declaration alſo ſtated, that ſentence of condemnation had paſſed at St. Helena, and that the ſaid ſhip had performed the ſaid ſervice, by carrying the priſoners to port L'Orient; and that the ſhip was employed in that ſervice three months and fourteen days; but that the defendant had not paid the freight, &c. To this declaration the defendant demurred ſpecially: and in ſupport of the demurrer it was contended, that the action was not maintainable; FIRST, becauſe it did not appear by the declaration, that the captors had any legal right to the ſhip, but that at the time of the voyage it remained the property of the king, becauſe all prizes taken by the king's ſhips are, at the time of the capture, the property of the king; and though, by the 19 *Geo.* 3. ch. 67. the king is empowered, by his proclamation, to diſtribute the prizes after condemnation in what proportion he pleaſes; and the ſhips are to be conſidered as the property of the captors after condemnation by the court of admiralty; yet till condemnation it remains the property of the king; and although the declaration averred, that a ſuit was inſtituted at St. Helena, for the purpoſe of condemning this ſhip, yet the commiſſioners, before whom the ſuit was depending, had no right to condemn her; for there was no court of admiralty at St. Helena. That thoſe perſons had no authority to determine queſtions of prize, but have only ſpecial and limited powers delegated to them for particular purpoſes, by the Eaſt-India company's charters. SECONDLY, That the defendant was not perſonally liable to pay this ſum; for the contract was entered into by him on account of government. ASHHURST, J. As to the firſt objection, it appears to be more doubtful than the ſecond, though I ſhould be inclined to de-

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cide in favour of the defendant, even on the firſt objection. The words are, "*as ſoon as ſentence of condemnation ſhould have paſſed.*" That muſt be taken to mean a legal condemnation. And though it is afterwards ſtated in the declaration, that the ſentence of condemnation, which was paſſed, was that referred to by the charter-party; yet that, being a matter of law, cannot be ſupplied by any averment, that it referred to the ſentence of condemnation at St. Helena. If there could be no legal condemnation, except by the court of admiralty, it muſt be taken that the parties meant that. And as this ſentence of condemnation was paſſed by a court out of the ordinary courſe of law, and not authoriſed by any public act of parliament, the plaintiff ſhould have ſhewn that it was made by a court having competent juriſdiction. We do not know that the commiſſioners at St. Helena, have a proper legal authority to proceed *in rem*, and condemn any ſhip carried into that port. A legal condemnation was a condition precedent, which ought to have been made out by the party claiming the benefit of it. However, it is not neceſſary to decide upon this part of the caſe, becauſe I am clearly of opinion, on the ſecond objection, that the action is not maintainable. *It would be extremely dangerous to hold that governors and commanders-in-chief ſhould make themſelves perſonally liable by contracts, which they enter into on the part of government.* It would be detrimental to the king's ſervice, for no private perſon would accept of any command upon ſuch terms. The caſe of *Mackbeath* v. *Haldimand*, ſeems to me to govern the preſent. It was there determined, that a commander was not anſwerable for contracts entered into by him on behalf of government. And whether the contract be by parol or by deed, it makes no difference as to the conſtruction to be put upon it. That, indeed, was a ſtronger caſe than the preſent; becauſe there it was left open to evidence, from whence it was to be inferred that the contract was made by the defendant, as the agent of government; but here it appears in expreſs terms that the defendant entered into this contract on the behalf of government. For there is an expreſs allegation in the beginning, that he made the contract "on account of his majeſty;" and the ſubſequent part, "that government ſhould be anſwerable for 1500*l.* in "a certain event," makes it perfectly clear. Therefore, the defendant only meant to contract as the ſervant of government, and not to bind himſelf perſonally. BULLER, J. and GROSE, J. declared themſelves to be of the ſame opinion.—Judgment for the defendant.

Convictions.

The King *v.* J. Jefferies, Tr. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 767.

If a conviction under a ſtatute which enacts, that all convictions againſt that act may be made out "in that form, or to the effect following" (giving the form), contain all the ſubſtantial parts of that preſcribed, it is good, though it alſo contains ſomething more; for ſurpluſage will not vitiate a conviction.—This was a conviction under the 31 *Geo.* 3. c. 21. for killing game without having a certificate; ſ. 4. of which enacts, that all convictions upon any offence againſt that act, or the 25 *Geo.* 3. ſhall be made out "in the form, or to the effect following, &c." and then gives the form. The conviction was *according to the effect of that form preſcribed*; as it ſtated every thing required by that form; and the objection to it was, that as the magiſtrate had ſtated more than he need have done, namely, the information, the ſummons, the defendant's appearance, and the names of the witneſſes, he ought alſo to have ſtated *the evidence itſelf.* PER CUR. This act of parliament has enabled the magiſtrate to draw up the conviction "in the form, or to the effect following." And it appears by the form, which is immediately ſubjoined, that neither the caſe or the evidence need be ſtated. The queſtion therefore is, Whether the conviction, now returned to us, be not to the effect ſtated in the act? It contains every thing that is important in the form given, and ſomething more. It ſtates the information, the ſummons, the defendant's appearance, the examination of witneſſes, *but not the evidence itſelf:* but the act ſays, that the conviction need not contain the evidence. The want of the very thing which the ſtatute ſays need not be done, conſtitutes the objection. The magiſtrate has done every thing that was required; and he has ſtated ſomething more in the conviction; but that will not vitiate it. Afterwards another objection was ſuggeſted, viz. that in the form given by the act a blank was left, in which the offence was to be deſcribed; but that here the juſtice had only ſtated the "offence aforeſaid," and that there was no offence beforementioned in the convicting part. But *Per Cur.* "The offence aforeſaid," refers to that mentioned in the information, where it is particularly ſet forth.—Conviction affirmed.

The King *v.* J. Pratten, Hil. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 559.

An information founded on a penal ſtatute muſt negative the exceptions in the enacting clauſe, creating the penalty, and alſo thoſe contained in a former clauſe, to which the enacting clauſe refers in expreſs terms.—This was a conviction on the ſtat. 1 *Jac.* 1. c. 22. ſ. 7. for buying rough hides. The information alleged, that after the paſſing of the above act, the defendant, "not being ſuch a perſon as by virtue of the

the ſaid act of parliament may lawfully uſe the craft or myſtery of tanning of leather, and doth tan the ſame, and not being ſuch perſon as doth taw the ſame," did bargain, buy, &c. The fifth ſect. of this ſtat. enacts, that no perſon ſhall tan any leather, or uſe, take, or have any profit, gain, or commodity, of, or by, the ſaid craft or myſtery of tanning of leather, " except ſuch perſon or perſons, &c. ſpecifying them. Several objections were taken to this conviction, one of which was, that the information did not negative the exceptions contained in the enacting clauſe, ſect. 5. And the counſel for the proſecutor, admitted that this defect could not be got over; for that the diſtinction had always been allowed between an exception in the enacting clauſe (1), creating the forfeiture, and a ſubſequent proviſo in the ſtatute; and that the exceptions in this caſe were of the former kind, by reaſon of the words in the enacting clauſe (ſect. 7.), " but only ſuch perſons as by virtue of this act may lawfully, &c." referring to the exceptions contained in the former ſect. 5. —*The Court*, being of this opinion, quaſhed the conviction.

Where a conviction by a juſtice is grounded upon an information taken at a time paſt, ſuch conviction may ſtate that the informer came and gave the juſtice to be informed, in the preter-perfect tenſe. The King v. Hall. Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 320.

And the offender ſhould be called on to plead to the charge, before any evidence in ſupport of it is given; but if the evidence be given firſt, though not in his preſence, and he confeſs the offence, the irregularity is cured.

Alſo where the proſecutor is not obliged to negative the exceptions in a ſtatute, and negatives ſome of them only, that part of the information will be rejected as ſurpluſage.—

This was a conviction on the 22 *Car.* 2. c. 1. for ſuffering a meeting, and unlawful aſſembly of divers perſons to be held in his dwelling-houſe, for the exerciſe of religious worſhip in other manner than according to the liturgy and practice of the church of England, not being certified to the biſhop of the dioceſe, or to the archdeacon of the archdeaconry, or to the juſtices of the peace at their general or quarter-ſeſſions of the peace for the parts and county in which the ſaid meeting was held, nor regiſtered in the ſaid biſhop's or archdeacon's court, nor recorded at the ſaid general or quarter-ſeſſions, againſt the form of the ſtatutes, &c. The objections taken to this conviction, were, 1ſt. That the information was not in the preſent tenſe. It being ſtated that *the informer came before the juſtice, and gave him to underſtand, &c.* 2dly. That it appeared that the evidence was not given in the preſence of the defendant, which it ought to have been; to this it was anſwered that he

(1) *Vid. R.* v. *Sparling*, 1 *Str.* 497; and *R.* v. *M. Jarvis*, 1 *Burr.* 148; 153.

had

had appeared and pleaded guilty. 3dly. That though this is charged as an offence againſt the ſtat. 22 *Car.* 2. only, yet it concludes contrary to the form of the ſtatutes. 4thly. That the information does not contain a charge within the ſtat. of the 22 *Car.* 2. c. 1. upon which the juſtice profeſſes to convict; for though it profeſſes to ſet out an offence againſt the 22 *Car.* 2. yet it is not confined to that ſtatute only, but negatives ſeveral exceptions in the ſtat. 1 *W.* and *M.* c. 18. It was therefore urged, that though it were not neceſſary for the proſecutor to negative any of the exceptions under the latter act, yet having undertaken ſo to do, the omiſſion of any one was fatal; and here the information had omitted, that in the third ſection, as it was not ſtated, "that he did not take the oaths, "and ſubſcribe the declaration, &c." by which he would have been indemnified. *The Court* ſaid, that none of the objections were ſufficient in point of law. As to the FIRST, they ſaid that the words objected to were better in the paſt than in the preſent tenſe; becauſe they referred to a time paſt, namely, the time of making the information. That the SECOND was cured by the defendant's having pleaded guilty. And as to the THIRD and laſt, they ſaid, that this was a conviction on the 22 *Car.* 2. therefore the proſecutor need not have negatived any of the exceptions in the ſtat. 1 *W.* and *M.* c. 18; and that they might be rejected as ſurpluſage. For if a ſubſequent ſtatute make an exception to a former one, it is incumbent on the defendant to ſhew, by way of defence, that he comes within ſuch exception. And beſides that, the 13th ſection of the 22 *Car.* 2. directs, "that that "act ſhall be conſtrued moſt largely, and that no proceed-"ings thereupon ſhall be reverſed, avoided, or impeached, "by reaſon of any default in form."

Rex. v. Vipont *et al.* Ea. Ter. 1 Geo. 3. B. R. 4 *Burr.* 1163.

The evidence in ſupport of a conviction, ought to be taken in the defendants preſence, and the juſtices muſt, at the ſame time, adjudge the forfeiture.—This was a conviction of certain journeymen wool-combers, for "that they had "agreed one amongſt another, and with other journeymen "wool-combers, to raiſe and advance their wages, and "that they would not work with the proſecutor, unleſs "he and they would advance their wages."—On behalf of the defendants, it was objected, 1ſt. That no evidence was ſtated to have been given in the preſence of the defendants; it was only, that the charge was read to them, in the preſence of the proſecutor, *Thomas Eaton*, the witneſs. 2dly. That this fact, as charged, was not an offence within the ſtatute, becauſe they were not formed into *unlawful clubs, or unlawful ſocieties abroad*, and there was no written agreement of the reſolution among them. 3dly. That there was no judgment; it being only ſaid, "that they are convicted for "unlawfully entering into ſuch combination." It ought to proceed

proceed "*quod foris faciat*," and expreſsly adjudge the forfeiture, and for this were cited, 2 *Strange*, 858; *Fitz. G.* 124. —THE COURT immediately over-ruled the ſecond objection, as a frivolous one, and not to be ſeriouſly ſupported. AND PER Lord MANSFIELD, after argument: The firſt and third objections are fatal. 1ſt. The evidence ought to be taken over again, in a defendant's preſence, unleſs he confeſſes. Here they do not confeſs, the evidence only was, "that they had formerly confeſſed this combination to the "witneſs." In a conviction, the evidence muſt be ſet out, that the Court may judge of it; and it muſt be given in the preſence of the defendant, that he may have an opportunity of croſs-examining. 3d Objection—Here, the puniſhment is under the ſtatute diſcretionary as to the length of the time of impriſonment, viz. for any time not exceeding three months (vide 12 *Geo.* 1. c. 34.); and here is no judgment at all, only a conviction. They ought to have gone on, and adjudged the forfeiture. Therefore, on both theſe objections, this conviction ought to be quaſhed; for, however uſeful a ſtatute this may be, for the benefit of trade, yet the juſtices muſt convict according to law. Mr. Juſtice DENISON concurred, and ſaid, as to the 3d objection, the time, the duration of the commitment, ought to be aſcertained upon the conviction. The ſtatute does not fix it, it only ſays, "for "any time not exceeding three months." Mr. Juſtice WILMOT alſo ſaid, 1ſt. That the witneſſes ought to be examined in the preſence of the party accuſed; that he may have the benefit of croſs-examination. And as to the 3d objection—That a conviction is equal to a verdict and judgment; but this was a verdict without a judgment.—Conviction quaſhed.

So alſo in this caſe, a conviction of a clergyman, before a juſtice of the peace, upon 19 *Geo.* 2. c. 21. ſ. 13. for neglecting to read the act to prevent profane curſing and ſwearing, was quaſhed, becauſe the evidence was not ſtated and ſet out, ſo as that the Court could judge of its ſufficiency. For THE COURT held, that the evidence ought to be ſet out. They ſaid, this was clearly ſo ſettled in *Rex* v. *Biſſex*, Trin. 1756, 29 and 30 G. 2. in this Court. Whereas, here it is only ſaid, "the ſame, as ſet forth, being duly proved." *V.* 10th *Mod.* (*Lucas*'s Reports) 213. *Queen* and *Green*, *B. R. Hill.* 12 *Ann.* "It ought to appear to the Court, from the "nature of the evidence, ſpecially ſet forth, that the defend-"ant was guilty." See alſo the caſe of *Rex* v. *Vipont et al*, *P.* 1 *G.* 3. So it was alſo ſettled in the caſe of *Rex* v. *Lloyd*, *M.* 8 *G.* 2 *B. R.* which is reported in 2 *Str.* 999. and was cited and relied on by Mr. Juſtice *Deniſon* in delivering the reſolution of the Court in the caſe of *The King* and *Biſſex*; where he declared, that the caſe of *The King and Queen*

Rex v. Killett, clerk, Ea. Ter. 7 Geo. 3. B. R. 4 *Burr.* 2063.

againſt *Pullen and others* (of oath made *de veritate præmiſſorum* generally, without ſetting it forth ſpecially, being ſufficient in convictions), is not law now; it having been, ſince that caſe, quite ſettled, "that, *upon a conviction, it is neceſſary* "*that the evidence ſhould be ſet out, that the Court may judge* "*whether the juſtices have done right*;" but, upon an order, it is not neceſſary; becauſe the Court will preſume that they have done right.

The King *v.* Read, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 485.

So alſo in this caſe, where the conviction runs, *whereupon witneſſes being examined on oath*, and the ſaid *William Read* having neglected or refuſed to attend, &c. I do accordingly adjudge and convict, &c. THE COURT ſaid, that the conviction could not be ſupported, the evidence not being ſet forth.

Rex *v.* Kempſon, Hil. Ter. 15 Geo. 3. B. R. *Cowp.* 241.

But if enough appears on the face of the conviction, to ſhew that the evidence was given in the preſence of the defendant, it is ſufficient, without ſtating that he was actually preſent at the time. In this conviction, the appearance of the defendant and the evidence were ſet forth as follows: "Afterwards upon the aforeſaid day, and in the year aforeſaid, he, "the ſaid *Samuel Kempſon*, having been duly ſummoned, *appeareth*, and *is here preſent* before me, in order *to make his* "*defence* againſt the ſaid charge and information, and *having* "*heard the ſame*, &c. pleadeth not *guilty*, &c. nevertheleſs, "on the ſaid 14th day of September, one credible witneſs, "*R. C.* now cometh before me, &c." The objection taken to this conviction was, that it did not appear that the *evidence* was given *in the preſence* of the defendant. SED PER CUR. Enough appears upon this conviction to ſhew, that the witneſs was examined in the preſence of the defendant, it muſt be ſuppoſed, that all that paſſed was at one and the ſame time.—Conviction affirmed.

The King *v.* Jeffries, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 241.

The evidence muſt, however, ſtate the offence to have been committed where it is laid.—This was a conviction on the lottery-act, 22 *Geo.* 3. c. 47. before two juſtices. The information charged, that on the 10th of March, 1786, the defendant did, in Great Queen-ſtreet, in the pariſh, &c. take, &c. And the evidence was, that, "*Thomas Jacſon*, on the 10th of March laſt, inſured perſonally with the ſaid *Thomas Jeffries*," &c. It was objected, that the evidence did not prove the offence to be committed in the place laid in the information, which it ought to have done; for wherever the juriſdiction of the magiſtrates who try the offence is local, the offence muſt be proved to have been committed within their juriſdiction. And of this opinion were the Court.—Conviction quaſhed.

The King *v.* Henry Salomons, Ea. Ter. 26 Geo. 3. B. R. 1 *Ter. Rep.* 249.

A conviction for the ſaid offence, where there are two diſtinct offences charged in the information, is bad.—This was a conviction on the lottery-act of 22 *Geo.* 3. c. 47. which charged

charged that the defendant did keep an office for dealing in ſhares of lottery-tickets; to wit, the ſhare of a ticket numbered 34,907, without the authority of a licenſe: and that he did keep an office for regiſtering the numbers of lottery-tickets, and did then and there take and receive three ſhillings, &c. for the regiſtering of a lottery-ticket, without the authority of a licenſe, &c. The conviction, after having ſtated the evidence, proceeded: "Whereupon, as it manifeſtly "appears to us the ſaid juſtices that the ſaid *Henry Salomons* "is guilty of the offence charged upon him in and by the "ſaid information, it is therefore adjudged by us that he be "convicted, and he is hereby convicted by us the ſaid juſ-"tices, of the ſaid offence charged upon him in and by the "ſaid information, according to the form of the ſtatute in "that caſe made and provided, &c." Several objections were taken to this conviction, BUT THE COURT ſaid, that it was bad on another ground, for there was a duplicity of charge. The defendant is charged with *dealing in ſhares of lottery-tickets*, AND *with regiſtering tickets without licenſe*, and he is convicted of the ſaid offence, ſo that it does not appear of what offence he is convicted. A conviction muſt be good in all its parts; the information muſt be ſupported by the evidence, and the judgment muſt be ſupported by both. Here the defendant is charged with two diſtinct offences, each of which would ſubject him to a ſeparate penalty; and ſuppoſing they could both have been included in one conviction, which is to be doubted, the defendant ſhould have been convicted of both. A judgment for too little is as bad as a judgment for too much. Conviction quaſhed.

Where juſtices of the peace are required by a penal ſtatute to diſtribute the penalty on conviction among certain perſons according to their diſcretion, an adjudication that the forfeiture be diſpoſed of as the law directs, is bad. Theſe defendants were ſeverally convicted before three juſtices, upon 26 *Geo.* 3. c. 10. for refuſing to receive ſoldiers regularly quartered and billeted upon them. Each of the convictions concluded as follows, "and we do adjudge that, for the "offence aforeſaid, he, the ſaid defendant, hath forfeited the "ſum of 5*l.* of lawful money of Great Britain, to be diſ-"poſed of as the law directs." It was objected, that there was no diſtribution of the penalty by the juſtices; and that the penalty is directed (1) to be applied, in the firſt place, to make ſatisfaction to the ſoldier for any expence he may have been put to, by reaſon of his not being billeted as the juſtices ſhall direct, and the remainder is to be paid to the overſeers of the poor of the pariſh. PER CUR. A judgment is an entire thing; and one part of it cannot be given

The King *v.* Dimpſey and the ſame *v.* Potts, Softly, and Wood, Mic. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 96.

(1) *S.* 66.

at one time, and another at a ſubſequent period. The diſtribution of the penalty is part of the judgment, and it ought to appear on the record.—Conviction quaſhed.

The King v. W. Prieſt, Hil. Ter. 36 Geo. 3. B R. 1 *Ter. Rep.* 538.

A conviction, adjudging a diſtribution of part of a forfeiture (which a ſtatute ſays ſhall be paid to the overſeers of the poor of the pariſh, for the uſe of the poor of the pariſh) to the overſeers of the poor of a townſhip, cannot be ſupported.—The defendant was convicted in the penalty of 40*s.* by a magiſtrate on the mutiny-act, 35 *G.* 3. c. 6. ſ. 68. for refuſing, by the ſpace of two hours, to billet one *T. Bates*, then being a ſoldier in his majeſty's ſervice, at Ulleſthorpe. That ſection enacts that every perſon offending, &c. ſhall forfeit 5*l.* or any ſum not exceeding 5*l.* nor leſs than 40*s.* as the juſtice ſhall think fit, to be levied by diſtreſs and ſale, &c.; and applied, in the firſt place, in making ſuch ſatisfaction to any ſoldier for the expence he may have been put to, &c. as ſuch juſtice ſhall order and direct, and the remainder ſhall be paid to the overſeers of the poor of the pariſh where the offence is committed, for the uſe of the poor of the ſaid pariſh. The 85th ſect. preſcribes a ſhort form of conviction, which concludes thus: "It is therefore conſidered and adjudged, by me, the ſaid juſtice, that the ſaid *A. B.* be convicted, and I do hereby convict him of the offence aforeſaid; and I do hereby declare and adjudge that the ſaid *A. B.* hath forfeited the ſum of —— for the offence aforeſaid, to be diſtributed as the law directs, according to the ſtatute in that caſe made and provided." In this caſe the adjudication of the forfeiture was as follows, "And I do hereby adjudge, order, and direct, that out of the ſaid ſum of 40*s.* ſo forfeited as aforeſaid, the ſum of 15*s.* be applied in making ſatisfaction to the ſaid *T. Bates*, for the expence he has been put to by reaſon of his not being billeted as aforeſaid; and that 25*s.* the remainder of the ſaid 40*s.* be paid to the overſeers of the poor of the townſhip of Ulleſthorpe aforeſaid, or to ſome one of them, for the uſe of the poor of the ſaid townſhip, according to the ſtatute in that caſe made and provided," &c. It was objected to the conviction, that it was not according to the form preſcribed by ſect. 85.; and becauſe the diſtribution of the penalty was not warranted by the act. Lord KENYON, Ch. J. When a form of conviction is preſcribed by a ſtatute, it is moſt ſafe in general to adopt the very words uſed: but taking the whole of this act of parliament together, the legiſlature could not intend that there ſhould be a literal adherence to the form preſcribed. The 68th clauſe points out the manner in which the forfeiture ſhall be diſtributed, namely, ſuch part of the ſum to the party grieved for expences, &c. as the magiſtrate ſhall direct, and the reſt to the overſeers of the poor of the pariſh for the uſe of the poor of the ſaid pariſh. If, therefore, the magiſtrate in this caſe had only made this addition

addition to the form of conviction prescribed by the subsequent clause (sect. 85.), the conviction might have been right. But I am of opinion, that the other objection, the distribution of the forfeiture to the poor of the township, is fatal.—Conviction quashed.

The King v. J. A. Harris, Ea. Ter. 37 Geo. 3. B R. 7 *Ter. Rep* 238.

If a conviction do not state an adjudication, it cannot be supported, whether the punishment be or be not fixed by the statute. This was a conviction on the stat. 1 *Jac.* 1. c. 27. for killing two hares with a gun. The conviction, after setting forth the information, summons, plea, and the evidence, concluded thus, "Whereupon, &c. it appears to us, "the said justices, that the said *J. A. Harris* is guilty of the "offence charged upon him in and by the said information; "and thereupon it is considered and adjudged by us, the said "justices, that the said *J. A. Harris* be convicted, and he is "hereby convicted by us, the said justices, by the testimony "of, &c. of the offence charged upon him in and by the said "information, according to the form of the statute in such "case made and provided." By the stat. 1 *Jac.* 1. c. 27. s. 2. every person who shall shoot at, kill, or destroy with any gun, &c. any hare, &c. (the same being proved, &c. before two justices, &c.) shall be by the said justices committed to the common gaol of the said county, &c. for three months, unless the offender forthwith, upon conviction, pay to the churchwardens of the parish where the offence is committed, or the party apprehended, to the use of the poor of the said parish, the sum of 20*s.* for every hare, &c. It was intended to take several objections to this conviction: 1st. That the stat. 1 *Jac.* 1. c. 27. was in this respect virtually repealed by the stat. 22 & 23 *Car.* 2. c. 25. But Lord Kenyon, Ch. J. said, Without agitating the question respecting the repeal of the statute of *James*, that he was clearly of opinion that the conviction could not be supported for want of an adjudication. Before the case of *R.* v. *Vipont* (1), there had been determinations both ways; but in that case it was clearly settled that this was a fatal objection. I have rather a fuller manuscript of that case than is to be found in *Burrow's Reports:* and according to that, Wilmot, J. said, "The other objection, for want of an adjudication, is still more material. A conviction is in the nature of a verdict and judgment, and therefore it must be precise and certain. And notwithstanding some old cases in *Salkeld* (2), and in other books, to the contrary, I take it that the judgment is an essential point in every conviction, let the punishment be fixed or not. And so it was held in *R.* v. *Hawkes* (3), on a

(1) 2 *Burr.* 1163. and p. 608, *ante.* (2) Vid. *R.* v. *Chandler*, *Salk.* 378.
(3) Vid. 2 *Str.* 858.

conviction for deer-ſtealing, though the penalty there was fixed at 50*l.* certain; and in that caſe Mr. *Fazakerly* cited two caſes to the ſame effect. This matter alſo came before the Court in Tr. 9 *Geo.* 1. on a conviction on the ſtat. 1 *Geo.* 1. c. 48. and there the conviction was only *ideo conſideratum eſt quod convictus eſt, &c.*; and though that point was not there decided, it appears to have been the ſenſe of the court that the conviction was bad for that reaſon. That caſe is reported in Modern Caſes in Law and equity (1); but it is totally miſtaken there, as indeed are nine caſes out of ten in that book. Therefore, without conſidering the virtual repeal of the ſtatute of *James*, which I deſire to leave untouched, I am clearly of opinion that this conviction cannot be ſupported for want of an adjudication. *Per Curiam* —Conviction quaſhed.

Rex *v.* Abraham Hall, Ea. Ter. 14 Geo. 3 B. R. *Coup.* 60.

And where coſts are to be paid by offenders, they muſt be aſcertained in the conviction.—The defendant was committed by a warrant of one juſtice, which ſtated a conviction of the defendant under the ſtat. 6 *Geo.* 1. c. 48. ſ. 1. for cutting down and carrying away an aſh timber tree, for which offence, being the firſt, the ſaid juſtice had ordered the defendant to forfeit and pay down the ſum of 15*l. together with the charges previous to* and attending ſuch conviction, which he refuſed to pay; and the commitment was to the common gaol for nine months, OR until the ſaid forfeiture or ſum of 15*l. together with the charges previous to* and attending the ſaid conviction ſhould be paid. The defendant being brought up by *habeas corpus*, it was objected that the conviction did not aſcertain any ſum for coſts or charges, and that therefore the time of impriſonment was uncertain. PER CURIAM, This conviction cannot be ſupported, the principal judgment is a penalty in a certain ſum of money, and impriſonment is a coercion of the payment; but while the ſame remains uncertain, the defendant cannot be releaſed; therefore, let the conviction be quaſhed, and the defendant diſcharged.

The King *v.* John Reaſon, Tr. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 375.

If juſtices of the peace acquit a defendant, againſt whom an information is laid before them for a penalty, the judgment cannot be reverſed, though the juſtices ſtate (on a return to a *certiorari*) evidence which *primâ facie* is ſufficient to convict. An information for uſing brimſtone in the drying of hops (2), having been exhibited againſt this defendant, the magiſtrates before whom it was laid made a return to the *certiorari*; which (after ſetting forth the informa-

(1) Vid. *R.* v. *Aſhton*, 8 *Mod.* 175.
(2) Which is an offence againſt the ſtat. 7 *Geo.* 2 c. 19. ſ. 2.

tion

tion and plea, and alſo very clear and preciſe evidence to ſhew that the defendant had uſed brimſtone for the purpoſe of giving the hops a better colour) proceeded: but becauſe the informer *(W. S.)* does not produce any other evidence before us, the ſaid juſtices, againſt the ſaid *J. Reaſon*, and becauſe all and ſingular the premiſes being heard and fully underſtood by us the ſaid juſtices, it manifeſtly appears to us that the ſaid *J. Reaſon* ought not to be convicted of the premiſes above laid to his charge in and by the ſaid information of the ſaid *W. S.* or of any part thereof; therefore it is conſidered by us, the ſaid juſtices, that he be acquitted of the premiſes above laid to his charge in and by the ſaid information of the ſaid *W. S.* and he is thereof acquitted by us the ſaid juſtices accordingly. PER CURIAM, The evidence given was entirely and excluſively for the conſideration of the juſtices below, who were placed in the ſituation of a jury; and as they have acquitted the defendant, this Court cannot ſubſtitute themſelves in the place of the juſtices acting as jurymen, and convict him. We cannot judge of the credit due to the witneſſes whom we did not hear examined. We can only look to the form of the conviction, and ſee that the party, if convicted, has been convicted by legal evidence. And we muſt conſider on this return that the magiſtrates determined on the facts, and not on the law of the caſe as diſtinguiſhed from the facts.

Copyhold.

How created.

A copyhold cannot be created by operation of law, but muſt have been demiſed or demiſable by copy time out of mind. Revell *et al. v.* Jodrell, Ea. Ter. 28 Geo. 3 B. R. 2 *Ter. Rep.* 415.

Alſo by a grant of a manor, with an exception of the waſtes, they are thereby ſevered from the manor, though the copyholders continue to have a right of common thereon by immemorial cuſtom.

And after a grant of the ſoil of thoſe waſtes to truſtees for the uſe of the copyholders in fee-ſocage, the lands, when incloſed, will be freehold, and not copyhold.

This was an iſſue directed under an incloſure act, 26 *Geo.* 3. c. 57. (1), to try whether the allotments made to copyholders, in reſpect of their copyholds, on two commons called Belperward and Chevinward, were freehold or copy-

(1) Private act.

hold. On the trial of the cauſe a verdict was taken for the plaintiffs by conſent, the parties intending to take the opinion of this Court upon a motion for a new trial: but by the direction of the Court the facts were put into the form of a ſpecial caſe; which ſtated the act of parliament, reciting that diſputes had ariſen between the defendant, as lord of the manors of Duffield and Belper, in the county of Derby, where the commons in queſtion lie, and the plaintiffs, copyholders of the ſaid manors, reſpecting the tenure under which the incloſed lands would be holden by them, and directing the queſtion to be tried in a feigned iſſue. The caſe alſo ſtated that on the 25th September, 1629, 4 *Car.* 1. the king granted to *Edward Titchfield* and others, and their heirs, &c. the manors of Duffield and Belper, with all their rights, &c. except [*inter alia*], always and altogether reſerved unto the king, his heirs, and ſucceſſors, all and ſingular foreſts, and chaſes, and all parks, &c. Under thoſe grantees the defendant is well entitled to the abovementioned manors. In the 6th of *Car.* 1. an information was filed by the attorney-general in the duchy court of Lancaſter, againſt the earl of Newcaſtle and others, ſtating that the king was ſeiſed of the foreſt or chaſe of Duffield, of which theſe wards were part, and was deſirous to approve, but that the defendants claimed ſome eſtate or common therein: The defendants in their anſwers admitted the king's ſeiſin of the land, and diſclaimed all intereſt therein but rights of common as appendant or appurtenant to their copyholds in the manors of Duffield and Belper, for all cattle, &c. *levant* and *couchant*; and that theſe wards had been parcel of the manor of Duffield till the time of the grant abovementioned. On the 27th March, 6 *Car.* 1. a commiſſion iſſued to treat with the defendants in that information; and it was mutually agreed that the king ſhould have one-third part of thoſe wards in ſeveralty, and the commoners the other two-third parts. In conſequence of which, on 21ſt November, 9 *Car.* 1. a decree was made in the ſaid cauſe, reciting the information, and commiſſion, &c.; and it was decreed, that the king ſhould have one-third part of the ſaid wards, diſcharged of all rights of common, &c. and that the commoners, in lieu of their common which they had formerly enjoyed upon the whole of the ſaid wards, ſhould have, hold, and enjoy for ever, the other two parts of the ſaid wards to them and their heirs, and all cottages and buildings upon the ſame, together with the ſoil of all the highways leading through the ſame, leaving free paſſage, &c. at and under certain yearly fee-farm rents therein expreſſed; and that his majeſty ſhould not from thenceforth have or claim any right, title, or intereſt, to the ſaid two parts of the ſaid wards, ſaving ſuch rents. And it was further decreed, that the ſoil of the ſaid two parts of each ſeveral ward

ſhould

ſhould be granted with all convenient ſpeed to *John Oſborne* and others, &c. and their heirs, for the uſe and benefit of the ſaid commoners, and their heirs, in fee-farm and fee-ſocage, as of his majeſty's manor of Enfield, in the county of Middleſex. And reciting likewiſe, that the king had ſignified his deſign to his chancellor to grant to *Edward Sydenham*, eſq. his third part of the ſaid wards in fee-farm; it was further decreed, that upon ſuch grant there ſhould be paid the reſerved rent of 40*s.* in the proportion therein ſpecified. Accordingly, on the 2d of September, 10 *Car.* 1. the king by letters patent, granted the ſaid two parts to the truſtees and their heirs as had been decreed. In 1670, 22 & 23 *Car.* 2. a private act was paſſed, intituled, An Act for ſettling an Agreement between Sir *William Smith*, and Sir *Thomas Hooke*, and *German Pole*, and others, which, after reciting that Sir *William Smith* and Sir *Thomas Hooke* were ſeiſed in moieties in fee-ſimple of 1350 acres in theſe wards, being parcel of the manor of Duffield, &c.; and that certain copyholders and freeholders, having right of common, &c. a decree had paſſed [as before]; and reciting, that diſputes had ariſen between the ſaid Sir *William Smith*, *John Fell* (from whom Sir *Thomas Hooke* claimed), *German Pole*, and other commoners, concerning the ſaid commonage; and that the decree made in the duchy court was confirmed about 16th July, 1660; but the ſaid *German Pole*, and ſome others of the commoners, not being ſatisfied, &c. for further and final ſatisfaction, Sir *William Smith* and Sir *Thomas Hooke* had conveyed one-fifth part of the 1350 acres to *German Pole* and others in truſt for the commoners, and by them quietly enjoyed ever ſince, confirmed the ſaid decree, and the conveyance of the fifth part to the uſe of the commoners; and enacted, that the reſt of the lands, as they were ſet out and held in ſeveralty by the ſaid *Smith* and *Hooke*, ſhould be held by them free from all right of common. But there is a ſaving in the act of the rights of all perſons not privy to the agreement. It was admitted between the parties in the preſent cauſe, that the right of common of the free holders and copyholders within the manors of Duffield and Belper on theſe two wards, was eſtabliſhed by a decree in the duchy court in 20 *Eliz.* and that the copyholders have immemorially enjoyed and ſtill have ſuch right. As to the reſpective acts of ownerſhip, the plaintiffs proved a ſeries of receipts for a century paſt, of coal-pit rents, and cottage rents, and rents for encroachments on theſe wards, which were applied to the poor rates; and that perſons had from time to time been put by them into the vacant cottages on the commons. On the other hand, the defendant gave in evidence various preſentments and orders at the court-leet and court-baron, reſpecting nuiſances, encroachments, &c. on theſe wards, from 1629 down to 1726; two

two or three cottage rents received ſince 1754; and waifs and eſtrays taken as far back as 1749. The caſe was very fully argued, and THE COURT took time to conſider; afterwards ASHHURST, J. delivered the opinion of the Court in the following manner:—In the firſt place it appears, from the ſtate of the caſe, that theſe two wards being reſerved out of the grant to *Titchfield*, and others, under whom the defendant claims, were ſerved from the manor, and have never ſince been a part of it. In the next place, it appears, that upon the ſubſequent litigation in the duchy court, and the decree in conſequence, it was ſettled and decreed, that the king was to have one-third of thoſe two wards, and the commoners the other two thirds, together with all cottages, &c. in lieu of their rights of common; and that the ſame ſhould be conveyed to truſtees for the uſe and benefit of the commoners and their heirs, under a fee-farm rent of 40*s*. And the king, by his letters patent, granted the ſame accordingly. It is plain, therefore, that it was the intention of the decree, that the commoners ſhould have an equitable intereſt in the whole freehold and inheritance of theſe two wards, in full right; and the legal intereſt was accordingly granted to their truſtees; and it was not meant that they ſhould merely have a right of commonage, for it expreſsly declares, that they ſhall have a right to all the cottages and buildings. But it is ſaid that the lord was not a party to theſe proceedings, and therefore was not bound by them. Had that objection been made recently, it might have admitted of ſome argument; but after ſuch a length of acquieſcence as 150 years, without taking any legal ſteps to have the matter ſet right, an aſſent on the part of the lords may fairly be preſumed. And as to any acts of aſſertion of right, they are very inconſiderable when compared with thoſe which have been exerciſed on the part of the plaintiffs. But laying this out of the caſe, there can be no doubt upon the iſſue now before us; for the queſtion is, WHETHER BY OPERATION OF LAW THESE ALLOTMENTS MADE TO THE COPYHOLDERS, SHALL BE FREEHOLD OR COPYHOLD? Now, in order to decide that queſtion, it is only neceſſary to conſider what is the nature of a copyhold, and what are the incidents inſeparable from it. It is held clearly, that *a copyhold muſt be time out of mind, and cannot begin at this day*. *Co. Lit.* 58. *b*. And agreeable to this is the caſe of *Kempe* v. *Carter*, 1 *Leon.* 55. In an action of treſpaſs the iſſue was, if the lord of the manor granted the lands in queſtion by copy of court roll, according to the cuſtom of the manor: it was proved that the lord had of late granted the lands by copy of court roll, where it was never granted by copy of court roll before; and it was holden, that the jury were bound to find *dominus non conceſſit*; for notwithſtanding that *de facto*

facto dominus conceſſit, yet not *conceſſit ſecundum conſuetudinem manerii*; the ſaid land was not cuſtomary, nor was it demiſeable, for the cuſtom had not taken hold of it. Then was the land now in queſtion ever demiſed, or demiſeable; and had the cuſtom of the manor ever taken hold of it? It clearly had not. Then it never can be copyhold, and of courſe muſt paſs as freehold. But it is argued, that this ſhall become copyhold by operation of law, as the acceſſary muſt always follow the nature of its princip l. But the misfortune is, that there is no inſtance ſhewn, in which a copyhold was ever created by operation of law; and for this plain reaſon, that a copyhold is not a creature of law, but of fact; it muſt have cuſtom to ſupport it, and cannot be created by any other mode, unleſs an act of parliament, which might operate as an eſtoppel to any man to ſay that it had not exiſted time out of mind. And the defendant himſelf, and thoſe who were concerned for him, were ſo perfectly well aware of this, that in this very act of parliament, as to other parts of the common, which were his own waſtes, and which were intended to be allotted to the commoners, care has been taken to inſert a ſpecial proviſion, that they ſhall be deemed and taken to be copyhold, and they very wiſely would not truſt to the operation of law. Therefore, on the whole, we are very clearly of opinion, that there muſt be judgment for the plaintiffs.—Poſtea to the plaintiffs. See alſo the caſe of *Townley* v. *Gibſon*, under title INCLOSURES, where Lord KENYON laid it down as "extremely clear, that no new tenure can be created, unleſs by the authority of parliament."

Deſcent of a Copyhold.

A cuſtom within a manor, that lands ſhall deſcend to the elder ſiſter, where there is neither a ſon nor a daughter, does not extend to an eldeſt niece; but the lands muſt deſcend according to the rules of the common law, in default of ſuch a ſon, daughter, and ſiſter; and a cuſtomary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from ſteward to ſteward, although not ſigned by any perſon, is good evidence to prove the courſe of deſcent within the manor.—This was an ejectment for copyhold lands lying in the manor of Bolſover, in the county of Derby. Three ſeveral demiſes were laid in the declaration, one by *Ann Goodwin*, of one undivided third part; another by *Wragg*, and his wife, for an undivided third part; and another by them, and *Ann Goodwin*, for two undivided

Denn, on the ſeveral Demiſes of Ann Goodwin, and George Wragg, and Ann his Wife, v. Spray. Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 466.

undivided third parts. On the trial of the cafe, a verdict was taken for the leſſors of the plaintiff, ſubject to the opinion of the Court on a caſe reſerved.—" *Joſeph Stanley* was " ſeiſed of this copyhold eſtate, and died inteſtate, and without iſſue, leaving one niece, the abovenamed *Ann Wragg*, " and the repreſentatives of two other nieces, who died before him, namely, the abovenamed *Ann Goodwin*, only " child of *Mary*, his ſecond niece, and the defendant *Joſeph Spray*, the eldeſt ſon of *Elizabeth*, his eldeſt niece; which " three nieces were the daughters and only children of *Thomas Stanley*, who was the eldeſt brother of the ſaid *Joſeph Stanley*, and who died in his life-time. The defendant is " now in poſſeſſion of the whole eſtate, and claims to be " heir according to the cuſtom of the manor. A parchment-" writing was produced, by Mr. *John Gladwin*, the ſteward " of the manor, as the cuſtomary of the manor. Mr. " *Gladwin* had been ſteward for five years; he was clerk " to Mr. *Dakin*, his immediate predeceſſor, who became " ſteward in the year 1748, and had the poſſeſſion of the " cuſtomary all that time, and had received it from Mr. " *Robert Wilmet*, the preceding ſteward. The parchment " writing bears no date, and begins thus—Bolſover—*Cum de* " *concilio domini regis ex aſſenſu omnium tenentium et ſummonitorum manerii dicti domini regis de* Bolſover *de modo tenuræ ſuæ* " *ad ſpecialem rogatum inſcriptis expreſsè ordinatum eſt, prout* " *patet in ſequenti, prout anteceſſores ſui a tempore* Gulielmi *conqueſtoris tenere conſueverunt; quæ quidem ſcripta omnibus hominibus hujus manerii et hæredibus de ſe provenientibus in ſeculum remanebunt inperpetuum.*—Art. 5. *Item, omnes terræ et* " *tenementa poſt mortem cujuſlibet tenentis infra dominicum prædictum per* Bedellum *villæ debent ſeſiri et remanere in manu* " *domini cum omnibus proficuis de ſe provenientibus, quousque* " *proximus hæres ſatisfaceret domino regi* 5s. 4d. *pro relevio ſuo,* " *et faceret fidelitatem in plenâ curiâ, quia nulla tenementa hujus* " *manerii ſunt partibilia nec inter hæredes maſculos nec fœmellas.* " —Art. 13. *Item, ſi aliquis tenens hujus manerii obierit, filius* " *ſuus primogenitus et legitimè procreatus habeat hereditamenta, et* " *dabit domino regi* 5s. 4d. *pro relevio ſuo; et ſi contingat alicui* " *tenenti quod non habeat filium, filia ſua ante nata habeat hæreditatem ſuam, abſque partitione, præter dotem, et dabit domino* " *regi* 5s. 4d. *pro relevio ſuo, ſicut filius primogenitus faceret.*— " As to daughters, an entry was read from a court-book, " dated the 17th of June, 1734, by which it appeared that " *Ann*, the wife of *Joſeph Williams*, claimed in open court, " as eldeſt daughter and heir of *John Palmer*, all ſuch cuſ-" tomary lands, &c. as deſcended to her on her father's " death; to which ſhe was admitted, according to the cuſ-" tom of the manor, &c."—It was admitted, that there were ſeveral entries before and after the above of the eldeſt daughter

daughter and heir; and the plaintiff's counſel did not controvert the fact, that the cuſtom extended to daughters. To ſhew that the cuſtom extended to ſiſters, another court-book was produced, from which the following entries were taken: June 9th, 646. *Bolſover*. The court of the manor of the marquis of *Newcaſtle*, &c. The jury, ſworn to enquire for the lord of the ſaid manor, ſay as follows; 1ſt, That *Wm. Springfellow*, who whilſt he lived held to him and his heirs of the lord of the ſaid manor a meſſuage, and certain lands in Clown, by the yearly rent of 5*s.* 4*d.* fealty, and ſuit of the court, ſince the laſt great court held here died ſo ſeiſed thereof, and that *Helena* (wife of *John Pinns*, of *Mansfield*) is the eldeſt ſiſter and heir of the ſaid *William*, and of full age, whereby falls to the lord for relief 5*s.* 4*d.* Then at another court, entitled court-leet of the king, and great court of the manor of the marquis of *Newcaſtle*, 28th October, 1046. At this court came *Eleanor Pinns*, wife of *John Pinns*, in her proper perſon, and here in full court, humbly begs to be relieved out of the hands of the lord, all and ſingular cuſtomary meſſuages, cottages, tenements, and hereditaments, in Clown, or elſewhere, within the manor, of which *William Springfellow*, her brother, died ſeiſed, which after the death of the ſaid *William* deſcended to her, *jure hereditatis*, according to the cuſtom of the ſaid manor; to which ſaid *Ellen*, the lord, by his ſteward, grants thereof ſeiſin by the rod, according to the cuſtom of the manor aforeſaid, to hold to her, her heirs and aſſigns, according to the cuſtom of the manor of the ſaid lord and his heirs, by the rents, &c. accuſtomed, and gives to the lord for relief 5*s.* 4*d.* and ſo is admitted tenant thereof. It was admitted, that there were three other entries as to the eldeſt ſiſters, and not diſputed, but that the cuſtom extended to them. As to nieces, there being no inſtances, the defendant's claim depends entirely on the beforementioned evidence. The queſtion was, Whether the leſſors of the plaintiff were entitled to recover? And the points made for conſideration were, 1ſt, That as there was no inſtance of any admiſſion of an eldeſt niece, it would be incumbent on the defendant to ſhew, that uſage was not neceſſary to prove the cuſtom. 2dly, That a cuſtom cannot be extended by conſtruction. The caſe having been fully argued, THE COURT took time to conſider, and afterwards *Aſhhurſt* J. delivered their opinion, as follows: A doubt was made, whether this parchment was admiſſible evidence, not being properly a court-roll: but we think the evidence was very proper to be received. It is an ancient writing found amongſt the court-rolls, and delivered down from ſteward to ſteward. It is ſtated to be *ex aſſenſu omnium tenentium*. It could not well be ſuppoſed to be the intereſt of any of the tenants to fabricate it; for it was competent to any of them

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by his own act, to do that which the cuſtom is made to do for him: ſo neither could the lord have any intereſt. Therefore, it is certainly admiſſible evidence. The words are, that the next heir ſhall ſatisfy to the lord 5*s.* 4*d.* becauſe no tenements are diviſible, either between heirs male or female. But then the queſtion is, Who is this cuſtomary heir? The 13th article ſhews, who ſhall be deemed ſuch in the immediate courſe of lineal deſcent. And to ſhew that this has obtained in practice, the court-roll, 17th June, 1734, was given in evidence, which proves the admiſſion of *Ann Williams* (formerly *Ann Palmer*), as eldeſt daughter and heir of *John Palmer*. Then to ſhew that the cuſtom does not ſtop there, but that it extends to collaterals, the court-roll, 9th June, 1646, was given in evidence, by which it appears, that *William Springfellow* died ſeiſed of a tenement held of the manor, and that *Helena* (wife of *John Pinns*) was admitted as eldeſt ſiſter and heir of the ſaid *William*; and there were three other entries to the like purpoſe. But then, as *Thomas Stanley*, the brother of *Joſeph* (and who would have been his heir had he ſurvived him), died in the life-time of *Joſeph*, the queſtion is, To whom the eſtate ſhall go in right of repreſentation to *Thomas*? *Now it ſeems to be a firſt principle in regard to copyholds, that cuſtom is the very eſſence of a copyhold; and if the cuſtom be ſilent, the common law muſt regulate the courſe of deſcent.* Lord *Coke* ſays, in the caſe of *Ratcliffe* v. *Chapman* (1), "that there are two pillars of cuſ-
"tom, one the common uſage, the other, that it be time
"out of mind;" and therefore he ſays, "upon the evidence
"given to the jury, the court enforced the parties, which
"maintained the cuſtom, to ſhew precedents in the court-
"rolls, to prove the uſage, and that without ſuch proof, and
"that it had been put in ure (although it had been deemed
"and reputed to have been the true cuſtom), yet the court
"could not give credit to the proof by witneſſes." Now here there is no proof at all in the court-rolls, as to the courſe of ſucceſſion in the collateral line, further than the caſe of a ſiſter. And it is expreſsly laid down by the court, in 4 *Leon.* 242. in the above caſe of *Ratcliffe* v. *Chapman*, that where the cuſtom is, that the eldeſt ſiſter ſhall inherit, yet by that cuſtom the eldeſt aunt or the eldeſt niece ſhall not inherit the land. That this is the law in regard to collaterals, is further proved by the caſe in 1 *Rol. Abr.* 624. *pl.* 2. where it is ſaid, that if the cuſtom be that the youngeſt ſon ſhall inherit, and a man has iſſue two ſons and dies, and the land deſcends to the youngeſt ſon, who dies without iſſue, the eldeſt ſon of the eldeſt brother ſhall have the land; becauſe

(1) 4 *Leon.* 242.

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the cuſtom does not hold in the tranſverſal line, but only in the lineal deſcent. Theſe two caſes, therefore, ſeem in point in favour of the plaintiff. Another argument in favour of the plaintiff ſeems to ariſe from the particular penning of the cuſtom (as it appears in the 13th article), which is the only piece of evidence preſcribing the rule in the courſe of deſcents; and that ſays, *ſi aliquis tenens hujus manerii obierit*, his eldeſt ſon, or (if no ſon) his eldeſt daughter, ſhall inherit. Now the defendant's grandfather, *Thomas* (under whom he derives his deſcent), never was a *tenens manerii*; and therefore the cuſtom, as to the courſe of deſcent, never attached upon him. For theſe reaſons we are of opinion, that the leſſors of the plaintiff are each entitled to recover an undivided third part of the premiſes in queſtion.—Poſtea to be delivered to the plaintiff.

Doe on the Demiſe of Harman and Wife, *v.* Morgan, Hil. Ter. 37 Geo 3. B. R. 4 *Ter. Rep.* 103.

One ſeiſed in fee of a copyhold of inheritance by deſcent, *ex parte maternâ*, ſurrendered the ſame to the uſe of himſelf for life, remainder to ſuch perſons, and for ſuch eſtates as he ſhould by deed or will, atteſted by three witneſſes, appoint, remainder in default of appointment to himſelf in fee; after which he made a mortgage, and ſurrendered to the uſe of the mortgagee in fee, who, upon repayment of the principal and intereſt, ſurrendered again to the mortgagor; THE COURT held that the line of deſcent was thereby broken, and that the eſtate deſcended to the paternal heir.—PER Lord KENYON, Ch. J. If it were material to decide the point, I ſhould think that an appointment by deed would have been good, though not executed in the preſence of three witneſſes, and that that number of witneſſes only applied to an appointment by will. But it is immaterial to conſider that point here. *The ſurrender in favour of the mortgagee, was not merely of an equitable, but of the legal, eſtate.* The mortgagee was admitted in fee under it; and his heir at law ſurrendered to the mortgagor in fee. This, then, is like a feoffment and reſeoffment (1), which, it has been long ſettled, breaks the line of deſcent; and conſequently the leſſor of the plaintiff, who is the heir *ex parte paternâ*, is entitled to recover.—Poſtea to the plaintiff.

Surrender.

Roe, on the Demiſe of Henry Noden, *v.* Geo. Griffits, and Eliz. his Wife, and Charles

A ſurrender is the conveyance of the ownerſhip of the eſtate, admiſſion only form: and the admiſſion relates back to the ſurrender.—This was a ſpecial caſe reſerved at the aſſizes, where a verdict was found for the plaintiff, ſubject to the opinion of

(1) *Vide Co. Lit.* 12. *b. Price* v. *Langford*, 1 *Show.* 93. *Salk.* 337. and *Carth.* 141.

the

Thomas, and Mary his Wife. In treſpaſs and ejectment. Mic. Ter. 7 Geo. 3. B. R. 4 *Burr.* 1952. 1 *Black. Rep.* 605.

the Court upon the following caſe: *Blackwell North*, being duly admitted, and ſeiſed in fee of the premiſes in queſtion (being copyhold of inheritance, held of the manor of Ebbiſham, in Surrey), in conſideration of a marriage intended between him and *Rachel Noden*, on the 20th of April, 1724, ſurrendered the premiſes by the rod, into the hands of the lord of the manor, by the acceptance of the deputy ſteward thereof (*Thomas Harris*), to the uſe of himſelf, his heirs and aſſigns, till ſolemnization of the marriage; then to the uſe of the ſaid *Blackwell North*, and his aſſigns, for his own life; then to the uſe of the ſaid *Rachel*, and her aſſigns, for her life; then to the uſe of truſtees, during the ſeveral lives of the ſaid *Blackwell North* and *Rachel*, upon truſt to preſerve contingent remainders; and after the deceaſes of *Blackwell North* and *Rachel*, and the ſurvivor of them; then to the uſe of ſuch child or children of the ſaid *Blackwell North*, on the body of the ſaid *Rachel* to be begotten, and for ſuch eſtate and eſtates, and in ſuch manner, ſhares and proportions, as the ſaid *Blackwell North*, in his life-time, by any deed or deeds, writing or writings, duly executed, and atteſted by three or more witneſſes, or by his laſt will and teſtament in writing, duly made and publiſhed, ſhould limit, direct, or appoint; and for want of ſuch limitation, direction, or appointment, and until ſuch eſtate and eſtates ſo limited, directed, or appointed, ſhall reſpectively commence and take effect; and as ſuch eſtate and eſtates, ſo limited, directed, or appointed, ſhall reſpectively end and determine, to the uſe of the heirs of the body of the ſaid *Blackwell North*, on the body of the ſaid *Rachel* to be begotten; and in default of ſuch iſſue, to the uſe of the ſaid *Blackwell North*, and of his heirs and aſſigns for ever. Soon after making the ſaid ſurrender, the ſaid marriage took effect. On 26th May, 1725, at a court then holden by the ſteward (*Dormer Parkhurſt*, eſq.), it is preſented by the homage, and atteſted by the ſaid *Thomas Harris*, deputy-ſteward, and recorded and inrolled, "that on the 5th of April then laſt paſt, "the ſaid *Blackwell North*, ſurrendered by the rod, and by "the acceptation of the deputy-ſteward, all his cuſtomary "meſſuages, lands, tenements, hereditaments, &c. with their "appurtenances, &c. &c. to the uſes of his will, in proper "form." On the 27th April, 1743, he made his will; and thereby gave to his ſaid wife *Rachel*, and her heirs, all and ſingular ſuch his freehold and copyhold lands and real eſtates, with their appurtenances, as he himſelf, or any other perſon or perſons in truſt for him or his uſe, were or ought to be intitled to or intereſted in, in poſſeſſion, reverſion, remainder, or expectancy; and all his eſtate, right, title, intereſt, uſe, truſt, inheritance, claim, and demand whatſoever, either at law or in equity, in, to, or out of the ſame, and every or any

any part thereof; and alſo all his chattels and perſonal eſtate; and made her his ſole executrix. On the 22d May, 1751, it was, at a court baron then holden by *Thomas Harris*, the then ſteward, preſented by the homage, and atteſted and inrolled, "that upon the 20th of April, which was in the year "of our Lord 1724, the ſaid *Blackwell North*, a cuſtomary "tenant of the manor, for and in conſideration of a mar-"riage then intended between him and the ſaid *Rachel* (his "now wife), did ſurrender, by the rod, into the hands of "the then lord of the manor, by the acceptance of the ſaid "ſteward (then deputy-ſteward thereof)," &c. &c. [ſetting out the ſaid ſurrender of 20th April, 1724, *verbatim*, as before ſtated; and alſo the admiſſions of *North* and his wife, in the words following:] "And afterwards, now alſo at this "court [22d May, 1751], the ſaid *Blackwell North* and "*Rachel* come in their own perſons, and humbly pray that "they may be admitted tenants to the lord, to all and ſingu-"lar the premiſes above ſurrendered, with the appurtenances, "according to the tenor and intent of the ſame ſurren-"der. And thereupon the lord, by his ſteward aforeſaid, "and by the rod, doth now at this court grant to the ſaid "*Blackwell North* and *Rachel* reſpectively, the aforeſaid ſur-"rendered premiſes with the appurtenances; to have and "to hold the ſame unto him the ſaid *Blackwell*, for and du-"ring the term of his natural life; and from and after his "deceaſe, to have and to hold the ſame unto her the ſaid "*Rachel*, for and during the term of her natural life; of "the lord, &c. by the rod and by copy, &c. according to "the cuſtom, &c. by the yearly rent, &c. And ſo the ſaid "*Blackwell* and *Rachel* are now admitted tenants, &c. and "have ſeverally ſeiſin by the rod. And the ſaid *Blackwell* "doth his fealty; but the fealty of the ſaid *Rachel* is re-"ſpited. And the ſaid *Blackwell* giveth for his aforeſaid ad-"miſſion nothing; becauſe he was before admitted to the "ſame premiſes; but giveth and payeth to the ſaid lord, in "court, for the aforeſaid admiſſion of the ſaid *Rachel*," &c. During all this time, the ſaid *Blackwell North* ſerved upon the homage, as a cuſtomary tenant. In October, 1753, *Blackwell North* died without iſſue. On the 21ſt of January, 1754, the ſaid *Rachel North* (his widow) was admitted in fee to the premiſes, under the ſaid will of *Blackwell North*, her huſband; and ſurrendered the ſame to the uſe of her will. On the 21ſt of May, 1764, ſhe made her will; and deviſed to the leſſor of the plaintiff; and died in June, 1764. On the 20th of May, 1765, the leſſor of the plaintiff was admitted to the premiſes, under *Rachel*'s will. The defendants, *Elizabeth Griffits* and *Mary Thomas*, are the heirs at law of the ſaid *Blackwell North*. The queſtion is, "Whe-"ther the plaintiff is entitled to recover under this eject-ment?"

ment?" The great point urged was, "that the ſurrender "was a part of the ſame tranſaction; and that the admit- "tance referred back to the time of the ſurrender, and was "to be conſidered as one conveyance." Lord MANSFIELD, The queſtion is, "Whether this will ſtands, as a good ſub- "ſiſting will, or is revoked?"—It has been argued at the bar, upon the foot of a revocation; and "that the lord took "from the ſurrenderor, and regranted to him again the "whole eſtate;" and "that this amounts to a revocation of "his will."—There is no colour, upon the circumſtances ſtated in the preſent caſe, to ſay that the teſtator intended to revoke his will. An intention to revoke, might, indeed (if it had ſufficiently appeared), have made a very different caſe. Here it is clear, that the teſtator had no ſuch intention.—The change of eſtate is, therefore, the only objection that can be urged in this caſe.—Where a man ſeiſed of an eſtate, makes his will, and deviſes it, and afterwards conveys it entirely away, though he takes it back by the ſame inſtrument, or by a declaration of uſes, it is a revocation; becauſe, as it is ſaid in the books, he has parted with his whole eſtate.—This rule being now eſtabliſhed, muſt be adhered to; although it is not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and ſubtilty. However, as in the earl of *Lincoln*'s caſe (1) it was ſo far eſtabliſhed that it ought to be obſerved in future, if a like caſe ſhould happen, we muſt not depart from it now, notwithſtanding one would wiſh that no ſuch rule had ever been eſtabliſhed, and lament that ſuch nice ſubtilties ſhould have been admitted as the ground of it.—But the preſent caſe does not come within the rule. *Blackwell North*, the teſtator, had a reverſion in fee in him. And though he limits it to himſelf, the words do not operate; for, the uſe reſults by operation of law. This reverſion in fee is the only ſubject-matter of the deviſe. In 1725, he ſurrenders to the uſes of his will; and afterwards, in 1751, he is admitted, upon the former ſurrender (made in 1724), to the uſes of his marriage ſettlement.—An admiſſion muſt follow the ſurrender; the lord has no power over it. The ſurrender directs and governs the admiſſion. Therefore the admiſſion is *prout lex poſtulat*; it is no re-admiſſion to his reverſion. It effectuates the uſes limited; but leaves the reverſion as it was. —This makes an end of the caſe; for here is no conveyance of the fee; no taking back an eſtate in it.—But ſuppoſing the fee to have been limited to a third perſon; I do not think that even in that caſe, what has been done by the teſtator

(1) *Vide Shower's* Parl. Caſes, 154. and Abridgment of Equit. Caſes, v. 1. p. 411, 412. Earl of *Lincoln v. Rolls et al.*

would

would have revoked the will.—It is ſaid, on the part of the defendants, "that the ſurrender alone (un-preſented) makes no alteration whatſoever." But I deny that: it is a conveyance of the ownerſhip of the eſtate; and the admittance is only form. 'Tis a ceremony derived from the origin of copyholds: but the lord's-act is now mere form. He cannot alter, nor affect the ſurrender: he is a mere inſtrument, and compellable to admit, according to the ſurrender. A *mandamus* would compel him: a decree in Chancery would compel him. The ſurrender is a depoſit in his hands: the land is bound by the ſurrender; and the admittance has relation to it.—The caſe of *Benſon* verſus *Scot*, is deciſive, 1 *Salk.* 185. pl. 3.; "that the land is bound by the ſurrender; and that the admittance relates to the ſurrender." This is ſettled.—If a joint-tenant in fee ſurrenders to the uſe of his will, deviſes, and dies; and then the ſurrender is preſented; the admittance of the deviſee to a moiety ſhall relate to the ſurrender. *Co. Lit.* 51. b. The eſtate of the land was bound by the ſurrender. The admittance is form: it is the ſhadow to the ſubſtance.—If a diſſeiſee makes his will, and afterwards enters, and then dies; 'tis a good ſubſiſting will, and not revoked: for his entry ſhall have relation back to the time of the diſſeiſin. So, if a diſſeiſee releaſes, it ſhall have relation back. So, an eſcheat after the date of a will. So, if a perſon, ſeiſed of a remainder in fee, makes his will; and then the tenant for life dies, in the teſtator's life-time; the will is not revoked thereby. All theſe ſhall relate back. —So here, the admittance of the lord ſhall relate back to the time of the ſurrender, and is only a completion of it.—This caſe is directly within the principles of the caſe of *Selwyn* v. *Selwyn* (1); "that the whole of a conveyance ſhall be taken together; and the ſeveral parts of it ſhall relate back to the principal part." So that either no alteration at all is made by this admittance; or, if there be any, yet the admittance ſhall have relation back to the time of making the ſurrender. Therefore I am moſt clearly of opinion, That there is no doubt at all in this caſe. The other three judges concurred in the ſame opinion: and all agreed, That after the ſurrender in 1724, to the uſes of the marriage-ſettlement, the reverſion ſtill remained in *Blackwell North*; and that no alteration or change of eſtate happened in this caſe (2). Per Cur. unanimouſly—Judgment for the plaintiff.

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(1) *Vide* title Deviſes.

(2) *Vide* many caſes together with more on the ſame ſubject, in *Viner*, title Deviſe (R. 6.) "Revocation by act of law, or alteration of eſtate in deviſor." Page 143 to 151.

Frogmorton *ex dim.* Robinſon *v.* Whurrey, Tr. Ter. 20 Geo. 3. C. B. 3 *Wils.* 125. Mic. Ter. 21 Geo. 3. C. B. 3 *Wils.* 144. 2 *Black.* 728.

John Robinſon being ſeiſed in fee of certain copyhold lands, on the 1ſt day of Auguſt, 1720, ſurrendered the ſame to the uſe of *Mary Arnall* (whom he then intended to marry), and the heirs of their two bodies, lawfully to be begotten; and, for default of ſuch iſſue, to the uſe of the right heirs of the ſaid *John Robinſon:* the marriage afterwards took effect, and, on the 21ſt of October, 1720, *Mary* was accordingly admitted tenant of the premiſes in queſtion: the ſaid *Mary* died in 1735, leaving *John*, her eldeſt ſon of that marriage, her ſurviving: he died in 1745, leaving the leſſor of the plaintiff, his only ſon and heir, born in that year, who was duly admitted tenant to the premiſes, in the year 1769. By the cuſtom of the manor, huſbands are entitled for life to the inheritance of their wives, in the nature of tenants by the curteſy, whether the wife be ſeiſed before the coverture, or afterwards. *John Robinſon*, the original ſurrenderor, ſurvived his wife, and continued in poſſeſſion till the year 1746, when he ſurrendered the premiſes to the defendant in fee, who was admitted, and hath been in poſſeſſion ever ſince. *John Robinſon*, the ſurrenderor, conceiving himſelf tenant in tail, under the ſurrender and admittance, in 1720, did the proper act to bar an eſtate tail, provided ſuch eſtate was veſted in him, according to the cuſtom of the ſaid manor, previous to the ſurrender of the defendant *Wharrey*. THE QUESTION was, What eſtate the wife took by the ſurrender? FOR THE PLAINTIFF, it was argued to be an eſtate tail in the wife, and therefore not barrable by the huſband; but that it deſcended to *John Robinſon*, the ſon, and on his death, to the leſſor of the plaintiff, the grandſon, ſubject to the curteſy eſtate of *Robinſon*, the ſurrenderor. FOR THE DEFENDANT, it was inſiſted to be only an eſtate for life, in the wife, with a contingent remainder to the heirs of the two bodies of her and her huſband; and that as *nemo eſt hæres viventis*, the alienation of the huſband, after the death of his wife, barred this contingent remainder. PER CUR. If the wife had been tenant in tail, ſhe might, if ſhe had ſurvived, have barred the entail, *being a copyhold*, as is reſolved, 2 *Sid.* 73. or (with her huſband) might have barred it during the coverture. If ſhe was only tenant for life, with a contingent eſtate to the heirs of her huſband, and her own body, that may be barred by the huſband, in caſe of his ſurvivorſhip. We could wiſh, for the ſake of the iſſue, to conſtrue it an eſtate tail, in the wife; but, upon very full conſideration, the words of the ſurrender, as well as the authority of the books, are too ſtrong for us to get over. We cannot do it, without bending the rule of law: the ſurrender muſt be conſidered as it ſtood at the time it was made: if the marriage had never taken effect, the woman would

would ſtill have had the ſame eſtate: whatever a court of equity might have done, a court of law could not control it. The law has furniſhed a redreſs for the wife in ſuch a caſe, by the writ of *cauſa matrimonii prælocuti*; but not for the man, *Co. Lit.* 204. In conſequence of ſo giving her a ſpecial tail, ſhe might have barred the donor's reverſion in fee, even in his lifetime: but taking the words, *heirs of their two bodies*, to be words of deſcription, and not of limitation; the man's reverſion would be preſerved, *Co. Lit.* 42. Though this event did not happen, nor was then in contemplation; yet we muſt conſtrue the words, in the ſame manner as if it had happened. It is true, the will of the donor muſt be effectuated, but we can only collect that will, from the words he has uſed: the eldeſt ſon is not the heir of the body of the huſband, while the huſband is living. Suppoſe this to have been a limited eſtate tail, viz. to the wife, and the heirs of her body, being alſo heirs of the huſband's body; ſtill the deſcription don't anſwer: for, during the life of the huſband, the iſſue has only one half of the qualification. 'Tis ſaid we may conſtrue it, heirs of the body of the wife, by the huſband begotten, which would anſwer to the event that has now happened: but, why not as well conſtrue it, heirs of the body of the huſband, on the wife begotten? that might have been equally neceſſary for the benefit of the iſſue, had the wife ſurvived the huſband: but the owner has plainly ſaid, no child of our two bodies ſhall have the eſtate, while either of us is living. Probably, he might not then be aware of all the conſequences: but we muſt follow his words, and cannot tranſgreſs ſo fixed a rule as *nemo eſt hæres viventis*. When an eſtate is limited to a *huſband and wife, and the heirs of their two bodies*; the word heirs is a word of limitation, becauſe an eſtate is given to both the perſons, from whoſe bodies the heirs are to iſſue; but, where it is given to one only, and the heirs of two (as, to the wife, and the heirs of her and *A. B.*), there the word heirs is a word of purchaſe; for no eſtate tail can be made to one only, and the heirs of the body of that perſon and another: this appears from *Litt. ſec.* 352. according to the true reading, collected from the original editions; the common editions make the eſtate *cypres*, therein mentioned, to be, to the widow, and *les heirs de corps ſa baron de luy engendrés*, which is not as near as might be, to the original eſtate intended, if the huſband had lived; viz. to the huſband and wife, and the heirs of their two bodies: but the original edition, by *Lettou* and *Macklinia*, in *Littleton*'s lifetime, and the *Roan* edition, which is the next, read it thus: *les heirs de les corps de ſon baron, et luy engendrés*; which is quite conſonant to the original eſtate: and this eſtate, to the widow for life, and

the heirs of the body of her huſband and herſelf begotten, *Littleton*, in the ſame ſection, declares not to be an eſtate tail. The ſame is held in *Dyer*, 99. in *Lane* and *Pannel*, 1 *Rol. Rep.* 438. and in *Goſſage* and *Taylor*, *Styles*, 325. There it was expreſsly held, that this was a contingent remainder, to the heirs of both their bodies. The only difference of theſe three caſes from the preſent is, that there, the wife had an expreſs eſtate, for life; and here, not but upon legal principles: the caſes are juſt alike. An eſtate to *A.* and the heirs of his body, is the ſame as an eſtate to *A.* for life, remainder to the heirs of his body. We are, therefore, all of opinion, that this was a contingent remainder to the iſſue; and not being capable of taking effect, at the determinations of the particular eſtate, is therefore gone for ever; and ſo judgment of nonſuit muſt be entered.

Doe ex dim. Ibbot, *v.* Cowling and Wife, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 63.

A ſurrender of copyhold lands, to the uſe of a will, only operates on the eſtate which the ſurrenderor has at the time of the ſurrender. And therefore, if a copyholder, having an eſtate, *pur autre vie*, ſurrender all his eſtate, in poſſeſſion, remainder, or expectancy, to the uſe of his will, and afterwards take the fee by deſcent, and then diſpoſe of the fee by will, the fee will not paſs by it. At a court baron, held the 22d of October, 1728, for the manor of Fenſtanton and Hilton, the death of *Jonathan Denne*, a cuſtomary tenant, was preſented; and his ſon and heir, *Jonathan Denne*, was admitted in fee, to four cuſtomary tenements, the premiſes in queſtion. At a court, held the 20th of October, 1730, it was preſented, that *Jonathan Denne*, on the 28th of October, 1729, ſurrendered, out of court, the premiſes in queſtion, *immediately after the deceaſe of the ſaid* J. Denne, *to the uſe of* Jane, *his wife, for life, remainder to the uſe of the heirs of their two bodies, remainder to the uſe of his own right heirs*; *Jane*, the wife, was admitted at the ſame court, according to the form of this ſurrender; and in 1735 ſhe died. At a court, held the 23d of October, 1782, it was preſented, that *J. Denne*, on the 18th of the ſame month, ſurrendered, out of court, his life eſtate, to his ſon, *W. Denne*, who was admitted accordingly. At a court, held the 27th of October, 1789, it was preſented, that *W. Denne*, on the 15th of November, 1788, ſurrendered, into the hands of the lord, all his meſſuages, &c. held of the ſaid manor, as well in poſſeſſion, as in reverſion, remainder, or expectancy, to the uſe of ſuch perſon, and for ſuch eſtate, as he *(W. Denne)* had deviſed, or ſhould by will deviſe. July 2d, 1789, *Jonathan Denne*, the father of *W. Denne*, died, leaving *William*, his only ſon and heir; who, by will, dated the 29th of October, 1790, deviſed all his freehold and copyhold meſſuages, &c. either in poſſeſſion or reverſion (ſubject to an annuity of 150*l.* to his wife for life), to *Ann Cordel*, his wife's daughter, in tail, remainder over.

W. Denne

W. Denne died ſoon after making this will, without iſſue; on which, *A. Cordel* took poſſeſſion of the premiſes in queſtion, was admitted in court, ſuffered a recovery, in the lord's court, to the uſe of herſelf and her heirs, and afterwards married the defendant. *By the cuſtom of the manor, no eſtate tail can be barred, without a recovery ſuffered in the lord's court;* and neither *Jonathan* or *W. Denne* ſuffered any ſuch recovery. The leſſor of the plaintiff was the heir at law of *Jonathan* and *W. Denne*. FOR THE PLAINTIFF, it was argued, that the defendant's wife took no eſtate, under the will of *W. Denne*; for, that either the ſurrender by *J. Denne*, in 1729, was void, becauſe it was to take effect *in futuro* (1), immediately after his death, or, if not void, that it only conveyed an eſtate tail to *W. Denne*, expectant on his mother's life eſtate, which was not barred by any recovery ſuffered in the lord's court, and conſequently that he had nothing to deviſe. To which it was anſwered, FOR THE DEFENDANT: That tho' *W. Denne* had not the fee, at the time when he ſurrendered to the uſe of his will, he had an eſtate capable of being ſurrendered; and that, under the ſurrender, the lord agreed to admit ſuch perſon as the ſurrenderor ſhould, by will, appoint; and that, when he made his will, he had the fee, by the death of his father; ſo that there was a ſurrender, and an eſtate, on which the ſurrender could then operate; a will, ſufficient to paſs the fee to the defendant; and a deviſable intereſt, in the deviſor, when the will was made. SED PER CUR. With regard to the ſurrender, by *W. Denne*, though it were a proper conveyance, to paſs the life eſtate which he then had, it could not operate on the remainder, which was then in the father. The ſon had (excluſively of his father's life eſtate) a mere hope of ſucceſſion; and if he had taken the fee, on his father's death, his ſurrender, which was prior to this, could not operate on the eſtate which he acquired ſubſequently. As to the lord's having agreed, to admit ſuch perſon as *W. Denne* ſhould by will direct; the lord only agreed, to admit ſuch perſon to ſuch eſtate and intereſt as the ſurrenderor had at the time. If the parties were on the other ſide of the Hall, this is not one of the caſes in which a ſurrender would be ſupplied: a court of equity will only ſupply a ſurrender, in three caſes, in favour of children, a wife, or creditors.—Poſtea to the Plaintiff.

In order to effectuate the intention of the parties, the Court will conſtrue the word "or" to mean "and," as well in a ſurrender of copyhold premiſes, as in a will.—On the trial of this ejectment, a verdict was taken for the plaintiff, ſubject to the opinion of this Court, on the following caſe: *Samuel Burrill*, who was ſeiſed in fee, according to the cuſtom of the manor of Skipſea, of the eſtate in queſtion, on the

Wright *ex dim.* Ann Burrill, otherwiſe Wallis, and Mary Burrill, otherwiſe Wallis, v. Kemp. Mic. Ter. 30 Geo. 3 B. R. 3 *Ter. Rep.* 470.

(1) *Vide Simpſon's* caſe, *Godb.* 265. 1 *Rol. Rep.* 137. *Clamp.* v. *Clamp*, 4 *Leon.* 8.

1ſt of February, 1743, made a voluntary ſurrender of it, to the uſe of himſelf for life, and from and after his deceaſe, to the uſe of *Elizabeth*, his wife, during her widowhood; and after his deceaſe, and upon the marriage of *Elizabeth*, then to the uſe and behoof of *William Wallis* ſon of *Elizabeth*, for his natural life; and from and after his deceaſe, to the uſe of the iſſue of his body, lawfully to be begotten; with a proviſo, that *in caſe* William Wallis, *ſhould die, in the lifetime of the ſurrenderor*, OR *without iſſue of his body, then and thereupon*, all the ſurrendered *premiſes ſhould go to the right heirs of the ſurrenderor*, for ever. *W. Wallis* was the natural ſon of *S. Burrill.* by *E. Wallis*, whom he afterwards married; and he and *Elizabeth Burrill* both died in the life-time of the ſurrenderor; *William Wallis* left iſſue, the leſſors of the plaintiff, who have been admitted tenants; and he bequeathed the tuition and guardianſhip of the perſons and eſtates of the leſſors of the plaintiff to his brother, *J. Burrill*, by will, dated the 25th of April, 1767, and died in the ſame year. *S. Burrill* died the 3d of April, 1774. *John*, who was the eldeſt legitimate ſon of his father, *Samuel*, was admitted tenant of the premiſes, as heir to his father, on the 15th of May, 1775; under whom the defendant claims, as a purchaſor for a valuable conſideration, though with notice of the claim, by *Wallis*'s children, under the ſurrender in February, 1743, and he has been alſo admitted. THE QUESTION was, Whether the Court will conſtrue the contingency, on which the limitation over to the right heirs of the ſurrenderor is to take effect, in the *conjunctive*, or *disjunctive?* Lord KENYON, C. J. Whether the ſurrender were voluntary, or for a valuable conſideration, it will, between theſe parties, have the ſame effect. The queſtions here are, what was the intention of the parties to the ſurrender? whether they have expreſſed it in legal terms? and if ſo, whether any rule of law will be violated, in giving effect to it? There is no doubt, but that a ſurrender is conſidered, as a common law conveyance, and is not entitled to the ſame favourable conſtruction, as a will. And therefore, unleſs the ſurrenderor, in this caſe, has uſed the language which will confer a legal eſtate, it cannot be conferred. In deeds, certain legal phraſes muſt be uſed, in order to create certain eſtates; as the word "heirs," to create a fee; and "heirs of the body," to create an eſtate in tail. But beyond that, I would ſay, with Lord *Hardwicke*, that there is no magic in particular words, further than as they ſhew the intention of the parties. Now, here it is impoſſible to entertain any doubt: *S. Burril* ſurrendered the eſtate to the uſe of himſelf for life, then to his wife, during her widowhood; *then*, that is, in caſe her eſtate for life is put an end to, by doing this act, which he meant to guard againſt, to his ſon, *W. Wallis*, for life, and after his deceaſe, to the iſſue of his body. Therefore, I cannot accede to what was ſaid by the defendant's

defendant's counſel, that this was a contingent remainder in *W. Wallis*; for it was veſted: though I cautiouſly avoid ſaying, what the limitation to his iſſue is. The ſurrender then proceeds to ſtate a proviſo, that, in caſe *W. Wallis* ſhould die in the life-time of the ſurrenderor, *or* without iſſue of his body, the eſtate ſhould go to the right heirs of the ſurrenderor: and here the queſtion ariſes on the word "OR." Now, there is no doubt on the intention of the parties: and, where ſenſe requires it, there are many caſes, to ſhew that we may conſtrue the word OR into AND, and AND into OR, 2 *Str.* 1175. and 3 *Atk.* 390. in order to effectuate the intent of the parties. Here, therefore, in order to give effect to the intention of the ſurrenderor, we muſt ſay, that, when he uſed the word OR, he meant AND. And there is no caſe, in which any difference has been made, as to this point, between a will and a deed; when the Court are conſidering, how the intention of the parties can be effected. Then, without deciding what intereſt the leſſors of the plaintiff have, at all events, they have a ſufficient title to maintain this ejectment. ASHHURST, J. The intention of the ſurrenderor muſt prevail, unleſs it be contrary to any rule of law. We muſt collect the intention of the parties, in deeds, as well as in wills; to give effect to which, the word *or* may, in both caſes, be equally conſtrued into *and*. BULLER, J. agreed, and mentioned a caſe, in *Moor*, 422. where the words are, "if he die without iſſue, OR before 21, then over." GROSE, J. alſo agreed.—Poſtea to the plaintiff.

Admittance.

The title to copyhold lands, relates back from the time of the admittance, to the ſurrender, as againſt all perſons but the lord. So that the ſurrenderee may recover, in ejectment, againſt the ſurrenderor, on a demiſe, laid between the times of ſurrender and admittance. In this caſe, the plaintiff proved his admittance, on the 26th of July, 1786, on a ſurrender by the defendant, by way of mortgage, made before April, 1786; ſo that the demiſe laid was before admittance. The JUDGE, on the trial, being inclined to think, that the title of a copyholder was not complete (ſo as to maintain an ejectment) before admittance, the plaintiff was nonſuited. And there was a motion, to ſet aſide the nonſuit. And it was argued, on the part of the defendant, that a ſurrenderee cannot maintain treſpaſs till admittance; for which was cited, *Cro. Eliz.* 349. SED PER CUR. We think, that the doctrine laid down in that caſe will not govern the preſent. For treſpaſs is a poſſeſſory action, and the caſe there put, is of a ſurrenderee, *who never was in poſſeſſion*; ſo that the determination, in that caſe, may be true. But ejectment is a fictitious action, for the trial of title.—As againſt all perſons,

Holdfaſt *ex dim.* Woollams *v.* Clapham, Hil. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 600.

ſons, but the lord, the title of a ſurrenderee, after admittance, is perfect, *as from the time of the ſurrender*, and ſhall relate back to it. If there had been no admittance here before the trial, it might have raiſed a greater doubt; though, even then, in the preſent caſe, we do not think it would have barred the plaintiff's right to recover, for reaſons ſtated hereafter. But here there was an admittance before trial, and that ſhall, by relation, operate ſo as to give the plaintiff a complete title, from the time of the ſurrender; for the admittance is only a circumſtance required by law, merely for the ſake of the lord. In 1 *Leon.* 100. *Rumney* v. *Eves*, it was holden, that if cuſtomary land do deſcend to the younger ſon, by cuſtom, and he enter, and leaſeth it to another, who takes the profits, and after, is ejected; he ſhall have an *ejectione firmæ*, without any admittance of his leſſor, or preſentment that he is heir; though there it might be as well urged, that the leſſor's title was a part of *his*, and not complete, without admittance. But, if there could have been any doubt, as between the preſent leſſor of the plaintiff and a ſtranger, we think, that, conſidering the relation between the leſſor of the plaintiff and the preſent defendant, that doubt is removed; for this ejectment is brought *againſt the ſurrenderor himſelf, by the ſurrenderee*. For the ſurrenderor is conſidered as a truſtee for the ſurrenderee. 9 *Mod.* 75. The caſe of *Davy* v. *Beardſham* is there cited, which was, where the teſtator had agreed for the purchaſe of a copyhold, and, purſuant to that agreement, a ſurrender was made, out of court, to his uſe; then, he deviſed all his lands to *R. B.*, and died before admittance: it was decreed, that the copyhold lands ſhould paſs, becauſe the teſtator had a title, in equity, to recover them, and the vendor ſtood ſeiſed for him, till a legal conveyance could be made. If, then, the ſurrenderor is only conſidered in the light of a truſtee for the ſurrenderee; whatever might have been the caſe formerly; in theſe days, the courts have conſidered this ſpecies of action with greater liberality, and will never ſuffer a truſtee to ſet up a formal objection againſt the plaintiff's recovering the poſſeſſion of that property, which he only holds in *his* right, and for *his* benefit. Therefore, on the whole, we think, that this nonſuit ought to be ſet aſide, and a new trial granted.—Rule abſolute (1).

Roe ex dm. Aſhton v. *Hutton et al.* Eaſ. Ter. 3 Geo. 3. C. B. 2 *Wils.* 162.

If a copyhold, ſurrendered to the uſe of a will, is demiſed to ſeveral perſons, and one offers to be admitted, the lord cannot refuſe to admit him, or ſeize *quouſque*.—The teſtator, being tenant of the copyhold lands in queſtion, ſurrendered to the uſe of his will; and thereby deviſed the ſame to *John Hutton*, and five other perſons, in truſt, and died. *John Hutton* went to the lord's court, and deſired to

(1) *Vide* 4 *Burr.* 1952.

be admitted tenant, upon paying his proportionable part of the fine; but the lord refuſed to admit him, unleſs he would pay the whole fine, for himſelf, and all the other five truſtees, which he refuſed: the other truſtees never appeared; whereupon three proclamations were made, for all the ſix truſtees to come in, and be admitted; or, that the whole land would be ſeized into the lord's hands, as forfeited: and afterwards the lord entered, for the forfeiture ſuppoſed. PER CUR. The Lord ought to have admitted *J. Hutton*, who offered himſelf, and then the lord might have proceeded, to recover his fine, for all the ſix truſtees; if it was either due by law, or the cuſtom of the manor; and he has been too haſty, in entering for a ſuppoſed forfeiture, before admittance: a ſeizure *quouſque* is, until ſomebody comes to be admitted: here, one comes, and offers to be admitted; ſo, it is clear, the lord had no right to ſeize.—Judgment for the defendants.

A lord of a manor cannot ſeize copyhold eſtates, as forfeited, *pro defectu tenentis*, without a cuſtom. Therefore, when, on the death of a copyholder of inheritance, the lord, after three proclamations, for the heir to come in and be admitted, ſeized the eſtate into his hands, and afterwards granted it in fee to another; the Court conſidered it as an *abſolute ſeizure*, and conſequently irregular, there being no cuſtom to warrant it; and being irregular, as an abſolute ſeizure, it could not afterwards be ſet up, by the lord, as a *ſeizure quouſque*.

Doe *ex dim.* Tarrant and others *v.* Hellier and others, Ea. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 162.

Alſo, if one of ſeveral co-heirs of a copyholder be a *feme covert*, at the time of the anceſtor's death, and the lord ſeize the whole eſtate (in default of the heirs not coming in to be admitted after three proclamations), without firſt appointing an attorney or guardian for the *feme covert*, according to the requiſites of the 9 G. 1. *c.* 29. a ſeizure of the *whole* eſtate is irregular, tho' it be not known to the lord that one of the heirs is a *feme covert*.

Likewiſe, a forfeiture, by a copyholder's levying a fine, may be waived by the lord.

And a forfeiture of a copyhold eſtate can only be taken advantage of by him who is lord at the time of the forfeiture, except in thoſe caſes where the act of forfeiture deſtroys the eſtate.

Alſo, a fine levied by a copyholder, who continues in poſſeſſion, is void, as againſt the lord.

The premiſes in queſtion, in this caſe, were the freehold and copyhold eſtates of the late Sir *Samuel Hellier*, who died ſeiſed thereof on the 12th of October, 1784, which were deviſed by him to the defendant, *Hellier*, by will, dated the 10th of September, 1784. A verdict was found for the defendants, as to the freehold eſtates; but, for the plaintiff, as to the copyhold eſtates; ſubject to the opinion of this Court, on the following caſe. The ſecond count in the declaration (under which alone the leſſors of the plaintiff claimed) was laid on the 25th of March, 1788, on the demiſe of *Benjamin Tarrant*, *John Griffin Hodgſon*, and

and *Ann*, his wife, *William Tutt*, *Ann Taylor*, and *William Shepherd*, for the term of ſeven years. The leſſors of the plaintiff (except *John Griffin Hodgſon*, who married *Ann Hodgſon*, in 1784) are the heirs at law of Sir *Samuel Hellier*. The copyhold eſtates in queſtion are copyholds of inheritance, holden of the prebend manor of *Featherſtone*, by ſeveral and different rents. *William Pultney*, eſq. is ſeiſed in fee of the ſaid manor, to which he became entitled in the year 1783. Sir *Samuel Hellier*, by will, deviſed to the defendant, *Hellier*, and his heirs, all his copyhold and freehold eſtates, after paying mortgages, debts, &c. No ſurrender was made of the copyhold premiſes, to the uſe of Mr. *Samuel*'s will. At a court leet, with a court baron, holden in and for the manor of *Featherſtone*, on the 27th of October, 1785, the homage preſented the death of Sir *S. Hellier*; and an entry of a proclamation on the rolls was made, as follows: "At this court, public proclamation was made, the firſt time, for the heir of Sir *S. Hellier*, knight, deceaſed, to come into court, and be admitted tenant to all and ſingular the ſeveral meſſuages, tenements, cloſes, pieces or parcels of land, and premiſes, ſituate and being in *Featherſtone*, within the precincts of this manor, whereof the ſaid Sir *S. Hellier* died ſeiſed, or elſe the ſame *would be ſeized by the lord of the ſaid manor, for want of a tenant*; but nobody came who ſhewed any title to the ſame: *Therefore, ſuch default and this proclamation are recorded.*" Two other ſimilar proclamations were made, at two ſubſequent courts, &c. By an entry, on the rolls of the manor of a ſmall court, and court baron, holden on the 14th of January, 1786, it appears as follows: "At this court, a precept was iſſued by the ſteward of the manor, and delivered to *William Bradſhaw*, bailiff, and officer of the manor, directing him, *to ſeize into the hands of the lord, all and ſingular the ſeveral copyhold meſſuages*, or tenements, lands, and premiſes, which are ſituate and being in *Featherſtone*, within the precincts of the manor, of which Sir *S. Hellier* died ſeiſed; and to return this precept at the next court, to be holden on Saturday, the 4th day of February next." By another entry on the rolls, at a ſmall court, and court baron, holden on the 4th of February, 1786, it appears as follows: "At this court, *W. Bradſhaw*, bailiff of this manor, and officer of this court, returned the precept, which iſſued, and was delivered to him, at the laſt court holden for this manor, in every part obeyed and executed, to wit, that he *had taken actual poſſeſſion of, and ſeized into the hands of the lord* of the manor, all thoſe four ſeveral copyhold meſſuages, or tenements, with the lands, hereditaments, and premiſes thereunto belonging, ſituate, &c. whereof the ſaid Sir *S. Hellier* died ſeiſed; as by the ſaid precept he was commanded." At a court, holden the 10th of April, 1786, the lord of the manor gave, granted, and ſurrendered,

rendered, the ſaid copyhold premiſes (ſpecifically naming each of the different eſtates) *to the defendant* Hellier, *his heirs and aſſigns, for ever*, according to the cuſtom of the ſaid manor, to be holden of the lord of the ſaid manor, by the rents and ſervices due, and of right accuſtomed. And he was, at the ſaid court, admitted tenant, and gave to the lord, for ſuch his admiſſion, 692*l.* (although the ſum, mentioned in the ſaid grant and admiſſion, is only 346*l.*), for a fine, and made his fealty. The leſſors of the plaintiff did not, nor did either of them, apply to the lord, or his ſteward, to be admitted to the copyhold premiſes, until the 26th of July, 1788; nor did they, or either of them, tender to the lord, or his ſteward, the relief due by the cuſtom of the manor, upon the admiſſion of an heir at law, claiming by deſcent; which, in the inſtance of the preſent eſtates, was the ſum of 3*s.* 6*d.* By the cuſtom of the manor, no fine is due to the lord, upon the admiſſion of an heir at law. In the 31ſt year of the reign of the late king, Sir *S. Hellier* levied a fine, in his Majeſty's Court of Common Pleas, of ſeveral eſtates in Staffordſhire, which, from the deſcription of the premiſes, in the deed to declare the uſes, comprehended both his freehold and copyhold eſtates. On the argument of this caſe, the counſel for the plaintiff made three points (1); 1ſt, That no *abſolute forfeiture* of the copyhold eſtate was incurred, either by the fine levied in the 31 *G.* 2. or by the default in the heirs of Sir *S. Hellier* not coming in to be admitted; 2dly, That the lord was not entitled to *ſeize quouſque*, becauſe one of the co-heirs was a *feme covert*; and the ſtat. 9 *Geo.* 1. *c.* 29. which protects her intereſt, equally protected the others; and, 3dly, Even if the lord were entitled to ſeize, till the heirs came in, that as the lord had proceeded, as for an *abſolute forfeiture*, his entry could not be converted into a *ſeizure quouſque*. For the defendants, it was inſiſted, 1ſt, That an abſolute forfeiture was incurred by the fine, levied in the late reign, which could not be done away by any ſubſequent act; and, 2dly, That the lord had a right to ſeize *quouſque*, till the heirs came in to be admitted, notwithſtanding the 9 *Geo.* 1. *c.* 29. Lord KENYON, Ch. J.—There is one circumſtance, in this caſe, of great importance, and which almoſt decides the queſtion, namely, that Sir *S. Hellier* died, ſeiſed of the eſtate in queſtion, on the 12th of October, 1784, leaving one of his co-heireſſes, a *feme covert*. Now, if this caſe were againſt the co-heirs, it muſt

(1) On the firſt argument it was objected, that it was not proved that the lord's bailiff had in point of fact ſeized; that the proclamations did not enumerate the *particular* eſtates, of which the tenant died ſeiſed, 1 *Lev.* 63; and that the proclamations were only proved by the entry in the court rolls, whereas they ſhould have been proved *viva voce*, 1 *Keb.* 287. But the Court did not think that there was any force in either of the objections, and they were abandoned on the ſecond argument.

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be admitted to be a caſe of the greateſt ſeverity; though that would not warrant the Court in trampling on the rules of law: however, it gives us ſome ſatisfaction to be able to decide in favour of the heirs, agreeably with the rules of law. Some general rules muſt be admitted; it is clear, that *a copyhold eſtate cannot paſs by will, unleſs there be a ſurrender, to the uſe of that will*; and it is equally clear, that *an heir at law may, before admittance to a copyhold eſtate, maintain an ejectment, to aſſert his title.* The caſe, therefore, here is, *primâ facie*, in favour of the heirs at law; unleſs the defendants can ſhew ſome title, under which they may hold adverſely againſt them: and, being aware of the imbecility of their own title under the will, they reſort to the ſuppoſed title of the lord of the manor. But, whether he had a right to confer that title on the defendants, depends on the points which have been made. The firſt point made is, on the ſuppoſed forfeiture, by reaſon of the heirs of Sir *S. Hellier* neglecting to come to the lord's court, to be admitted as his tenants, and to ſatisfy the lord's claim, of the fruits of his tenure. I cannot but obſerve, that the intereſt of the lord of this manor, was not very deeply concerned in the heirs not coming in to be admitted; becauſe it is ſtated, that no fine was due on admiſſion. The caſe does indeed ſtate, that he had a minute intereſt, namely, a relief of 3*s.* 6*d.* but, however ſmall this fruit of tenure was, the lord undoubtedly had a right to it; and to ſee, by the inſpection of his court-rolls, who were his tenants. But, the ſeverity of the law, in theſe, as in all other caſes of forfeiture, warrants the courts in taking care, that there is the greateſt accuracy in the lord's proceeding. It is ſo, in the caſe of outlawry; and all caſes of criminal proceedings. Several caſes were mentioned in the argument, which ſhew, that *a general forfeiture of a copyhold eſtate, for not coming in to be admitted, does not accrue, unleſs there be a cuſtom to warrant it.* In ſuch caſes, the lord has only a right to enter into poſſeſſion, to ſatisfy himſelf for the injury he ſuſtains for want of a tenant; *he can only retain the poſſeſſion quouſque.* It ſeemed almoſt, and would have been very properly admitted in the argument, that if the lord, having a right to ſeize *quouſque*, did ſeize *abſolutely*, there was a defect in the ſeizure, which vitiated the whole: but it was contended, that there was no defect in the ſeizure; for, that the Court might preſume, for any thing that appeared to the contrary, that the lord did only ſeize till a tenant came in to be admitted: and that *omnia præſumuntur ſolemniter eſſe acta.* But I think that ſufficient appears in the caſe, to ſhew that the ſeizure was irregular. *A ſeizure general and undefined, muſt neceſſarily be a ſeizure of the whole property*; if it were not, what other line could be drawn? So, *an entry upon an eſtate generally is*

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an entry for the whole; and if it be for leſs, it ſhould be ſo defined at the time. The caſe, however, does not reſt on this obſervation; for we collect, from ſubſequent acts of the lord, which are unambiguous, what his idea was, when he did ſeize: for he made an abſolute grant of the whole of this property to the defendant, his heirs and aſſigns for ever, taking a fine of 692*l.* on his admiſſion. Then I am bound to ſay, that the lord entered, as for an abſolute forfeiture. And as this is a proceeding, where the moſt ſtrict regularity is neceſſary, in all its parts, we are warranted in ſaying, that *here was no ſeizure binding on the parties*. Another point was made, which, if ſuſtainable, would alſo give a right to the lord; the ſuppoſed forfeiture, which accrued by reaſon of the fine levied in the thirty-firſt year of the late reign, the deed to declare the uſes of which, according to the caſe, comprehended the copyhold, as well as freehold eſtates. How that fact was, we are not ſufficiently appriſed: but I think that, if the deed to declare the uſes, has not concluded the queſtion; we ought to infer, that only the freehold property was included in the fine. This claim of the lord of the manor, and, conſequently, of the defendants who claim under him, depends on a clauſe, in the eleventh ſection, of the Supplement to *Co. Copy.* and on two caſes. *I will obſerve, in the firſt place, that this Supplement to the Copyholder, is not Lord* Coke's *work: from whoſe hands it came, I do not know; though I do not mean to diſpute that part generally*; but I think I can diſtinguiſh the ſection cited, from the preſent caſe. The words are, "if a copyholder levy a fine, &c. in ſuch caſe, no acceptance of the rent, or act done by the lord, ſhall be available to make the eſtate again good." This is ſaid to be one of the caſes, which cannot be made good, by this act of the lord. I admit, that the act of the lord there referred to, and acts of that ſort, will not make the eſtate good again; becauſe, acceptance of rent is of an ambiguous nature; the poſſeſſion of the tenant may remain, though his former eſtate was gone; and there, the rent may be accepted from him, under a tenancy, from year to year. Therefore an act of that kind ſhall not be binding on the lord, as a waiver of the forfeiture. But that ſome acts done by him, ſhall operate as a waiver, cannot be diſputed; they do not operate as a new grant, but admit the tenant to be in of his old title. In *Milfax* v. *Baker*, 1 *Lev.* 26. it was held, that "the lord, by admitting a copyholder, after a forfeiture, *diſpenſes with the forfeiture*." The word "diſpenſes" is material, and ſhews that he does not grant a new title. The caſe of admiſſion is only one inſtance; but things of the ſame nature will have the ſame effect; and will ſhew, that the lord diſpenſes with the forfeiture, and meant that the tenant ſhould ſtill continue in his

his tenancy. Now in this case, the lord suffered near thirty years to elapse without taking advantage of the forfeiture, and by several solemn acts in his court recognized the late Sir *S. Hellier* as his tenant: it was first presented that he died seised, then the lord required his heir to come in and be admitted as his tenant. These are as solemn acts of recognition as the admittance of the copyholder, in the case in *Levintz:* and I do not think I am straining that case, in saying, that any act equally solemn on the part of the lord is sufficient to preclude him from taking advantage of the forfeiture. Then as to the stat. 9 *Geo.* 1. c. 29. it protects infants and *feme coverts*, who are not in a situation to protect themselves, declaring that their estates shall not be forfeited for not coming in to be admitted, and prescribing the mode to be taken by the lord. But it is said that at any rate the lord was entitled to take the five other shares: be it so; but then he should have proceeded regularly to obtain possession of that estate to which he was entitled; instead of which he has proceeded as for a forfeiture of the whole. And here, as in proceedings of outlawry, which are *strictissimi juris*, if there be any irregularity it is sufficient to overturn the whole proceedings. Another ground has just occurred to me, as an answer to the supposed forfeiture by levying the fine, upon which I only hazard an opinion. I do not see why the statute of limitations (21 *Jac.* 1. c. 16.), which operates as a bar to other rights of entry after twenty years, should not bar the lord in this case. It seems to me that he should have availed himself of his right of entry within twenty years. However on this ground I give no positive opinion; but clearly on the other grounds the plaintiff is entitled to recover. ASHHURST, J. The Courts have always leaned against forfeitures, which are odious in the law. In this case the general right of the heirs at law of Sir *S. Hellier* stands confessed, and the only question is on the grounds made by the defendants to prevent that right from attaching. It appears that the lord entered as for a forfeiture; therefore he elected to take under that title at the time, and he cannot now resort to another because he finds that that will not bear him out. He claimed under a title arising from the default of the heirs coming in, and under that idea made a general seizure; he did not affect at the time to seize *quousque:* now it is admitted, that he had no right to seize as for a forfeiture on that ground without a special custom, which does not exist in this case. If it had rested on the seizure alone, I think it might have been explained by other acts of the lord: but his subsequent acts clearly prove that he meant to seize *absolutely*, for he afterwards made a grant of the estate to the defendants and their heirs. This is stated on the rolls of his court, and it negatives the idea that he meant

meant to ſeize *quouſque*. With reſpect to the forfeiture by the fine which was levied in the late reign, it ſhould have been preſented at his court as a forfeiture; for the lord was not bound to take advantage of the forfeiture: and here there does appear ſufficient on the rolls of the court to ſhew that the lord had waived it. The admittance of a copyholder afterwards would clearly have been a waiver, and any act equally ſolemn will operate in the ſame manner. BULLER, J. The queſtion reſpecting the ſeizure for the heirs not coming in to be admitted, has been ſo fully diſcuſſed by my lord, that I ſhall only add my aſſent to what has been ſaid. But as to the fine, two queſtions ariſe, independently of thoſe which have been already obſerved upon. The firſt is, Whether the fine did in fact extend to the copyhold eſtate? and, ſecondly, If it did, what effect it had? With reſpect to the firſt, I am not ſatisfied that it did; and if the caſe had reſted on that point, I ſhould have been deſirous of having it aſcertained on another trial; for *it does not follow, that becauſe the deed to declare the uſes comprehended a greater number of acres than the amount of the freehold eſtate, the copyhold was included in the fine.* But ſecondly, ſuppoſing it was, the fine, as to the lord, was void. It is laid down in the caſe of a forfeiture, that nothing removes the eſtate out of the tenant but the lord's ſeizure. *Gilb. Ten.* 247. Here the lord never did ſeize for that forfeiture, therefore the fine was void as againſt the lord, becauſe the copyholder continued in poſſeſſion afterwards. *Saffyn*'s caſe, 5 *Co.* 123. *Fermor*'s caſe, 3 *Co.* 77.; and *Margaret Podger*'s caſe, 9 *Co.* 104. The paſſage in *Supp. to Co. Cop.* ſ. 11. and the *dictum* of *Treby*, Ch. J. in *Eaſtcourt* v. *Weekes*, muſt be underſtood as applicable only to thoſe caſes where the fine deſtroys the eſtate. Another inſtance there put is of a feoffment with livery; but that is where there is a tranſmutation of poſſeſſion. And if there be a tranſmutation of poſſeſſion either by a fine or feoffment, it diveſts the lord's right, becauſe it gains a fee-ſimple to the perſon to whom it is made or levied. But that is not ſo where the poſſeſſion continues, which is the preſent caſe. It is like the caſe of a mortgagor levying a fine, and continuing in poſſeſſion, which is no bar to the mortgagee (1 *Ventr.* 82. 1 *Lev.* 272. 2 *Vez.* 482). So where a tenant in ancient demeſne levied a fine, it did not extend to the lord; and the reaſon given in *Plowden* (*Plowd.* 370) is, "becauſe he claims no title or right to the land at the time "of the fine levied, but to his ſeigniory and ſervices iſſuing "out of the land." Beſides, there is great weight in my lord's laſt obſervation, that at the diſtance of more than twenty years the lord could not enter for a forfeiture. There is alſo another anſwer to this point: no lord can take advantage of a forfeiture, but he who is lord at the time of the

forfeiture incurred, except only in the caſe put in *Co. Cop. Supp.* where the act of forfeiture deſtroys the eſtate; but here the eſtate was not deſtroyed. GROSE, J. concurred.—Poſtea to the plaintiff.

The King *v.* the Lord of the Manor of Hendon, and Richard Troward, the ſteward of the manor, Ea. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 484.

If the lord of a manor refuſe to admit a perſon to whom a copyhold is ſurrendered, on account of a diſagreement reſpecting the fine to be paid, the Court will grant a *mandamus* to compel the lord to admit without examining the right to the fine.—On ſhewing cauſe againſt a rule for granting a *mandamus* to the lord and ſteward of the manor, to admit one *Rankin* to a copyhold. It appeared that *Bonham*, who was originally poſſeſſed of this eſtate, covenanted to aſſign and ſurrender to *Goodrich*; which covenant the homage had preſented at a court, and the conſideration-money was paid, but no ſurrender was ever made to him. *Goodrich* then aſſigned to *Rankin* his intereſt, and *Bonham* ſurrendered to *Rankin*, who now claimed to be admitted. This application was therefore reſiſted on the ground that no fine had been ever paid to the lord for the conveyance to *Goodrich*, and that this was a mode of cheating the lord of his fines; that before *Rankin* was admitted he ought to pay both the fines which were due. *The Court* ſaid, That they had frequently declared they would give no opinion reſpecting the lord's fine (1) on an application by a tenant for a *mandamus* to be admitted, becauſe the lord has no right to the fine at all till admittance. All the lord has a right to require is to have a tenant, and here he had one during the whole time. And they ſaid that any private agreement between *Bonham* and *Goodrich*, not followed up by a ſurrender of the eſtate, could not give the lord of the manor any right to a fine, notwithſtanding it was preſented by the homage.—Rule abſolute for a *mandamus*.

The King *v.* Rennett, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 197.

But the Court will not grant a *mandamus* to admit a copyholder, claiming by deſcent.—On a rule to ſhew cauſe why a *mandamus* ſhould not iſſue, directed to the defendant as ſteward of the court of A. commanding him to admit a perſon who claimed as heir at law, to a cuſtomary eſtate within the manor. It was contended againſt the rule, that this court would not interfere, as the party applying had another remedy in the court of chancery. *Lit.* ſ. 66, 67. *Cro. Jac.* 368. 1 *Rol. Abr.* 108. And at all events a *mandamus* ſhould not be granted to admit a perſon who claims by deſcent; becauſe he may enter and do every other act before admittance. *The Court* had no doubt but that a *mandamus* ought to be granted to compel a lord of a manor to admit a copyholder, if a proper caſe were laid before them; but as

(1) Vide *Cro. Car.* 196.

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the party making this application claimed by deſcent, it could anſwer no purpoſe to grant the *mandamus*, ſince he had as complete a title without admittance as with it, againſt all the world but the lord.—Rule diſcharged.

Fine.

A copyholder ſurrendered to the uſe of his will, and by his will ordered and directed two perſons to ſell and to apply the monies ariſing thereby, for the purpoſes in the will, theſe truſtees by virtue of the ſaid will and ſurrender, did by deed indented bargain and ſell the premiſes to a purchaſer; the death of the teſtator was duly preſented at a court-baron, and at that and two ſubſequent courts proclamations were made for his heirs to come in, and be admitted to the premiſes: at the laſt court the purchaſer attended with the deed of bargain and ſale, and craved to be admitted thereon, which the lord refuſed, inſiſting that the truſtees ſhould have been firſt admitted and paid a fine. PER CURIAM, Copyholders anciently, were little better than ſlaves, or the cattle upon the land; their tenure originally (moſt probably) was in villenage: but by the help of reaſon, true religion, and ſcience, we by degrees emerged from that ſtate of barbarity; villenage became copyhold, but ſtill the tenure was at the mere arbitrary will of the lord; at length copyholders got more permanent eſtates, like freeholds; anciently their lord might ouſt and turn them out when he pleaſed; his fines were arbitrary, but ſince we are become more civilized and free, *the lord cannot, at this day, ſet a fine at more than two years' value upon an admittance on an alienation.* Admittance was formerly of grace and favour, now it is of right; the lord took his fine for the admittance in nature of a relief, it was a boon for having admitted the tenant, and the admittance is the true parent of the fine, 4 *Rep.* 28. a.—If a copyholder ſurrenders to the uſe of his will, and deviſes to *A. B.* and his heirs, the will *only* doth not paſs the eſtate, but the ſurrender and will together transfer the eſtate: the legal eſtate in this caſe was in the deviſor until his death, when it deſcended to his heir, in whom it now continues, until the admittance of the vendee under the order and direction of the will: ſo in the caſe of an alienation, the copyhold eſtate always reſts in the ſurrenderor until the ſurrenderee be admitted tenant, 4 *Rep.* 23. a. *Fitchie's* caſe. It is objected that the truſtees (who have no eſtate or intereſt given them by the will, but are only *ordered* and *directed* to ſell) ought firſt to have been admitted, before they could have power to

Holder *ex dim.* Sulyard *v.* Preſton, Ea. Ter. 9 Geo. 3. C. B. 2 *Wilſ.* 400.

ſell (1).—In anſwer to this, we are of opinion, that when the deviſor died the power to ſell was inſtantly in the truſtees, and that where a man by his will gives power to ſell, the lands deſcend to the heir until that power be executed. There is a great difference between a naked power and a veſted intereſt; upon a naked power given to a wife ſhe may ſell to her huſband; in the preſent caſe, a mere naked power is given by the will to the truſtees to ſell, and when the vendee comes in, he is in under the ſurrender and the will, as much as if he had been expreſsly named in the will, the commiſſioners (in the caſe of a bankrupt ſeiſed of copyhold lands) by their bargain and ſale put an eſtate therein in the aſſignees, although the commiſſioners were never admitted, and the aſſignees, who are bargainees or vendees, take from the original owner of the eſtate: we think theſe truſtees have no right to be admitted tenants, in law or equity, becauſe they have no intereſt, but only a mere naked power or authority; and as the vendee came in upon the third proclamation and deſired to be admitted, he ought to have been admitted upon paying a reaſonable fine to the lord.

Grant v. Aſtle, C. B. 2 *Doug.* 723. (n. 2.)

The land-tax is not to be deducted out of the two years value, payable as an arbitrary fine for admiſſion to a copyhold eſtate.—On a caſe reſerved for the opinion of the court of common pleas, the queſtion ſtated was, *Whether the lord of the manor was bound to allow any ſum of money for land-tax, out of the fine?* If he was, a nonſuit was to be entered; if not, the verdict to ſtand. Lord *Loughborough* delivered the opinion of the Court as follows: We are all of opinion, that the lord of the manor is not bound to make any deduction for the land-tax, out of a fine due for admiſſion on a deſcent. In the firſt place, The land-tax is annual, and, however probable its continuance may be, there can be no legal preſumption as to the future intentions of the legiſlature, and there can be no deduction, by anticipation, of an uncertain future burthen. In the ſecond place, The tax, though commonly called a tax upon land, is not, in its nature, a charge upon the land. It is a tax upon the faculties of men, eſtimated, firſt, according to their perſonal eſtate, ſecondly, by the offices they hold, and laſtly, by the land in their occupation. The land is but the meaſure by which the faculties of the perſon taxed are eſtimated; and, where it is intended by the legiſlature that the burthen ſhould not ultimately reſt upon the perſon charged, a power of deducting is given him by the act; as in the caſe of rents, and other certain outgoings. But no deduction is allowed for fines which are uncertain. In the laſt place, This claim

(1) *Cro. Jac.* 199. 4 *Mod.* 318. *Co. Lit.* 111. b 271. b.

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being new, and there being no precedent nor inſtance to ſupport it, the uſage of almoſt a century is a ſtrong proof, that no ſuch deduction ought to be made, and amounts to a contemporary and permanent expoſition of the land-tax acts, in favour of the lord. Theſe are the reaſons which have weighed in the opinion of the Court, to determine this caſe in the manner I have ſtated.—But the ſubject having led to much curious and intereſting enquiry into the nature of copyhold eſtates, and the progreſſive advancement of the rights of the tenant, I wiſh to ſtate a few circumſtances that have occurred to my obſervation. Copyhold tenures are agreed, by all writers, to be more ancient than the Norman government. In ſome of the moſt approved authors, the copyhold tenure of land is derived from the ſtate of villenage, which now happily forms a very obſcure title in the law. It is ſuppoſed that all copyholders were originally villeins, and that, by the mitigation of villenage, and the progreſs of enfranchiſement, the eſtate grew, by degrees, to be more free and permanent, till it came into the condition of a copyhold. I cannot help doubting whether that deduction is not founded in miſtake. The circumſtance which firſt led me to entertain the doubt is, that in thoſe parts of Germany from whence the Saxons migrated into England, there exiſts, at this day, a ſpecies of tenure exactly the ſame with our copyhold eſtates; and that there exiſts likewiſe, at this day, a complete ſtate of villenage; ſo that both ſtand together, and are not one tenure growing out of another, and, by degrees, aſſuming its place. In Eaſt Friezeland, the duchy of Brunſwick, and other northern parts of Germany, there are villeins in groſs, and villeins regardant, with the ſame rigour which our law formerly knew. There are alſo copyhold tenants, who are freemen, but whoſe eſtates are alienable only by licence, and are tranſmiſſible by deſcent; and, in both inſtances, they muſt paſs through the courts of the lord. Nay, in the ancient ſeat of the Anglo-Saxons, there exiſts, at this day, that peculiar deſcent to the youngeſt ſon, which we call Borough Engliſh; of which the name ſhews the original. What I have ſtated I found in a very accurate treatiſe of German law, by *Selchow*, one of the profeſſors of the univerſity of *Gottingen*, intituled, "*Elementa Juris privati Germanici.*" This ſeems ſufficient to negative the idea that copyholders ſprang out of villeins. In England, villenage has ceaſed, and copyholds remain; but here, as in other countries, they both prevailed at the ſame time. It is not difficult to conceive, that, whenever agriculture became an object of reſpect in the northern and weſtern parts of Europe, thoſe who applied themſelves to the cultivation of land, though inferior in point of dignity, would be equal in point of freedom, to thoſe whoſe only profeſſion was arms.

The copyhold tenants were husbandmen; their persons were free; and, in that respect, they were as much above the villeins, as, in point of consequence, they were inferior, in a military age, to those who had arms in their hands. Their lands were held of a lord who could defend them, and who, in return for that defence, was entitled to certain profits and advantages, founded upon paction express or presumed. *A fine to be paid on the change of a tenant is almost a constant incident of a copyhold estate*, and it does not seem to have been long before the end of the reign of Queen *Elizabeth*, that courts of law interposed to moderate the exercise of the lord's right to a fine, where the custom had left the amount of it uncertain; for it is pretty remarkable, that a question on this subject was depending in the 36th and 37th of Queen *Elizabeth*, in the court of King's Bench, and in this court, at the same time: you will find it in 1 *Rolle's Abr.* 507. and in the contemporary reporters. The question was this, Under what circumstances a refusal to pay a fine should amount, in a court of law, to a forfeiture of the copyhold estate? It was contended, upon the part of the lord, that the mere non-payment of the fine assessed would amount to a forfeiture. That proposition appeared too strong, even in a court of law; however the court of King's Bench, in the 36th of *Elizabeth*, held, that, after the demand of a fine by the lord, and the refusal of the tenant to pay, though the fine should be unreasonable, the estate should be forfeited. This court, a term or two afterwards, in the case of *Jackman* v. *Hoddesdon*, reported in *Cro. Eliz.* 351. held, that, in such case, there was no forfeiture. The court of King's Bench (as has been just stated) had held the contrary, but the opinion of this Court prevailed; and, in the 43d of *Elizabeth*, in the case of *Hobart* v. *Hammond*, reported in 4 *Co.* 27. b. the court of King's Bench, referring to the case of *Jackman* v. *Hoddesdon*, in the Common Pleas, varied their idea, and held, that the refusal to pay an unreasonable fine was no forfeiture of the estate. From the manner in which the report in that case is stated, and the anxiety with which the judges support the proposition, one would be apt to conclude it had not been of great antiquity. A few years afterwards, in the 6th of King *James*, in *Willowe's Case*, 13 *Co.* 1. this point again occurred, and the law was not then taken to be so settled, as for the Court simply to say; "the point is so," but the report states a great deal of reasoning and argument to support the position, that the judges not only might, but ought, either upon the facts appearing upon a demurrer, or upon evidence to go to a jury, to determine, what was a reasonable fine; and, in that case, the court held, that two years' value was an unreasonable fine. Thus, then, the matter rested; the fine was to be assessed by the lord; and, whether it was

reasonable

reaſonable or unreaſonable, was a queſtion for the conſideration of the court and jury: and it would obviouſly be ſubject to much fluctuation and uncertainty. To prove, upon a trial, the annual improved value of land, and then to calculate how much of that value ſhould be paid for a fine, was likely to be attended with ſo much diſſatisfaction, that recourſe would frequently be had to the court of Chancery, which had always relieved againſt the forfeiture, and taken upon itſelf, without a jury, to determine what ſhould be a reaſonable fine. Lord Keeper *Coventry*, in the 5th of *Charles* I. and again, in the 12th of the ſame reign (1 *Chan. Rep.* 18. or 33. (1), and *ibid.* 51. or 96. (2), held, that one year's improved value was a reaſonable fine—guarding the decree—that one year's value ſhould not be counted a fine certain, but referable to the diſcretion of the Court whether it was reaſonable, and that the payment was then directed becauſe it was reaſonable. In the 29th of *Charles* II. in the year 1677, Lord *Nottingham*, in the caſe in 2 *Rep.* in *Chan.* 135. (3), held, that two years' value was a reaſonable fine; and, at the time of this determination, in 1677, two years' value was not a much higher payment, than one year's value had been at the time of Lord *Coventry*'s determination. The intereſt of money had been reduced, and, from that and other cauſes, the value of land had riſen. One year's value might be nearly as large as an *aliquot* part of the ſelling price of land in the 5th of *Charles* I. as two years' value at the time of Lord *Nottingham*'s determination. From that time to the preſent, the idea of two years' value being a reaſonable fine, in the caſe of a fine arbitrary (or, in the more proper phraſe, *arbitrable* (4), has prevailed uniformly, and the adhering to this rule has been a matter of very great convenience, though it cannot be ſaid to be a matter of ſtrict juſtice. Two years' value, the intereſt of money being ſix *per cent*, as at the time of Lord *Nottingham*'s determination, is a much larger proportion of the ſelling price of a copyhold eſtate, than the ſame number of years' purchaſe, the intereſt of money being at five and four *per cent*. But to follow the variations of price, would create confuſion in this property, would occaſion a depreciation of it, and is not the true intereſt of the copyholder. Public convenience, therefore, that great ſource of law and juſtice, has eſtabliſhed the authority of the rule laid down by Lord *Nottingham*; and, it is to be obſerved, that the deciſion was not above eighteen years prior to the firſt land-tax act. From that time to the preſent hour, not an inſtance can be found, where there has

(1) *Middleton* v. *Jackſon*.
(2) *Popham* v. *Lancaſter*.
(3) *Morgan* v. *Scudamore*.
(4) *Co. El.* 351.

ever been a deduction from the two years' value (then fixed as the utmoſt amount of a fine), upon account of the land-tax. It ſeems, therefore, to me, much better for the intereſt of copyhold tenants, and for the public advantage, as there is a great deal of that property in the kingdom, that the fine to be paid upon the renewal of a copyhold eſtate ſhould be ſtrictly kept to that ſum which has ſubſiſted now above a century, namely, two years' improved value, without any deduction except for quit-rents, which can hardly be called a deduction, for the lord muſt allow that which he has received, or is to receive.

Power of the Copyholder under the Lord's Demiſe.

Mardiner v. Elliot, Mic. Ter. 29 Geo. 3. B. R. 2 *Ter. Rep.* 746.

Where a copyhold eſtate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the eſtate.—On the trial of an action of trover, for the value of ſome elm trees which had been growing on a copyhold eſtate in the manor of Abberley, of which the biſhop of Chicheſter was lord, which eſtate the plaintiff was entitled to in right of his wife, whoſe admittance on the death of her father, was to hold to her and her heirs for three lives. The jury found a verdict for the plaintiff. Afterwards, a rule to ſhew cauſe why the verdict ſhould not be ſet aſide was obtained, on two grounds: 1ſt. That the cuſtom, under which the plaintiff claimed, was bad in point of law: and 2dly, Even if it were good, that it was not ſupported by the evidence. The evidence was as follows: The plaintiff called *Ovenden*, the biſhop's woodward, who proved that the trees in queſtion had been cut down by the plaintiff; that the biſhop had before given him, *Ovenden*, orders to cut them down, but before he got there the plaintiff had done it; but he had ſeized them for the biſhop, and ſold them to the defendant for 37*l.* who carried them away. He ſaid alſo, that he had cut timber for the biſhop upon the copyhold lands of this manor, not being copyhold of inheritance; and that the cuſtom was that a copyholder for life, as the plaintiff was, had no right to cut timber. It appeared by another witneſs, that the father of the plaintiff's wife had cut timber off this eſtate forty-five years ago, but it was not known what became of it. And a third witneſs, who had known the manor forty years, ſaid, that twenty-four years ago, he had bought thirty-ſix elms of the ſame perſon, which were felled upon this eſtate. In anſwer to which, the defendant called *Ovenden* a ſecond time, to prove, that in 1771 the biſhop had taken trees growing on

on the copyhold of one *Merrit*, who was a copyholder for life, which trees had been ſold to the laſt witneſs, but the latter obſerved, that *Merritt* was either dead, or dying, at the time. Lord KENYON, Ch. J. This caſe is ſtrongly againſt the plaintiff, both on the law and on the facts. The plaintiff's counſel has been obliged to aſſume as a ground of his argument, that which fails him, namely, that this is *quà* an eſtate of inheritance; and it has been argued, as if the tenant had a power of compelling the lord to renew after the dropping in of the lives. Such was the firſt caſe of *Rowles* v. *Maſon* (1), which has been cited by the plaintiff's counſel; where, as the tenant had a power of nominating his ſucceſſor, his eſtate was *quà* an eſtate of inheritance, and then by analogy, they borrowed the rules of the common law relative to eſtates of inheritance. But in the preſent caſe, the tenant has no ſuch power; and therefore the argument does not apply. Neither does it follow, that the cuſtom in this caſe can be ſupported, becauſe the widow of a copyholder for lives may be entitled to her free bench: the privilege of free bench does not ſhew it to be an eſtate of inheritance; for a copyholder for life may have, in ſome inſtances, ſuch an excreſcence growing out of his eſtate, though generally ſpeaking, the tenant of ſuch an eſtate has not. Therefore, I am of opinion, that the cuſtom attempted to be ſet up in this caſe is againſt law, and cannot be ſupported. But upon the ſecond ground alſo, I ſhould have thought the caſe clearly with the defendant. For the evidence given in ſupport of the cuſtom is extremely weak, when compared with that given againſt it. ASHHURST, J. BULLER, J. and GROSE, J. were of the ſame opinion.—Rule abſolute.

Firebraſs *ex dim.* of Jane Symes, widow, *v.* Pennant, Mic. Ter. 5 Geo. 3. C. B. 2 *Wils.* 254.

The grant by the lord of the manor of copyhold lands to his wife, immediately, without the intervention of another, is void. In this caſe, the rector of *Compton Martin*, in the county of Somerſet, who was, as ſuch rector, lord of the manor for the time being, of the manor of the rectory of Compton Martin, did demiſe the premiſes in queſtion, upon the death of the laſt tenant, to the leſſor of the plaintiff, *Jane Symes*, who was his wife by copy of court roll, to hold to the ſaid *Jane Symes*, *Richard Symes*, and *Chriſtian Symes*, for the term of their lives, and the life of the longeſt liver of them ſucceſſively, according to the cuſtom of the ſaid manor, &c. the huſband afterwards died, and the defendant thereupon became rector of the ſaid rectory, and lord of the manor.—THE QUESTION was, Whether the demiſe by copy of the court roll, by a lord of the manor to his wife, be good in law or not? PER CUR. We cannot get over that maxim

(1) *Rol. Abr.* 560. pl. 18. *Cro. Car.* 221. 1 *Brownl.* 132. 2 *Brownl.* 85.

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in law, *that a husband and wife are one person*, and, therefore, cannot grant lands to one another: where there is no particular custom in a manor, the common law must take place. This is an original voluntary grant by the husband to the wife, who cannot, by law, take immediately from him, any more than a monk, who is dead in law, and considered as no person. So here is no person to take, for the husband and wife are only one person.—Postea to the plaintiff.

Copy-right.

Brooke *qui tam* v. Milliken, Mic. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 509.

Two penalties may be incurred on the same day, on the 12 *Geo.* 2. c. 36. for selling books originally written and published here, and afterwards reprinted in any other country, and imported into this, if the acts of sale be distinct.—This was an action on the statute 12 *Geo.* 2. c. 36.; the first section of which enacts, that "it shall not be lawful to "import or bring into this kingdom for sale any book, first "composed and written, and printed and published in this "kingdom, and reprinted in any other place whatsoever; "and if any person, knowing the same to be so reprinted and "imported, shall sell, publish, or expose to sale, any such "book or books, he shall forfeit the said book or books, and "the same shall be forthwith damasked; and such offender "shall forfeit 5l. and double the value of every book which "he shall so sell, &c. together with costs, &c." At the trial, the plaintiff proved two distinct acts of sale on the same day, the one of several books by the defendant himself in the morning, the other by his wife in the afternoon, in an open shop; and the judge being of opinion, that this constituted two different offences, for which two penalties were incurred, a verdict was taken for the plaintiff on two separate counts. On a motion for a new trial, THE COURT were of opinion, that the two penalties might be recovered because they were two distinct acts of sale, and discharged the rule.

Coleman v. Wathen, Ea. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 245.

Evidence that the defendant acted a piece on the stage, of which the plaintiff had bought the copyright, is not evidence of a publication by the defendant, within the meaning of the stat. 8 *Ann* c. 19.—This was an action for the penalty, under the statute 8 *Ann* c. 19. for publishing an entertainment, called the *Agreeable Surprize*. The plaintiff had purchased the copyright from *O'Keeffe*, the author; and *the only evidence of publication by the defendant was, the representation of this piece upon his stage at Richmond.* A verdict was taken for the plaintiff, with nominal damages, in order to raise the question, Whether this mode of publication were within the statute?

ſtatute? PER CUR. The ſtatute for the protection of copy-right only extends to prohibit the publication of the book itſelf, by any other than the author or his lawful aſſignees. But reporting any thing from memory, can never be a publication within the ſtatute. The mere act of repeating ſuch a performance, cannot be left as evidence to the jury that the defendant had pirated the work itſelf.

Thompſon v. Symonds et al. Mic. Ter. 33 Geo. 3. B. R. 5 Ter. Rep. 41.

The aſſignee of a print may maintain an action on the ſtat. 17 *Geo.* 3. c. 57. againſt any perſon who pirates it, and in ſuch an action it is not neceſſary to produce the plate itſelf in evidence; one of the prints taken from the original plate is good evidence.—This was an action on the caſe, on the ſtat. 17 *Geo.* 3. c. 57. for pirating a print of the counteſs of *Huntingdon*. The declaration ſtated, that the plaintiff, before and at the time of the pirating, &c. was the legal and true proprietor of a certain print, &c. which before that time had been drawn and deſigned by one *R. Bowyer*, &c. and afterwards it ſtated, that the defendant pirated it, &c. At the trial, the plaintiff proved that *Bowyer* originally publiſhed this print in Auguſt, 1790; that in July, 1791, he aſſigned his property in it to *Fitler*; that the defendant had ſince that time pirated it; and he gave in evidence two prints, the original one, by *Bowyer*, and another after the plaintiff became the proprietor. On the firſt print was engraved, "painted by *Bowyer*; engraved by *Fitler*; publiſhed as the act directs, by *Bowyer*, the 26th of Auguſt, 1790." On the ſecond, the laſt part was altered thus, "publiſhed as the act directs, by *Thompſon*, the 26th of Auguſt, 1790." Two OBJECTIONS were made by the defendant's counſel; 1ſt, That an aſſignee of this property could not maintain any action in his own name under the ſtatute; 2dly, That, if any ſuch action could be ſuſtained, the plaintiff muſt fail in this, becauſe the evidence did not ſupport the plaintiff's title, inaſmuch as the ſecond print, which muſt be taken to be a counterpart of the plate at preſent, purported to be an original print, by *Thompſon*, in 1790, whereas, it really was publiſhed by *Bowyer*, in 1790. The judge over-ruled both theſe objections; and the plaintiff obtained a verdict for 10*l.*; but the points were reſerved. The ſtatute 8 *Geo.* 2. c. 13. ſ. 1. veſts the property of certain prints in the inventors, deſigners, &c. for fourteen years, "*from the day of publiſhing, which ſhall be truly engraved with the name of the proprietor on each plate, and printed on every ſuch print*;" inflicting on other perſons printing the ſame, "*without the conſent of the proprietor thereof, firſt had and obtained in writing*," the penalty of forfeiting the plate, the ſheets on which the prints are copied, together with 5*s.* for every print, &c. The ſecond ſection provides, that it may be lawful for any perſons, who ſhall thereafter purchaſe any plate for printing from the original

ginal proprietor, to print and reprint from the ſaid plates, without incurring any penalty. The 7 *Geo.* 3. c. 38. ſ. 1. extends to prints, taken from any pictures, models, &c.; and enlarges the right to twenty-eight years. And the 17 *Geo.* 3. c. 57. gives a ſpecial action upon the caſe, in which the proprietor may recover damages. After a motion to ſet aſide the verdict, and to enter a nonſuit, and cauſe ſhewn, *The Court* were very clearly of opinion, that there was no foundation for the firſt objection. And as to the ſecond, Lord KENYON, Ch. J. ſaid, When the plaintiff purchaſed of the original proprietor, he had every thing which the legiſlature required; and even if he had afterwards deſtroyed the plate, his title would have continued. It ſhould ſeem, that the reaſon for requiring the name and the date to appear on the print was, that they might convey ſome uſeful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor ſhould appear, in order that thoſe who wiſh to copy it, might know to whom to apply for conſent. It ſeems, therefore, neceſſary, that the date ſhould remain, but that the name of the proprietor ſhould be altered as often as the property is changed. BULLER, J. All the difficulty in this caſe ariſes from the circumſtance of the plaintiff's having proved too much at the trial. He gave in evidence two prints, the one publiſhed by *Bowyer*, the other by himſelf. If he had reſted his caſe on the production of the firſt print only, no queſtion could have ariſen; for he would then have proved all the allegations in his declaration. The objection has been made on the other print; but if the plaintiff has a right to this print, and has ſuſtained an injury in conſequence of the defendant's having pirated it, it would require a very ſtrong caſe on the part of the defendant to induce the Court to grant a new trial. Then it was objected, that the firſt print was not ſufficient to entitle the plaintiff to a verdict, becauſe the plate itſelf was not produced. But although ſeveral actions of this kind have been tried ſince the paſſing of theſe ſtatutes, in no one of them has the plate itſelf been produced; the print has been always received in evidence, and no objection taken to it. With regard to the point gone into at the bar, I can ſee no reaſon, on reading the act of parliament, to diſtinguiſh between the date and the perſon who publiſhes the print. When the legiſlature gave the monopoly to the perſon who engraved, &c. they required, that the date and the name of the perſon entitled to the monopoly ſhall appear; both of which are required in the ſame ſection, "the day of the firſt publiſhing ſhall be truly engraved, with the name of the proprietor, on each plate." The proprietor there ſpoken of, is the inventor; and the ſecond ſection, which takes it for granted that the

proprietor

proprietor may aſſign, ſays, that ſuch aſſignee "may print and reprint from the ſaid plate;" the meaning of which is, that the aſſignee ſhall copy from the plate, as it exiſted at firſt, in order that the public may know from the bare inſpection of the print, that it was taken from the very ſame plate, for which the monopoly was granted. GROSE, J. When the print was originally publiſhed, the requiſites of the ſtatute were complied with. Then the excluſive right was veſted in *Bowyer*; and the inſtant he aſſigned to the plaintiff, the latter had every right that *Bowyer* had before.

See alſo the caſes of *Millar* v. *Taylor*, in Vol. I. p. 116. and *Beckford* v. *Hood*, in the ſame vol. p. 915.

Corn.

It is illegal to ſell corn by any other meaſure than the Winchester meaſure.—This was a conviction on the 22 *Car.* 2. c. 8. ſ. 2. & 22. & 23 *Car.* 2. c. 12. ſ. 2. for buying corn, on the 23d of July, 1791, at Newport, in the Iſle of Wight, by a buſhel different from the Wincheſter meaſure. It appeared by the evidence ſet forth in the conviction, that the corn was bought by the cuſtomary meaſure uſed in the Iſle of Wight, which contains a pint more than the Wincheſter meaſure. The defendant was convicted in 40s, and 10*l.* 15s. being the value of the wheat ſold. By the ſtat. 22 *Car.* 2. c. 8. ſ. 2. it is enacted, that "If any perſon ſhall ſell any "ſort of corn or grain, uſually ſold by buſhel, either in open "market, or any other place, by any other buſhel or meaſure than that which is agreeable to the ſtandard, marked "in his majeſty's exchequer, commonly called the Win"cheſter meaſure, containing eight gallons to the buſhel, he "ſhall forfeit, for every ſuch offence, the ſum of 40s." And by the 22 & 23 *Car.* 2. c. 12. ſ. 2. it is enacted, that "Every perſon who ſhall ſell or buy any corn, &c. in any "other manner than as is directed by the ſaid act (22 *Car.* 2.), "ſhall forfeit and loſe, beſide the penalty of the former act "appointed, all corn, &c. bought or ſold contrary to the act, "or the value thereof," &c. THE COURT, after argument, ſaid, that as this was a queſtion of very general concern, they would take time to conſider of it. AND now Lord KENYON, Ch. J. delivered the opinion of the Court—We have hitherto delayed giving judgment in this caſe, in the hopes of diſcovering that the farmers in general have been acting under a miſtake; for it is a matter of notoriety, that in different parts of the country corn is ſold by different meaſures, ſome greater, and others leſs than the Wincheſter meaſure. This queſtion depends on the ſtat. 22 *Car.* 2. c. 8. and the 22 and 23 *Car.* 2. c. 12. The former impoſes a penalty of 40s. on any perſon

The *King* v. J. Major, Tr. Ter. 32 Geo. 3. B. R. 4 *Term Rep.* 750. *Nolan*, 54.

perſon who ſhall ſell corn, or grain, uſually ſold by buſhel, by any other buſhel or meaſure than the Wincheſter meaſure. The ſtat. 22 & 23 *Car.* 2. c. 12. recites the former act; and, in order to enforce it, ſubjects both the buyer and ſeller to an accumulative penalty, the value of the corn ſold. *Theſe acts of parliament are expreſſed in the moſt poſitive terms*; and it was admitted in the argument, that there was no ſubſequent law, which directly repealed them. But then the 10 *Geo.* 3. c. 39. & 17 *Geo.* 3. c. 44. and ſeveral other ſtatutes for the regulation of the corn trade were referred to, directing the returns of the average price of corn to be made, and noticing in thoſe returns a cuſtomary meaſure. Theſe, it was argued, obliquely, though not directly, repealed the ſtatutes of *Charles* the ſecond. We have conſidered this matter very fully, and are of opinion, that the argument does not lead to that concluſion. We cannot get rid of thoſe poſitive laws by a reference to ſubſequent ſtatutes, which were paſſed for another purpoſe, and which leave the former ones ſtill in force.—Conviction affirmed.

The King. *v.* J. Arnold, Tr. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 353. *Nolan.* 282.

And the buyer of corn, by any other than the Wincheſter meaſure, forfeits the penalty of 40*s.* beſide the value of the corn, by ſtat. 22 & 23 *Car.* 2. c. 12.—This was a conviction againſt the buyer of corn by a meaſure different from the Wincheſter meaſure, on the 22 & 23 *Car.* 2. c. 12. The ſtatute 22 *Car.* 2. c. 8. ſ. 2. impoſes a penalty of 40*s.* on perſons ſelling by a buſhel or meaſure different from the Wincheſter meaſure. The ſtat. 22 & 23 *Car.* 2. c. 12. ſ. 2. after reciting the former one, enacts, "that every perſon who ſhall ſell or buy any corn, in any other manner than as is by that act directed, ſhall forfeit and loſe, beſides the penalty of the former act appointed, all corn bought or ſold contrary to the act, or the value thereof." Several objections were taken to this conviction. 1ſt, That the defendant was convicted in the penalty of 40*s.* beſides the value of the corn; whereas, he was only liable to the latter penalty, which is inflicted by the 22 & 23 *Car.* 2. c. 12. 2dly, That the quantity of corn bought was not ſufficiently aſcertained in the information, it being merely ſtated to be "a certain quantity of wheat, containing divers, to wit, fifteen, buſhels." 3dly, That the offence is charged to be contrary to the ſtatute; whereas, if the defendant be liable to both the penalties, it is contrary to the two ſtatutes. 4thly, That the defendant was adjudged to pay coſts, whereas, none are given by the ſtatute. Lord KENYON, Ch. J. In order to decide this caſe, we have only to look at the very words of the ſtatute 22 & 23 *Car.* 2. which expreſsly ſubjects the buyer to both the penalties; for it is thereby enacted, that the buyer ſhall forfeit and loſe, beſide the penalty of the former act, all corn bought, &c. that is, he is to forfeit the value of the corn,

corn, in addition to the penalty of 40*s.* impoſed by the former act. Nor is there any objection in ſaying that this forfeiture is an offence againſt the form of the ſtatute; for all that reſpects the buyer is prohibited by the ſtat. 22 & 23 *Car.* 2. And I obſerve that the proof of buying, according to the regulations of the ſtatute is, by the third ſection in the act, thrown on the defendant. ASHHURST, J. concurred. BULLER, J. The ſtatute 22 & 23 *Car.* 2. c. 12. inſtead of ſaying expreſsly, that the buyer ſhall be liable to the penalty of 40*s.* and to a forfeiture of the corn ſo bought, has ſaid the ſame thing impliedly; for it ſays that he ſhall forfeit and loſe, beſide the penalty of the former act (which is a penalty of 40*s.*), the corn ſo bought, &c. With regard to the objection, that the quantity is not ſufficiently aſcertained; an information before two magiſtrates need not be more particular than an information filed in this court; and in the latter caſe, an allegation that the defendant "bought a certain quantity of wheat, containing, to wit, fifteen buſhels," would be ſufficiently certain; and here the evidence has particulariſed it.—PER CUR. Conviction affirmed.

Coroner.

The King *v.* The Juſtices of Norfolk, Mic. Ter. 33 Geo. 3. B.R. *Nolan.* 141.

In regard to the bodies of perſons manifeſtly drowned at ſea, and caſt upon the ſhore, it is ſaid to be the conſtant uſage for the inhabitants of the place to bury them, without any inquiſition being taken by the coroner; and unleſs the coroner has taken an inquiſition in due form, he is not entitled to any fees.—This was a motion for a *mandamus* to compel the juſtices to pay to the coroner the fees and travelling expences due to him, for taking four inquiſitions upon four bodies caſt by the ſea upon the ſhore. It appeared that the papers, purporting to be inquiſitions, *were not inquiſitions at all*, as they were ſigned only by the coroner and foreman of the jury. The principal queſtion was, WHETHER, when the coroner finds the body of a perſon manifeſtly drowned at ſea upon the ſhore, he may not take an inquiſition on the body? THE COURT inclined to the opinion that he could not; and it was ſaid to be the uſage to bury ſuch bodies without any inquiſition being taken; but without expreſsly determining this, they ſaid, that the firſt queſtion which they had to decide was, Whether the coroner had taken any inquiſition at all? If he had not, he was not entitled to be paid for what he had not done: this, therefore, was an objection *in limine* to the preſent application; for theſe inquiries not being ſigned by all the jurors, were not inquiſitions.—*Mandamus* denied.

Neither

The King *v.* the Juſtices of the Weſt Riding of Yorkſhire, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 52.

Neither are the coroners of franchiſes, that do not contribute to the county rates, entitled to the fees given by the ſtat. 25 *Geo.* 2. c. 29. nor to any fees to be paid by the county.—On a *mandamus* to the defendants, to make an allowance to *Thomas Lang*, gent. *coroner of the liberty and franchiſe* of the honor of Pontefract, parcel of the duchy of Lancaſter, in the ſaid county of York, of his fees and travelling expences in reſpect of certain inquiſitions; and a return made; it was admitted by the counſel for the defendant, that the return was bad, but ſeveral objections were taken to the *mandamus*. 1ſt, The ſtat. 28 *Ed.* 3. c. 6. directs, that coroners ſhall be choſen in full counties, except in ſeigniories and franchiſes: now here the coroner claims his fees as coroner for a particular franchiſe, without ſhewing any grant, preſcription, uſage, or any other right to be coroner; he ſhould have alleged his title. 2dly, It is not ſtated in the writ that the honor of Pontefract is within the weſt riding of Yorkſhire, or that the inquiſitions were taken within the weſt riding; ſo that it does not appear that the defendants had any juriſdiction to make the order, which they are required by the writ to make. Lord KENYON, Ch. J. ſaid, there was another objection to the writ, which alone was deciſive. It does not ſtate, that the honor of Pontefract contributes to the county rates, and conſequently, the defendants had no authority by the ſtat. 25 *Geo.* 2. c. 29. (1) to make the order required. The proſecutor ſhould have alleged in the writ, all thoſe facts which are neceſſary to ſhew that he was entitled to the relief prayed, and that he had a right to call on the magiſtrates to do that for their non-performance of which he ſued out this compulſory writ.—PER. CUR. Writ quaſhed.

Corporations.

Nature of a Corporation.

Mayor and Commonalty of Colcheſter *v.* Seaber, Executor of William Seaber, his late father, Ea. Ter. 6 Geo. 3. B. R. 3 *Burr.* 1866. 1 *Black.* 591.

A corporation being diſabled to act, accepting a new charter is not diſſolved, but dormant; and after ſuch acceptance, the new corporation is the ſame as the old was.—On the trial of an action for debt, brought upon a bond in the penalty

(1) Sect. 1. enacts, that for every inquiſition taken by a coroner for any townſhip or place contributory to the rates, directed by an act 12 *Geo.* 3. c. 29. he ſhall have 20s.; and ſect. 5. enacts, that no coroner of any liberty or franchiſe, not contributory to the county rates, ſhall be entitled to any fees under the act, but ſhall only have ſuch fees and allowances as they were before entitled to, or as ſhall be given to them by the perſons by whom they are appointed.

of,

of 50*l.* conditioned for the payment of 25*l.* for the payment whereof, *William Seaber*, the defendant's father, was one of the ſureties. A verdict was agreed to be given for the plaintiffs, ſubject to the opinion of the Court upon the following facts: That Colcheſter is a borough by preſcription. That by letters patent, dated the 6th of December, 1 *Ric.* 1. Power was given to the burgeſſes to appoint, from amongſt themſelves, their own bailiffs and juſtices: and by letters patent, dated the 1ſt of March, 1 *Ed.* 4, they the bailiffs and burgeſſes were incorporated, and made to conſiſt of two bailiffs and one commonalty, in perpetual ſucceſſion. That in 15 *Car.* 2. by letters patent, dated the 3d of Auguſt, in that year, the free burgeſſes were made one body corporate and politic, by the name of "mayor and commonalty of the "borough," to conſiſt of one mayor (to be choſen annually from amongſt the aldermen), eleven aldermen, eighteen aſſiſtants, and eighteen common council: and that this charter was confirmed by letters patent, dated the 27th of July, 5 *W.* & *M.* to the mayor and commonalty, and their ſucceſſors. That on the 28th of September, 1735, *William Seaber*, the defendant's teſtator, duly executed the bond to the ſaid mayor and commonalty, upon which the preſent action is brought. That in 1740, there were judgment of ouſter againſt all the perſons then claiming in fact to be mayor and aldermen of the ſaid corporation. That the ſaid perſons were all dead before the year 1763. That from the year 1740 to 1763, no perſon, in fact, took upon himſelf, or claimed to be a mayor or alderman of the ſaid corporation. That in 1763, the (1) preſent charter was granted and accepted; and has been acted under, ever ſince. THE QUESTION was, "Whether the preſent corporation could maintain this action." Lord MANSFIELD. Many corporations, for want of legal magiſtrates, have loſt their activity, and obtained new charters. Maidſtone, Radnor, Carmarthen, and many more, are in the ſame caſe with Colcheſter. And yet it has never been diſputed, but that the new charters revive and give activity to the old corporation; except, perhaps, in that caſe in 3 *Levins*, 238 (2), where the corporation had a new name; and even there, the court made no doubt. Where the queſtion has ariſen upon any remarkable metamorphoſis, it has always been determined "That they re-"main the ſame, as to debts and rights." It now comes on, as a queſtion, "Whether the old corporation exiſts, after this "judgment of ouſter againſt the mayor and all the alder-

(1) It is dated the 9th of September, 3 Geo. 3.
(2) Corporation of Riſborough v. Butler.

" men, and the new charter." And it is argued, " That this " new corporation is totally diſtinct from the old one." But there is no authority, no *dictum* for it; and the conſequences are obvious, and would be moſt inconvenient. Without an expreſs authority, ſo ſtrong as not to be gotten over, we ought not to determine a caſe ſo much againſt reaſon, as that the parliament ſhould be obliged to interfere to ſet it right. The corporation is not diſſolved by the judgments of ouſter, and ſubſequent deaths of the mayor and aldermen: though they are without their magiſtracy, their conſtitution is not deſtroyed and gone. Their former rights remain. Would not a freeman of Colcheſter ſtill continue to have a right to common, or to vote for members to parliament? So it ſtands upon general reaſon. And Sir *James Smith*'s caſe, in 1 *Show.* 274. and in 4 *Mod.* 52. is in point, " That " the corporation is not diſſolved by the judgment." Notwithſtanding this judgment of ouſter, a right may remain, ſo as to be capable of being again raiſed and revived. The corporation can not act without legal magiſtrates; but their rights may be revived, and put in action again, by a new charter from the crown, giving them legal magiſtrates. I am clear, upon principles of law, that the old corporation was not abſolutely diſſolved and annihilated, though they had loſt their magiſtrates; and that by virtue of the new charter, they are ſo revived as to be entitled to the credits, and liable to the debts of the old corporation. Where there is a judgment againſt the corporation itſelf, the caſe would be of a different conſideration. Mr. Juſtice WILMOT concurred.—Wherever a corporation accepts a new charter, it remains, to every intent and purpoſe, as it did before, though the name be altered. *Haddock*'s caſe in Sir *T. Raym.* 439, is in point on this head. The caſe of the corporation of Scarborough, in 3 *Levinz.* 238. is alſo very ſtrong, upon a new charter. There the action was brought by the corporation by the new name; and the book ſays, "there was no doubt made of it." Then, the law being clear, " That a new charter does not " deſtroy the right of the old corporation," the queſtion is, " Whether this corporation was diſſolved by the judgment " of ouſter againſt individuals." Clearly, it is not. The difference is between a judgment againſt the corporation itſelf (for that may be a forfeiture), and a judgment of ouſter " againſt individuals." God forbid that the rights of the innocent ſhould be loſt and deſtroyed by the offence of individuals! Before the act of 11 *Geo.* 1. c. 4. (which took its riſe from a caſe of the corporation of Banbury), the corporation that had ſlipt the time of election of their chief officer, could not proceed by their own power; but the king might have given them the power, by reviving and reanimating them

them. The corporation only lay dormant and *quieſcent*, till revived and reſtored to their activity. And here the crown have reſtored and revived all the rights and privileges of this corporation. The conſequences, if it were otherwiſe, would be fatal: I mean, if the rights of common, of election to parliament, and other rights of five hundred innocent perſons were to lie at the mercy of ſome of their members only. Mr. Juſtice YATES concurred. Colcheſter is a borough by preſcription; and they are afterwards incorporated by ſuch and ſuch names, &c. and officers given to them. But the removal of their officers can not extinguiſh their rights; no more can the change of their name, as it is laid down in *Luttrell*'s caſe, 4 *Co.* 87. *b.* expreſsly. As to the debt now demanded—The Scarborough caſe, in 3 *Lev.* 237, 238. is very applicable. There, the name in which the action was brought was the new name. In 1 *Lutw.* 508, *Knight et Ux.* v. *Corporation of Wells*, where the corporation were ſued by their old name, the objection was made to the name only; none at all to the action. As to the retaining rights of common, and other rights, he mentioned the caſe of *Mellor* v. *Spateman*, in 1 *Saund.* 343. where it was agreed, "That a "corporation, by the change or alteration of the name of "the corporation, does not loſe their franchiſes." Old rights muſt remain: it would be very unreaſonable, if it ſhould be otherwiſe. Mr. Juſtice ASTON declared his concurrence; and that he founded it upon 4 *Co.* 87. *Luttrel*'s caſe, and *Haddock*'s caſe, in 1 *Ventr.* 355. and *Raymond* 439. As to the ſtatute of 11 *Geo.* 1. c. 4. the intent of it was not to conſider ſuch corporations as diſſolved, and to grant them new powers, or, as it were, new charters, as bodies diſſolved; but to revive their activity, and to put them again in motion. Though a new charter ſhould grant new rights, or a new name, yet the acceptance of it does not deſtroy the former rights, privileges, or franchiſes of the corporation; but the corporation may uſe and enjoy them, as they did before. This is expreſsly laid down in 4 *Co.* 86. *Luttrel*'s caſe, and in *Haddock*'s caſe, *Raym.* 439. It has formerly been doubted, "In which of the names, the action ſhould "be brought;" but, of late, the new name has been thought the moſt proper to be uſed. Mr. Juſtice WILMOT. In thoſe caſes of non-elections upon the fixed day, before 11 *Geo.* 1. c. 4. the corporation having ſlipt their day or time of election, the nomination remained in the crown: ſo that that was juſt the ſame caſe then, as this is now.—Poſtea to the plaintiffs.

The proclamation of *James* the Second, in the 4th year of his reign, for reſtoring corporations to their ancient charters, &c. operates (when accepted) as a grant of revival to ſuch of the old corporations as had ſurrendered their corporate

Newling v. Francis, Ea. 29 Geo. 3. B. R. 3 *Ter. Rep.* 189.

rate franchiſes to *Charles* the Second (but which ſurrenders were not enrolled) who had granted new charters; and overturns ſuch new charters.

And when the mode of electing officers is not regulated by charter or preſcription, the corporation may make bye-laws to regulate the election.

Theſe were iſſues to try the right of election of mayor for the borough of Cambridge. The firſt count ſtated the plaintiff's mode of election; that the names of all the common council of the borough preſent at the election ſhould be firſt written on ſeveral pieces of paper, and laid upon the table; that the mayor and his aſſiſtants ſhould elect two aldermen to incloſe the names in balls of wax, and put the ſame in a box; that the mayor and his aſſiſtants ſhould alſo appoint one other alderman to take out one of the balls for the bench; and that the commonalty ſhould appoint a burgeſs to take out one other ball; and that the two whoſe names ſhould be incloſed in the balls ſo taken out ſhould chooſe twelve burgeſſes, that is to ſay, three for every ward within the borough; and the twelve being firſt ſworn ſhould chooſe unto them ſix other burgeſſes, *viz.* two out of two of the wards, and two out of each of the others, and that thoſe eighteen burgeſſes ſo choſen and ſworn, ſhould, within an hour, chooſe a mayor, bailiff, and counſellors of the borough. The ſecond count ſtated the defendant's mode of election; that the mayor and his aſſeſſors or counſellors ſhould elect one of the commonalty, and that another of the commonalty ſhould be elected by the commonalty, which two being ſworn ſhould elect twelve men of the commonalty, which twelve ſhould chooſe ſix more of the commonalty, and thoſe eighteen in the preſence of the commonalty ſhould ſwear that they would chooſe a certain fit mayor to govern the town, four bailiffs, and four counſellors; and that the two, who chooſe the twelve, ſhould not be part of the eighteen in the election; and that the eighteen ſhould chooſe the mayor, bailiffs, and counſellors of the borough. At the trial, a ſpecial verdict was found in ſubſtance, as follows: "Cambridge is a borough by preſcription, by the name of the mayor, bailiffs, and burgeſſes of the borough of Cambridge. There has not been any one uniform and certain mode of election of the mayor, bailiffs, and counſellors, of the borough, uſed and eſtabliſhed in the borough from time immemorial: but it has from time to time been ordered and directed by bye-laws for that purpoſe made by the body at large. The verdict then ſtated a bye-law made in 18 *Ed.* 3. for the election of mayor, bailiffs, and counſellors, as ſet out in the ſecond count of the declaration; which was followed

" lowed till the 10th of *Elizabeth*, when the bye-law pre-
" ſcribing the mode of election, as ſtated in the firſt count,
" was made. This latter was uſed from that time till the
" granting of the charter of 36 *Car.* 2. hereafter mentioned.
" It then ſtated, that the corporation, by a deed of ſurrender,
" dated the 11th of November, in the 36th of *Car.* 2. granted
" and ſurrendered to the king all their powers, franchiſes, and
" liberties of or concerning the election of any perſons in
" the ſeveral offices of mayor, and ſeveral others: but no
" deed of ſurrender of any charters, franchiſes, or privi-
" leges, belonging to the corporation, was enrolled of re-
" cord before the granting of that charter. The verdict
" then ſet out the charter of *Charles* the Second; which,
" after reciting the above ſurrender, contained *(inter alia)*
" a power of amoving any of the corporators by an order
" of privy council; a licence to purchaſe lands in mort-
" main, with a *non obſtante* clauſe; and which directed that
" the mayor, &c. ſhould be elected in the ſame manner as
" had been accuſtomed for twenty years paſt: which letters
" patent on the 12th of January, in the 36th of *Charles* the
" Second, were accepted. The verdict then ſtated, that the
" mode of election of officers, which had been accuſtomed
" within the borough by the ſpace of twenty years, previous
" to and until the granting of the letters patent, further pre-
" vailed and was uſed in the borough until the 4th of *James*
" 2d.; and that then *James* 2d. iſſued a proclamation, ſealed
" under the great ſeal, intituled, " *A Proclamation for re-*
" *ſtoring Corporations to their ancient Charters, Liberties,*
" *Rights, and Franchiſes*;" and dated the 7th of October, in
" the 4th year of his reign, which is as follows: the pro-
" clamation recited, that ſeveral deeds of ſurrender, which
" had been lately made by ſeveral corporations within the
" kingdom of England and Wales of their charters, fran-
" chiſes, and privileges, were not yet recorded or enrolled,
" and that upon the proceedings and rules for judgments
" which had lately been had upon the *quo warrantos*, or in-
" formations in the nature of a *quo warranto*, judgments
" had not yet been entered upon record, notwithſtanding
" which new charters had been granted by *Charles* the Se-
" cond and by *James* the Second, which deeds (being not
" enrolled or recorded) did not amount to, or in law make,
" any ſurrender of the charters, franchiſes, or liberties there-
" in mentioned; and that ſuch of the ſaid corporations,
" againſt which rules for judgments had been made, but no
" judgments entered upon record, were not diſcorporated
" or diſſolved; and that it was in his (King *James*'s)
" power to leave ſuch corporations in the ſame ſtate and
" condition they were in, and to diſcharge all further pro-

" ceedings and effects that might be of ſuch rules for judg-
" ments and deeds of ſurrender; it was declared, that upon
" due ſearch and examination it appeared, that the deeds of
" ſurrender made by the corporation, of the ſaid cities and
" towns (except the corporations following, that is to ſay,
" Thetford, Nottingham, Bridgewater, Ludlow, Bewdley,
" Beverly, Tewkeſbury, Exeter, Doncaſter, Colcheſter,
" Wincheſter, Launceſton, Liſkeard, Plympton, Tregony,
" Plymouth, Dunwich, St. Ives, Fowey, Eaſt Looe, Camel-
" ford, Weſt Looe, Tintagell, Penryn, Truro, Bodmyn,
" Hadleigh, Leſtwythell, and Saltaſh) were not inrolled or
" recorded in any of the courts; and that the rules for
" judgments had paſſed upon informations in nature of *quo*
" *warranto*, againſt the corporations of ſeveral cities and
" towns, yet no judgments had been, or were entered upon
" record upon any ſuch informations (except againſt the
" city of London, Cheſter, Calne, St. Ives, Poole, York,
" Thaxted, Langhorn, and Malmſbury); and alſo reciting,
" that the king being reſolved to reſtore and put all his
" cities, towns, and boroughs in England and Wales, and
" alſo the town of Berwick upon Tweed, into the ſame
" ſtate and condition in which they were in the late reign,
" before any deed of ſurrender was made of their charters,
" or franchiſes, or proceedings againſt them, &c. The king
" did publiſh, declare, direct, and require that the ſaid cor-
" porations, whoſe deeds of ſurrender were not enrolled, or
" judgment entered againſt them as aforeſaid, and the
" mayors, bailiffs, ſheriffs, aldermen, common councilmen,
" &c. and all and every others the members of, or in, every
" of them reſpectively, upon the publication of that pro-
" clamation ſhould take upon themſelves, and proceed to
" act as a corporation, or body politic; and where places
" were vacant by death, or otherwiſe, to make elections,
" conſtitute, and fill up, the ſame, notwithſtanding the uſual
" days and times of elections by the ancient charters and
" conſtitutions ſhould happen to be paſſed; and to do, exe-
" cute, and perform, all and every matter and thing as they
" lawfully might and ought to have done, if no ſuch deeds
" of ſurrender, rules for judgment, or other proceedings, &c.
" had been had or made. And for the better effecting the
" ſaid intention, the king did, by order (made in council, and
" under the ſign manual), and did alſo by his proclamation
" (made with the advice of the council) diſcharge, remove,
" and diſmiſs all and every perſon and perſons of and from
" all offices and places of mayors, bailiffs, &c. and all and
" every office and place, which they or any of them had or
" claimed only by charter, patent, or grant, from the late
" king, or himſelf, ſince the dates of the reſpective deeds of
" ſurrender,

" ſurrender, or rules for judgment (except ſuch corpora-
" tions whoſe deeds of ſurrender were inrolled, or againſt
" whom judgment was entered), and that all and every ſuch
" perſon and perſons ſhould deliver up into the hands and
" cuſtody of the ſaid perſons thereby appointed, and intend-
" ed to act, and execute the ſaid offices and places, all and
" every the charters, records, books, evidences, and matters,
" concerning the ſaid reſpective corporations. And it was
" thereby further publiſhed and declared, that the king had
" cauſed all and every the ſaid deeds of ſurrender, which
" could be found, to be delivered and put into the hands of
" the attorney-general, to be by him cancelled, and returned
" to the corporations whom they concerned, and had alſo
" given to the ſaid attorney authority, and he was thereby
" warranted and commanded, not only not to proceed to or
" enter judgment upon the ſaid *quo warranto*, &c. but to en-
" ter upon the reſpective records *noli proſequis* and legal diſ-
" charges thereof. And the king thereby publiſhed and de-
" clared his further grace and favour to the ſaid cities, cor-
" porations, &c. at any time thereafter by any further act
" to grant, confirm, and reſtore unto them all their charters,
" liberties, franchiſes, and privileges, that at the reſpective
" times of ſuch deeds of ſurrender, or rules for judgment
" made or given, they held or enjoyed; and, in order to the
" perfecting his ſaid gracious intentions, he thereby likewiſe
" publiſhed and declared his royal will and pleaſure as for
" and concerning the reſtoring to ſuch of the cities, corpo-
" rations, and boroughs, which had made deeds of ſurren-
" der, or had had judgment given againſt them, which ſur-
" renders and judgments were entered of record, that the
" chancellor, and attorney-general, and ſolicitor-general,
" without fees to any officer or officers whatſoever, upon
" application to them made, ſhould, and they were thereby
" required to prepare and paſs charters, inſtruments, grants,
" and letters-patent, for the incorporating, regranting, con-
" firming, and reſtoring to all and every the ſaid cities, &c.
" their reſpective charters, liberties, rights, franchiſes, and
" privileges, and for reſtoring the reſpective mayors, bailiffs,
" recorder, ſheriffs, &c. as were of ſuch cities, corporations,
" &c. at the time of ſuch deeds of ſurrender or judgments
" reſpectively given or had, for the putting them into the
" ſame ſtate, condition, and plight they were in at the time
" of ſuch deeds of ſurrender or judgments made or given.
" It then recited, that divers boroughs that were not thereto-
" fore corporations had, ſince the year 1679, had charters
" of incorporation granted and paſſed unto them, and the
" king thereby further expreſſed and declared his royal
" pleaſure to determine and annul the ſaid laſt-mentioned

" charters and corporations, and to that end he had, in " purſuance of the power reſerved in the ſaid charters (by " order in council and under the ſign-manual), remov- " ed and diſcharged, and the king did alſo by the proclama- " tion (made with the advice of the council) remove and " diſcharge all and every perſon of or in the laſt-mentioned " corporations, of and from all offices and places of mayors, " bailiffs, &c. and of and from all and every other office and " place from which he had power reſerved by the ſaid char- " ters reſpectively to remove and diſcharge them. And the " king thereby promiſed and declared, that he would do and " conſent to all ſuch acts, matters, and things, as ſhould be " neceſſary to render thoſe his gracious intentions and pur- " poſes effectual; it being his gracious intention to call a " parliament, as ſoon as the general diſturbance of the king- " dom by the intended invaſion would admit thereof. The " ſpecial verdict further ſtated, that after the iſſuing of the " proclamation, to wit, on the 26th of October, 4 *Jac.* 2. " 1688, at a meeting of the corporation of Cambridge, at " the common hall, after reading the proclamation, it was " agreed and ordered by the general conſent, that the mayor, " aldermen, and other officers of the corporation, who were " in their reſpective places at and before the making of the " ſurrender, ſhould take upon them their reſpective places, " and proceed to make elections, and fill up ſuch places as " were vacant by death or otherwiſe, as the proclamation " directed; upon which certain perſons took the oaths of " office for mayor, aldermen, bailiffs, town-clerk, and com- " mon councilmen, and ſubſcribed the declaration, &c. It " then ſtated a bye-law, made in 1786, agreeable to the de- " fendant's mode of election ſet out in the ſecond count." The counſel for the plaintiff, made four queſtions: 1ſt, As to the deed of ſurrender prior to the granting of the charter of *Car.* 2. not being enrolled. 2d, Whether that charter contained any clauſe which, being void in law, vitiated the whole grant. 3d, Concerning the effect of the proclamation of *James* the Second. 4th, Whether, ſuppoſing the charter of *Car.* 2. to be a valid and ſubſiſting charter, the corporation under the power of making bye-laws, could make the bye-law in 1786, to alter the election of officers. But the opinion of the Court proceeded on the two laſt points. And with reſpect to the THIRD POINT, it was contended, that the proclamation of *James* the Second neither could, or did grant any thing to the corporation of Cambridge. And as to the fourth, that the bye-law of 1786, was void; becauſe a corporation cannot change its conſtitution as to the election of officers, where it is regulated by charter, or a preſcriptive uſage. And here the charter of

Charles

Charles the Second directed the mode of election, as it had been for twenty years before. Lord KENYON, Ch. J. Two modes of election are ſtated on this record: if the firſt is to prevail, the plaintiff is right: if the other be the true one, the defendant muſt ſucceed. The ſpecial verdict ſtates, that there is no preſcriptive mode of election; it is, therefore, neceſſary to reſort to the bye-laws which have regulated the election; for if the bye-law does not exclude thoſe perſons who were intended by the king's charter to concur in the election, or does not narrow the number of perſons eligible, it may be good. A bye-law cannot indeed exclude integral parts, as was decided in the Maidſtone caſe (1): but, generally ſpeaking, within theſe bounds the mode of election may be regulated by provident bye-laws. Now in the corporation of Cambridge there was no other ſtandard previous to the charter of *Charles* the Second; and if prior to that time, the bye-laws of the corporation were competent to regulate the mode of election, they continue ſo at this time, unleſs ſome alteration, in this reſpect, was made by that charter. If that charter has regulated the mode of election, and is the ſubſiſting charter now, the corporation muſt conform to it: and therefore great pains have been taken in the argument to ſhew that this is the ſubſiſting charter at this day. Then let us conſider whether it is ſo or not. It is not a very popular argument to ſay, that this charter, which, with many others granted under the like circumſtances, was one of the greateſt grievances of the country, and tended more than any thing elſe to bring about the revolution, ſhall be enforced again after it has ceaſed to be acted under for a century paſt. It muſt be obſerved, that the proclamation of *James* the Second was iſſued only nine days before the landing of king *William*; in which the former does not indeed abſolutely ſay that thoſe things which had been done relative to the granting of thoſe charters were contrary to law, but he admits fully that they ought not to have been done. Then, ſpeaking of thoſe corporations who had ſurrendered their old conſtitutions, and accepted new charters, he ſays that the ſurrenders which had been enrolled were not binding: and, after excepting London, Cheſter, and ſome others (whoſe ſurrenders had been enrolled), he proceeds to ſay in effect by the proclamation, that all the proceedings relative to the other corporations, were void; and he directs that, on the publication of that proclamation, they ſhall be reſtored to the ſtate in which they were before ſuch ſurrenders were made, or new charters granted. And thoſe cor-

(1) See p. 489. *ſupra.*

porations

porations were not to wait till new charters were paſſed, but they were required, in the very words of the proclamation, immediately to take upon themſelves, and proceed to act as bodies politic; and they were required to fill up the vacancies, notwithſtanding the uſual days of election were paſſed. Then, indeed, orders were given to the lord chancellor, and the attorney and ſolicitor general, to do whatever ſhould be deemed neceſſary for reſtoring the old corporations. Then conſider the nature of the inſtrument by which this is to be effected: it is an inſtrument under the great ſeal, declaring the king's intention competent to the purpoſes for which it was granted, and expreſſed in words which admit of no ambiguity. But it has been objected that, as this inſtrument extends to many different corporations, it could not be repealed as to any one, in caſe of forfeiture or otherwiſe, without effecting all the others. But I do not ſee why it may not be cancelled as to one, and remain good as to the others. It was then ſaid, that this corporation had acquired powers by the charter of *Charles* the Second, which they were not deſirous of parting with, and that in fact they did not accept of this proclamation. In anſwer to this, it is only neceſſary to advert to what the corporation did; they aſſembled in their corporate capacity, and in council profeſſed to act under it, by electing officers as they were directed by the proclamation, and taking the oaths. Now, there could not be any ſtronger act of acceptance than this. Therefore the charter of *Charles* the Second being out of the caſe, the corporation were reſtored to the ſtate in which they were before that time: and there being no charter or preſcription to regulate their mode of election, it was competent to this corporation to make the bye-law in 1786, under which the defendant claims. Ashhurst, J. I ſee no objection to a proclamation under the great ſeal having the force of a grant, if it be accepted as ſuch, and acted under. And though this was not in form a grant, yet it is tantamount to it; it is like a charter of reſtoration. It makes no difference whether it is referable to one corporation in particular, or to all the corporations then in exiſtence: for it operates as an individual grant to each. Now here the old corporation agreed to accept it as ſuch, by immediately meeting in their corporate capacity, and proceeding to the re-election of their old officers, who were ſworn in. This is a ſtrong act of acceptance. Then, as to the validity of the bye-law in 1786. I admit that, though bye-laws cannot alter the conſtitution, they may regulate the manner of election, if they do not infringe their charter. Here it is expreſsly found that their mode of election was not regulated by any charter or preſcription, but that it has varied from time to time. The ſame power, therefore, which

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enabled the corporation to make the former bye-law, alſo enabled them to ſubſtitute another in its room. BULLER, J. It is certainly a rule that the jury muſt find facts, and not merely evidence of facts: but there is no foundation for the objection here, for the jury have found facts. And ſuppoſing the queſtion at the trial has been, whether or not that which was proved amounted to an acceptance in point of law, they could not have found more correctly than they have done; for they have ſtated that which the corporation did, and if that amount, in law, to an acceptance, it is a ſufficient finding. GROSE, J. of the ſame opinion.—Judgment for the defendant.

The King *v.* John Paſmore. Ea. Ter. 29 Geo. 3. R.B. 3 *Ter. Rep.* 199.

When an integral part of a corporation is gone, and the corporation has no power of reſtoring it, or of doing any corporate act, the corporation is ſo far diſſolved that the crown may grant a new charter.—An information in the nature of a *quo warranto* was exhibited againſt the defendant, calling upon him to ſhew by what authority he claimed and exerciſed the office of mayor of the borough of Helleſton. The defendant in his plea ſet forth, that *George* the Third, by letters patent under the great ſeal, bearing date the 3d of September, in the 14th year of his reign, of his ſpecial grace, certain knowledge, and mere motion, for himſelf, his heirs, and ſucceſſors, did will, grant, ordain, conſtitute, confirm, and declare, that the ſaid borough of Helleſton ſhould and might remain, for ever thereafter, a free borough of itſelf; and the burgeſſes of the ſame borough, by whatſoever name or names of incorporation they had theretofore been incorporated, or called, ſhould, and might, for ever thereafter be one body corporate and politic in deed, fact, and name, by the name of the mayor and commonalty of the borough of Helleſton. And by the ſaid letters patent it was further ordained, &c. that there ſhould be five aldermen, who ſhould continue for life, one of whom was to be mayor; and the firſt modern mayor and aldermen were thereby conſtituted by name. And the king did further will, grant, ordain, declare, and confirm, that for ever thereafter there ſhould be certain perſons within the borough who ſhould be freemen and burgeſſes thereof; and he thereby nominated, created, and conſtituted the defendant and thirty others, by name, being inhabitants within the ſaid borough, to be burgeſſes thereof. It then ſtated the mode of election of mayor to be, that the mayor or his deputy, and aldermen, or the major part of them, whereof the mayor or his deputy ſhould be one, for ever thereafter, in every year upon Sunday next before the feaſt of St. Michael the archangel, ſhould meet in the Guildhall, or in any other convenient place within the ſaid borough, and there nominate and aſſign two of the aldermen before the freemen of the ſaid borough, then and there preſent, to the intent

intent that they might elect one of the ſaid two aldermen to the office of mayor, &c. It then ſtated the acceptance of the ſaid letters patent on the 4th of September, in the ſaid fourteenth year, &c. and derived title to the defendant under that charter. The replication, taking iſſue upon the fact of acceptance of the ſaid letters patent, ſtated that the king, by the ſaid letters patent, after reciting that the borough of Helleſton was a borough by preſcription, and under letters patent of the twenty-ſeventh of *Elizabeth*, and ſixteenth of *Charles* I.; and alſo, that it appeared to the ſaid lord the king, by divers petitions of and on the behalf of divers merchants, tradeſmen, inhabitants, and freeholders, of his ſaid borough of Helleſton, that ſeveral diſputes had ariſen within the ſame, and informations, in nature of *quo warranto*, had then been proſecuted in his court of King's Bench, and judgment of ouſter obtained againſt ſeveral perſons for acting as mayor, aldermen, and freemen, reſpectively, of the ſaid borough, whereby, and by the natural deaths of other aldermen of the ſaid borough, his ſaid corporation was then in danger of being diſſolved, and incapable of continuing itſelf, or of exerciſing and enjoying their ſaid liberties and franchiſes, by reaſon whereof the petitioners laboured under great hardſhips, grievances, and inconveniences; he, being willing that they might be relieved in their ſaid complaints, as far as in him lay, and that there ſhould be one certain and undoubted method of preſerving the peace within his ſaid borough of Helleſton; and that his people might enjoy their rights there, and exerciſe acts of juſtice without any delay, did, by the ſaid letters patent, grant and ordain as in the ſaid plea is above ſet forth. The replication then proceeded to ſet forth further parts of the ſaid letters patent; aſcertaining the boundaries of the juriſdiction of the borough; and alſo, that it was thereby further granted to the mayor and commonalty of the ſaid borough, that in caſe of ſickneſs, or abſence from the ſaid borough, of the mayor, he might appoint a deputy under his hand. And that the king further granted that there ſhould be a recorder of the ſaid borough; and that he might, at all times, by writing under his hand and ſeal, appoint a deputy; and that in the nomination and election of magiſtrates, and all other corporate acts to be done by the mayor and aldermen, the mayor, or his deputy, ſhould have a double or caſting voice in caſe the votes were equal; and in the nomination of two of the aldermen to the freemen of the ſaid borough for the election of a mayor, upon the death or amotion of any mayor of the ſaid borough, if the votes of the aldermen ſhould be equal, then the alderman who laſt ſerved the office of mayor, preſent, ſhould have a double, or caſting vote. And that the king further willed by the ſaid letters patent, that in caſe of the death, non-reſi-

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dence, or amotion, of any alderman, the mayor, or his deputy, and the reſt of the aldermen, or major part of the ſame, might, within eight days after ſuch death or amotion, elect one of the freemen to be an alderman. It alſo ſtated the mode of electing freemen; and alſo a grant of a market and fairs, with all cuſtomary tolls and profits; and of all waives and eſtrays within the ſaid borough to the mayor and commonalty of the ſame. And that the king further granted and confirmed to the mayor and commonalty the power of electing two burgeſſes, to repreſent them in parliament, and he did alſo ratify, confirm, and reſtore, as far as in him lay, to the aforeſaid mayor and commonalty, his ſaid borough of Helleſton, and the market-houſe there, and all and ſingular the ſame manors, hamlets, lands, commons, courts, &c. goods and chattels of felons, &c. hereditaments, authorities, liberties, privileges, franchiſes, rights, juriſdictions, &c. whatſoever, which the burgeſſes of the ſaid borough, or their predeceſſors, then or theretofore had, or had uſed and enjoyed, by whatever names they were incorporated, &c. to have, hold, and enjoy the ſame to the ſaid mayor and commonalty of the borough aforeſaid, and their ſucceſſors for ever, under the ancient rent or fee farm theretofore accuſtomed, to be rendered to him for the ſame. And that he moreover willed, and by thoſe preſents granted to the ſaid mayor and commonalty, all and ſingular the gifts, grants, liberties, franchiſes, &c. and all and ſingular things, as well in that preſent charter declared, as in all and ſingular other charters, letters, or gifts, by any of his progenitors theretofore made or granted. And that he, graciouſly ratifying all thoſe things for himſelf, his heirs and ſucceſſors, as far as in him lay, of his ſpecial grace by the tenor of thoſe preſents did approve, ratify, and confirm, the ſame to the ſaid mayor and commonalty for ever, &c.; as by the ſaid letters patent, &c. The replication then proceeded to ſtate, that the borough of Helleſton was a borough by preſcription, previous to, and at the time of the granting of the charter of *Elizabeth* thereafter mentioned; and that before the granting of the letters patent of *Geo.* 3. a charter had been granted to the borough in the 27th of *Eliz.* [the proviſions of which are therein particularly ſet forth, and which are ſimilar to thoſe before ſpecified in the charter of *Geo.* 3. except as is hereafter noticed]. It then ſtated the acceptance of the charter of *Eliz.* and that it was in force at the time of making the letters patent of *Geo.* 3. It then proceeded to ſtate, that from time whereof, &c. until and at the time of granting the ſaid letters patent of our ſaid lord the king, the mayor of the ſaid borough had not by any charter, uſage, or preſcription, any power or authority of conſtituting a deputy to exerciſe the office of mayor during his abſence or ſickneſs, or on any other

other occaſion whatſoever; nor had the mayor, in any corporate act whatſoever, done or to be done by the mayor and aldermen of the ſaid borough, where the votes were or ſhould be equal, a double, or caſting vote; nor in the nomination of two of the aldermen of the ſaid borough to the freemen of the ſaid borough for the election of a mayor, upon the death or amotion of any mayor, in caſe the votes of the aldermen were equal, had the alderman who had laſt ſerved the office of mayor of the ſaid borough, preſent at ſuch election, a double or caſting vote; nor had the recorder any power or authority of appointing any perſon to be his deputy, other than and except the town-clerk of the borough. That before, and at the time of granting the ſaid letters patent of our ſaid lord the king, *R. Johns*, in the ſaid letters patent of our ſaid lord the king, firſt named, and ſeven other perſons, [naming them] in the ſaid letters patent laſt mentioned, alſo named, were reſpectively burgeſſes and freemen of the ſaid borough, and were then the only exiſting burgeſſes and freemen of the ſame. It then concluded by ſtating, that a majority of theſe perſons refuſed to accept the letters patent of *Geo.* 3. The rejoinder joined iſſue on the firſt replication as to the acceptance of the charter of *Geo.* 3.; and, as to the matter laſtly replied, proteſting that it is not ſufficient in law to convict the defendant, or exclude him from his ſaid office; proteſting alſo that the charter of *Elizabeth* was not in force at the time of granting the charter of *Geo.* 3.; proteſting alſo that the ſaid *Richard Johns* and the other ſeven perſons [naming them] were not burgeſſes of the ſaid borough at the time of granting the laſt-mentioned charter; ſtated that queen *Elizabeth* did further will and grant, by her ſaid letters patent, that the mayor and major part of the aldermen of the ſaid borough, for the time being, on Sunday next before the feaſt of *St. Michael* the archangel, in every year, ſhould meet in the Guildhall of the ſaid borough, and there nominate and aſſign two of the aldermen before the freemen of the ſaid borough then and there preſent, to the intent that they might elect one of thoſe two aldermen to the office of mayor for one whole year, and until another ſhould be elected to the office in the ſame manner; and that ſhe further granted that, upon the death or amotion of the mayor, an election of another might be made, according to the mode above preſcribed, for the remainder of the year. That for a long time before, and at the time of, the granting the ſaid letters patent of our ſaid lord the king, there was no mayor of the ſaid borough; nor were there two aldermen of the ſaid borough; and that by reaſon thereof a mayor of the ſaid borough could not be named, aſſigned, or elected; nor could any election of a freeman or burgeſs of the ſaid borough, nor any nomination or election of an alderman of the ſaid borough, be had or held under, or by virtue

virtue of the ſaid letters patent of the ſaid queen *Elizabeth*, or under or by virtue of any preſcription or other patent or charter whatſoever, whereby the ſaid corporation of Helleſton before, and at the time of, the granting the ſaid letters patent of our ſaid lord the king, became, and was incapable of continuing itſelf, or of exerciſing and enjoying the liberties, franchiſes, &c. by the ſaid charter of *Elizabeth*, or by any preſcription, or any other charter whatſoever, granted or confirmed, or of performing the duties thereby required; and by reaſon thereof became, and was totally and abſolutely diſſolved, &c. The ſurrejoinder ſtated, that the burgeſſes of the ſaid borough, at the time of granting the charter of *Geo.* 3. were a body politic and corporate, in manner and form as in the replication alledged, &c. On the trial of this cauſe, a ſpecial verdict was found, the facts being previouſly agreed to by the parties. The verdict ſtated, that "Helleſton was "a corporation by preſcription; and before and at the time "of granting the letters patent of queen *Elizabeth*, hereafter "mentioned, the burgeſſes of the ſaid borough had held and "enjoyed divers lands, tenements, rights, juriſdictions, li-"berties, and franchiſes, by preſcription, and by virtue of "divers letters patent: and that queen *Elizabeth*, by her let-"ters patent, dated the 26th of January, in the 27th year of "her reign, granted to the burgeſſes of the ſaid borough in "manner and form as in the replication and rejoinder is "above ſet forth; which letters patent were duly accepted. "That at the time of granting the letters patent of *Geo.* 3. "*Richard Johns* was the only remaining perſon who had "before that time been elected an alderman of the ſaid "borough; and *Richard Johns* the elder, *Matthew Willis*, "*Edmond John*, *Richard Penhall*, otherwiſe *Penhale*, *William* "*Rogers*, *Thomas Glynn*, and *Thomas Willes*, were the only "remaining perſons who had before that time been elected "burgeſſes and freemen of the ſaid borough, under and by "virtue of the ſaid letters patent of queen *Elizabeth*. And "that there was not then, nor had been for twelve months "previous to the granting the aforeſaid letters patent of "*Geo.* 3. any mayor of the ſaid borough, and by reaſon "thereof a mayor of the ſaid borough could not be named, "aſſigned, or elected; nor could any election of a freeman "or burgeſs of the ſaid borough, nor any nomination or "election of an alderman of the ſaid borough, be had or "held under, or by virtue of the ſaid letters patent of *Eli-*"*zabeth*, or under or by virtue of any preſcription, or other "patent, or charter, whatſoever: nor had the burgeſſes of "the ſaid borough, by any uſage, preſcription, or charter, "any power of holding any corporate aſſembly, or of doing "any corporate act, in any other manner than as by the "parts of the letters patent of the ſaid queen *Elizabeth* above "ſet

" ſet forth, they had the power of doing. That on the 3d
" of September, in the 14th *Geo.* 3. the king, by his letters
" patent of that date, and directed as in the defendant's plea,
" is mentioned, granted in manner and form as is ſet forth
" in the plea and replication; and that all the perſons, to
" whom the ſaid letters patent laſt mentioned were di-
" rected, accepted the ſame, except the ſaid *Richard Johns*,
" ſo having been elected an alderman of the ſaid borough,
" and that the ſaid *Matthew Willis*, *Richard John* the elder,
" *Edmund John*, *Richard Penhall*, otherwiſe *Penhale*, and
" *William Rogers*, being the majority, or greater part of the
" then remaining perſons who had before that time been
" elected freemen and burgeſſes, and being the perſons who are
" ſeverally deſcribed in the ſaid laſt-mentioned letters patent,
" who then ſeverally and reſpectively refuſed, and from thence
" hitherto have refuſed, to accept the ſaid letters patent.
" That the ſaid *Richard Johns*, *Matthew Willes*, *Richard*
" *Johns* the elder, *Edmund John*, *Richard Penhall*, otherwiſe
" *Penhale*, and *William Rogers*, had, before the granting the
" ſaid letters patent, been ſeverally elected and admitted into
" their reſpective offices; and had not, nor had either of
" them, ſubſequent to the time of their reſpective elections
" into their ſaid ſeveral offices, been removed from, or re-
" ſigned the ſame." But whether upon the whole matter,
&c. the ſaid letters patent were duly accepted by the perſons
to whom they were directed, &c. the jurors prayed the ad-
vice of the court, and alſo, whether upon the whole matter,
&c. the burgeſſes of the ſaid borough, until and at the time
when the ſaid letters patent were granted, were a body cor-
porate, &c.; the jurors alſo prayed the advice of the court,
&c. This verdict was twice argued: and for the relator it
was contended; Firſt, that the old corporation, under the
circumſtances of this caſe, was not diſſolved; becauſe there
are only three ways in which a corporation may be diſſolved;
1ſt. By abuſer, miſuſer, or forfeiture, for a breach of the
condition implied in all grants of corporations. *Bract. l.* 2.
fo. 56. 2 *Inſt.* 222. 1 *Show.* 274. and 4 *Mod.* 55. 2dly. By
ſurrender; or, 3dly, By the death of all its natural members.
1 *Ro. Abr.* 514. *J.* 2. Secondly, that the new charter, re-
citing that the old corporation was an exiſting corporation,
admitted the old corporation not to be diſſolved; and that
therefore thoſe who claimed under it, were eſtopped by their
own act of acceptance, to ſay that the old corporation was
diſſolved. Thirdly, that the crown, on refuſal of acceptance
by an exiſting corporation, cannot intrude upon it a conſti-
tution of a different frame. And, fourthly, that even if the
old corporation were, in point of law, diſſolved, the king, in
granting the new charter, was deceived, and that his grant was
void.—Lord KENYON, Ch. J. The general queſtion which
ariſes

ſiſes on this ſpecial verdict is, Whether the charter of *Geo.* 3. was accepted? In arguing which, ſome things are clear: when a corporation exiſts capable of diſcharging its functions, the crown cannot obtrude another charter upon them: they may either accept or reject it. In arguing one part of the caſe, the counſel, for the relator, took their ground on the convenience of the caſe, inferring from thence, that the law would coincide with it. Now, let us conſider what is the convenience of the caſe; and, in doing ſo, I do not confine my obſervations to Helleſton alone, but they are applicable to corporations in general, where they have excluſive juriſdictions from the reſt of the county. That the magiſtracy in this borough had ceaſed, and that the remaining corporators could not exerciſe thoſe functions which were intended for the government of the borough, are allowed on all hands. Then it cannot be ſuppoſed that it muſt depend on the whim or caprice of three or four individuals, or, perhaps, one, whether there ſhould be any magiſtracy in the town or not; eſpecially too in direct oppoſition to the intentions of the king, who, as *pater patriæ*, is to ſuperintend the adminiſtration of juſtice throughout the country, and who thought it neceſſary to provide by his charter a ſufficient number of magiſtrates for the government of this place: and, as was ſaid by Lord *Mansfield* (though for another purpoſe) in the caſe of the mayor, &c. of *Colcheſter* v. *Seaber*, (1), "without an expreſs authority, ſo ſtrong as not to be gotten over, "we ought not to determine a caſe ſo much againſt reaſon." The ſeveral inconveniences which have been pointed out, namely, that the corporation-lands would revert to the donor, by which the means of carrying into execution public and charitable truſts would be defeated; and that various privileges would be deſtroyed, would, if true, have conſiderable weight. But the great difficulty of the caſe is ſolved by this: when an integral part of a corporation is gone, without whoſe exiſtence the functions of the corporation cannot be exerciſed, and the corporation has no means of ſupplying that integral part, the corporation is diſſolved to certain purpoſes. This appears by the caſe put in *Rol. Abr.* (2) of the corporation of brothers and ſiſters: This paſſage is adopted by Lord Ch. B. *Comyns* in his digeſt (3): another paſſage equally ſtrong is there added; and though he mentions no authority to ſupport it, yet it muſt be remembered that his opinion alone is of great authority. But it does not follow that, becauſe the corporation is diſſolved to a certain purpoſe, the king cannot renovate it. Corporations are the creatures of

(1) 3 *Burr.* 1870. and *p.* 656, *ſupra.* (2) 1 *Ro. Abr* 514. *L.* 1.
(3) 3 *Com. Dig.* 415.

the crown: and, on their diſſolution, their franchiſes revert to the crown. But if the king chooſe that all their rights ſhall be revived, it is competent to him to do ſo, either with the old or new corporators; and thereby no perſon is injured, nor is any rule of law infringed. And, by the new charter, the king did not conſider the old corporation as diſſolved to all purpoſes; but he granted thoſe rights to a new ſet of men, and ſuperadded ſuch other powers as he deemed neceſſary. It has been ſaid, that in the caſe of the mayor, &c. of *Colcheſter* v. *Seaber*, it was determined that the old corporation was not irrecoverably gone, though they had loſt their magiſtrates; and that is the main ground on which the argument for the relator ſtands: But I think it is all reconcileable with this doctrine. Lord *Mansfield* did not ſay in that caſe that the corporation could act, or that it was not diſſolved to ſome purpoſes; but only that the king might renovate it; and, when renovated, all the former rights would revive, and attach on the new corporation; and, amongſt others, the right of ſuing on the bond given to the old corporation. But it is ſaid that, ſuppoſing this to be the caſe, the king was deceived in his grant, and that the grant is conſequently void. But I think he was not. The recital in the new charter ſtates all thoſe facts from whence the king's right aroſe, and from whence he drew his concluſion in point of law, that the corporation was in danger of being diſſolved. There is no doubt but that was the caſe. But there is no one fact there ſtated to the king which was not true. If the king be called upon to grant ſome part of his eſtate, and the intereſt which he has in it is greater than that which is repreſented to him, he is then deceived, and his grant is void. But that is not the caſe here. The old corporation was in danger of being diſſolved, and no relief could be adminiſtered without the king's interference; his act was neceſſary to revive the corporation. Then it is ſaid that the new charter cannot take effect, becauſe the king has not uſed in it words of grant, but only words of confirmation. This, in my opinion, reverts to what I have already ſaid. To ſome purpoſes it was diſſolved; it was ſo, if the king did not chooſe to renovate it. But he did ſo chooſe: and by his grant (which it was competent to him to make), he gave power to do ſuch acts as were neceſſary for the government of the town. Then, has this new charter been accepted or not? The majority of the grantees are ſtated to have accepted it; and the refuſal by a few of the body was certainly not ſufficient to repel the acceptance of the reſt. Therefore judgment muſt be given for the defendant, who derives his title under this charter.

Ashhurst, J.—Although this matter has in the argument branched out into ſeveral points, the principal queſtion is, Whether at the time of granting the charter the preſent king had a right

a right to grant it, and whether from any thing contained in the charter it is inadequate to the purpoſe intended. To determine this it may be proper to conſider what is the end and intention of creating corporations aggregate of the kind now under diſcuſſion. The principal end is for preſerving good order and government within the limits of the towns in which they are eſtabliſhed: they are not merely temporary inſtitutions, but are intended to have perpetual ſucceſſion. Therefore they muſt have the means of preſerving that ſucceſſion: and whenever a corporation is ſo far reduced by accident or negligence as to be inadequate to the purpoſes of government, and to have loſt the power of continuing that ſucceſſion from the want of any integral part, it is virtually dead, for it is no longer capable of anſwering the end of its inſtitution. And, as it was originally created for the public good, and not merely with a view to the private intereſt of individuals, whenever it can no longer perform thoſe functions which is a condition incident to its incorporation, the crown ought not, for the ſake of a few individuals, to be reſtrained from exerciſing its prerogative in granting a new conſtitution for the benefit of the inhabitants of the place, whoſe intereſt the crown had in view in the original incorporation. This corporation was in that ſtate at the time of the new charter; it could not continue its own exiſtence, nor do any corporate act; then what ſhould in law or reaſon prevent the crown from interpoſing? But it has been contended that the old corporation was not diſſolved, becauſe ſome of the natural members were in exiſtence; and that there cannot be two corporations at one time in the ſame place with co-extenſive powers. I admit the latter part of the poſition to be true, namely, that there cannot be two ſuch effective corporations in the ſame place; for, inſtead of good order, that would only be productive of anarchy; but I deny the former poſition; for I ſay when the old corporation was reduced to ſuch a ſtate as to be incapable of continuing its exiſtence, and of doing any corporate act, it was extinct as a body corporate. The caſe cited from *Rolle's Abridgment* is expreſſed to that effect; for it is there laid down, that if a corporation conſiſt of brothers and ſiſters, and all the ſiſters die, the corporation is diſſolved. If ſo, it muſt follow as a neceſſary conſequence that the crown has a right to interpoſe, either by reviving the old corporation, or by granting a new charter. Reaſon is ſtrongly in favour of this determination; and one caſe that has reaſon to ſupport it, ought to weigh againſt many that are deſtitute of that foundation. To what end ſhould the crown be reſtrained? And is it fit that the intereſted views of a few individuals ſhould preponderate againſt the general good of the whole place?—There have been many inſtances cited at the bar, where very able Attornies and Solicitors General, ſometimes aſſiſted by

judges, have concurred in adviſing new charters where the ſame circumſtances of the diſſent of ſome of the old corporation has occurred; and yet ſuch charters have been acted under without being impeached. And though the mere opinion of an Attorney or Solicitor General ought not to be cited, yet coupled with the fact, it may have ſome weight as ſhewing the general ſenſe of profeſſional men. As to there being here a diſſent of a majority of the old members, I lay no ſtreſs upon it; for as thoſe who were left were no body corporate, but a mere collection of individuals, the vote of the majority of them has no binding force, and the diſſent of any one might, in my opinion, have as much effect. As to the contrariety of opinions in the books on this ſubject, I ſhall not attempt to reconcile them; but we ought to lean to that ſide which is beſt ſupported by reaſon. Poſſibly the ſeeming contrariety may have been in ſome degree occaſioned by the equivocal uſe of the term "diſſolved." As far as concerns the power of the crown to grant a new charter, I think the corporation was diſſolved. As to ſome particular purpoſes which do not relate to the powers of government, but to perſonal privileges which are annexed to the perſons of the remaining individuals, ſuch as rights of common, &c. it may be ſaid not to be diſſolved, at leaſt till the crown interpoſes: for as a particular intereſt may ſubſiſt after the term or eſtate out of which it is carved is merged or extinct, ſo it may poſſibly be in reſpect to ſome of the individuals of a corporation, after the corporate body is diſſolved. But were this otherwiſe, it would be no reaſon againſt the crown's interpoſing in granting a new charter; for it is not fit that the private intereſt of individuals ſhould ſtand in the way of the intereſt of the community. Here the members of the old body have no injury or injuſtice to complain of, for they are all included in the new charter of incorporation; and if any of them do not become members of the new incorporation, but refuſe to accept, it is their own fault. But, at any rate, whether they refuſe or accept, it does not affect the right of the crown.—Then it was argued that, admitting the old corporation to be in a ſtate to be diſſolved, that could not be effected without a *ſcire facias* to repeal the former grant, or a judgment on a *quo warranto*. But, I think thoſe modes are only neceſſary to be purſued in the following caſes. A *ſcire facias* is proper where there is a legal exiſting body, capable of acting, but who have been guilty of an abuſe of the power entruſted to them: for as a delinquency is imputed to them, they ought not to be condemned unheard; but that does not apply to the caſe of a non-exiſting body. And a *quo warranto* is neceſſary where there is a body corporate *de facto*, who take upon themſelves to act as a body corporate, but from ſome defect in their conſtitution, they cannot legally exerciſe the powers they affect

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to uſe. But where there is no corporate body in exiſtence in law or in fact, it would be an abſurdity to proceed by either of thoſe modes, neither would it be of any uſe. For if the fact be that a corporation is ſo reduced that it cannot act as a body corporate, it is fit the crown ſhould interpoſe; if it be not, then any new charter granted upon that idea would be void, as the crown would be deceived in its grant. Then it was contended, that even allowing the old corporation to have been diſſolved, the new charter was void, becauſe the king was deceived in his grant; for that the recital proceeds on the idea that there was then a corporation exiſting in the town; and that the words uſed are merely words of confirmation, and not of grant. But I think the crown was not deceived; for it may poſſibly be ſaid not to be diſſolved, *quoad* the individuals, for particular purpoſes, though it is ſo *quoad* the corporate body. It may plainly be collected that the crown was ſufficiently appriſed of the ſtate of the borough. And it appears to me that there are ſufficient words uſed to paſs all the rights of the old corporation. BULLER, J.—The queſtion referred by the jury for the opinion of the court, is, whether the letters patent of the preſent king were or were not duly accepted by the perſons to whom they were granted. Now it is found by the verdict that a majority of them did accept: but the argument adduced at the bar goes beyond what the iſſue ſeems to import. However to purſue it; the firſt queſtion made is, whether the old corporation was diſſolved. And I am of opinion that, whenever a corporation is reduced to ſuch a ſtate as to be incapable of acting or continuing itſelf, it is diſſolved. The counſel for the proſecutor contended that, if this poſition were right, it would extend to the caſe of a mayor dying in the middle of the year: but it would not, provided the corporation have a power of electing a new mayor and continuing itſelf. This point has been very much diſcuſſed in parliament as well as in Weſtminſter-Hall. And great weight is due to the *Tiverton* caſe; not ſo much on account of the opinions which were given by the crown lawyers as of the conſequences of them. That caſe aroſe in the 11 *Geo.* 1. The Attorney and Solicitor General were of opinion that the corporation was diſſolved. Among Mr. J. *Clive*'s manuſcripts, which are a collection of caſes by ſeveral judges, this caſe of *Tiverton* is mentioned; and it ſays "On the mayor's abſenting himſelf, and no election made on the charter day, it was the opinion of the Attorney and Solicitor General, and ſeemed to be the general opinion, that the corporation was diſſolved. And accordingly upon application to the king a new charter was granted. Note, a bill paſſed in parliament this ſeſſions to prevent corporations from being diſſolved by the mayor, &c. abſenting themſelves on the day of election: And when this bill was read in the houſe of Com-

mons, Mr. *Jefferys* and Mr. *Weſt* upon the debate were of opinion that corporations could not be diſſolved by ſuch an act of the mayor; and there were ſeveral lawyers of the ſame opinion. *Sed quære.*" So that there is no doubt from the beginning of the note, and the *quære* which is added to the latter part of it, what was conſidered as the beſt opinion at that time. We have alſo one opinion in the books, which is entitled to great deference, that of Lord *Macclesfield*, who uniformly held that on ſuch an event the corporation was diſſolved; firſt in the *Banbury*, and afterwards in the *Bedford*, and other caſes. And I do not know how to reaſon on this point better than in the manner urged by one of the relator's counſel; who conſidered the grant of incorporation to be a compact between the crown and a certain number of the ſubjects, the latter of whom undertake, in conſideration of the privileges which are beſtowed, to exert themſelves for the good government of the place. Now if thoſe perſons have ſo far violated their truſt by negligence or miſconduct that they are no longer capable of governing the place, there is an end of the compact. The ground of the charter was the government of the place; and when that cannot be carried on, I ſee no reaſon why the crown cannot grant another charter to a different ſet of perſons. It is true that two corporations cannot exiſt at the ſame time and in the ſame place with ſimilar powers. But, the former corporation being gone, the king may grant a new charter as if no former one had ſubſiſted. I do not think that the caſe of the mayor, &c. of Colcheſter v. *Seaber* bears on this. There a new charter had been granted, and the only queſtion under the conſideration of the court was as to the effect of that charter on the debts due to the old corporation. The court proceeded on the idea that the crown might revive the old rights by a new grant; and if their opinion went on the ground of reſtoration, it cannot apply to this caſe, where the old corporation was extinguiſhed and no charter of reſtoration had been granted to them. It was there thrown out, that the old corporation would not loſe their rights of common and certain other rights. With regard to the rights of common, it was probably taken by Lord *Mansfield* from a caſe in Lord *Raymond* (1), where Lord *Holt* is ſuppoſed to have given ſuch an opinion. But no authority is there cited for it. But if ſuch a right were claimed, let us conſider how it could be ſupported. If it were granted to them as a corporation, the perſons claiming it muſt ſhew that there is a corporation in exiſtence. And if they claim by preſcription, they muſt ſet it up in the name of the old corporation; but it cannot be

(1) 2 Lord *Raym.* 953.

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ſet up in the names of perſons who do not exiſt. I doubt whether there is not a miſtake in what is ſuppoſed to have been ſaid by Lord *Holt*; for he refers to a caſe in *Saunders* (1) which does not prove the poſition. There the corporation was in exiſtence, and the rights were preſcribed for in the corporate name; that caſe, therefore, can only apply where the corporation is in exiſtence. Another caſe there mentioned is that of the corporation of Scarborough, where it was ſaid that debts due to the firſt corporation remained, notwithſtanding a change of name. Of that no doubt can be entertained; for if the king intended to give rights to the new corporation which were enjoyed by the old one, it was undoubtedly competent to him to do ſo. And this is the amount of what I ſuppoſe the court intended to decide in the Colcheſter caſe. Then, if the old corporation were diſſolved, it remains to be conſidered whether the preſent king was deceived in his grant. One argument urged was, that the crown could not grant to any but the members of the old corporation: but I by no means accede to that; for if the old corporation were gone, it was either competent to the crown to grant a new charter to the remaining members in conjunction with others, or to others alone: and when the old corporation was gone, the remaining members had no claim on the juſtice, whatever they might have on the diſcretion, of the crown. Neither is there any foundation for ſaying that the king was deceived from what is ſtated in the new charter. It begins with ſtating the petition of the inhabitants, which alleges that ſeveral of the members were dead, that judgments of ouſter had been obtained againſt others, and that the remaining members were incapable of continuing the corporation, or of doing any corporate act: now theſe facts were all true. If ſo, it was competent to the king to give them a new charter of incorporation, without weighing very nicely whether they could be ſaid to be actually diſſolved, or only in danger of being ſo: and this is a grant of incorporation. But it is objected, that the word "grant" is not mentioned in the clauſe which gives the lands: I do not think it neceſſary to examine whether that clauſe would or would not be available: but it is found by the verdict that Helleſton is a corporation by preſcription; and if ſo, perhaps that clauſe would be ſufficient to reſtore the ancient rights. But however that might be, it was evidently the intention of the crown to incorporate the inhabitants and burgeſſes, and to give them new powers. Therefore I am of opinion that the king cannot be ſaid to have been deceived in his grant. GROSE, J.—

(1) 1 *Saund.* 343.

Although this caſe has been already ſo fully diſcuſſed on the bench, yet as it is of great importance, I will ſtate the grounds of my opinion. The queſtion reſerved for the opinion of the court is, Whether the charter of the preſent king was duly accepted by the perſons to whom it was directed? It has been contended that it was not, becauſe it was not accepted by a majority of the remnant of the old corporation; while, on the other hand, it is ſaid that the old corporation was diſſolved, and that the conſent of the remaining corporators was unneceſſary. This makes the firſt and the principal queſtion in the caſe, Whether or not the old corporation was ſo diſſolved as that the crown could grant the new charter without the conſent of the remainder of the old corporation? The next queſtion is, Whether or not the new charter is void in law, on the ground that the king was deceived? As to the firſt; let us conſider the principles on which corporations are created, before we go on the precedents which have been adjudged on this ſubject. The end of every corporation is the good government of that place over which its power extends; corporations are undoubtedly mere creatures of the crown; they exiſt only by the bounty of the crown; for they muſt exiſt either by charter, or preſcription which ſuppoſes a charter. Now, in point of good ſenſe, when the purpoſes for which a corporation was created can no longer be anſwered, there is no reaſon why it ſhould not be conſidered to be ſo far diſſolved as that the crown may raiſe there a new corporation, or revive the old one by continuing the members, and adding new officers. This principle is founded on good ſenſe, and is not in want of caſes to ſupport it. The caſe cited from *Rolle's Abridgment* is ſtrong to this effect; for *Rolle* puts the caſe under this head, "what diſſolves a corporation." He therefore undoubtedly conſidered that the inſtant an integral part of the corporation was gone, without any power left to continue itſelf, the corporation was diſſolved; though as I ſhall ſhew preſently, the king might continue it if he pleaſed. The next caſe cited is that of the King v. the Mayor, &c. of Colcheſter, where Lord *Mansfield* conſidered the corporation to be diſſolved by the loſs of an integral part, and yet ſome of the individuals of the corporation were in exiſtence. So, in the Banbury caſe, Lord *Macclesfield* ſaid, that if the mayor died in the middle of the year, and there was no power to elect another before the end of the year, the corporation was diſſolved. Then followed the Tregony caſe: and it is material to conſider what happened upon that; about a year afterwards, the ſtatute 11 *Geo.* 1. c. 4. was paſſed, which ſays, that if the mayor or other chief officer be not elected on the charter day, the corporation ſhall not thereby be taken to be diſſolved. It is clear, therefore, that the perſons who brought that bill into parliament had no doubt but that a corporation was diſſolved by the

the loſs of an integral part, if the king choſe that it ſhould be ſo. So that the corporation of Helleſton was diſſolved, and could only be revived by the bounty of the crown. In anſwer to theſe authorities, the caſe of the mayor, &c. of Colcheſter v. Seaber is brought forward. I have attentively conſidered that caſe; and it appears to me that the true queſtion there was, whether the new charter did not ſo far revive the rights of the old corporation as to give power to the new corporation to ſue for them. The court thought that it did: and if it were otherwiſe, the conſequences would be fatal to almoſt all the corporations in the kingdom; for there is hardly any which have not, at ſome time or other, been diſſolved in that point of view; and all thoſe would loſe their preſcriptions. The court, indeed, did ſeem to think in that caſe that the corporation was not diſſolved to any purpoſe; but, on looking into the caſes there cited and relied on, they will not be found to warrant that general propoſition. Therefore I cannot but think that the propoſition, that this corporation was diſſolved, is true. Then the next queſtion is, Whether or not the king was deceived in his grant? I do not know how I can better ſtate the law on this ſubject than by referring to the Earl of *Rutland*'s caſe (1), and *R.* v. *Kemp* (2); if the king be deceived by the ſuggeſtion of the grantee, there the grant is void: but if the facts ſuggeſted by the grantee be true, though the king be miſtaken in his inference of the law, the grant ſhall not be avoided. Now in this caſe the facts ſtated by the petitioners are accurately true; by which facts it appears that the corporation was diſſolved. And though the king might be miſtaken in his concluſion of law, that would not avoid the grant. And I am alſo of opinion that the anſwer given by my brother *Buller* as to the words of confirmation, is a good one. Therefore this charter cannot be conſidered as void.—Judgment for the defendant.

It was held by the court of king's bench (3) in theſe caſes, that a judgment of ſeizure *quouſque*, *&c.* againſt a corporation, in default of appearance, operates as a final judgment to diſſolve the corporation, if they do not appear in the ſame term, or the next at furtheſt. And a new charter of incorporation granted after that time to a new body in the ſame place is good, notwithſtanding a charter of reſtitution be afterwards granted to the old corporation; and ſuch charter of reſtitution is abſolutely void.—A power reſerved to the crown, in a charter of incorporation, to amove, by order of council, one or more of the corporators, which declared that all or any of them ſo amoved ſhould actually and without further proceſs be amoved, and which alſo provided at the

The King v. T. Amery, and the King v. John Monk. Tr. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 515. 4 *Ter. Rep.* 122.

(1) 8 *Rep.* 55. (2) 12 *Mod.* 78.

(3) But this judgment was afterwards reverſed in the Houſe of Lords, April 20, 1790, upon a writ of error, 4 Ter. Rep. 122.

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ſame time that upon ſuch amotion the remaining corporators might proceed to fill up the vacancies, cannot be exerciſed to ſuch an extent as not to leave a ſufficient number to make a re-election; and therefore an amoval of all is illegal and void.

The firſt of theſe was an information in nature of a *quo warranto* againſt the defendant for exerciſing the office of alderman of the city of Cheſter. To which he pleaded letters patent granted by Car. 2. on the 4th of Feb. in the 37th year of his reign, by which the citizens and inhabitants of Cheſter were incorporated; and that there ſhould be a mayor, recorder, twenty-four aldermen, forty common councilmen, two ſheriffs, and certain other officers. The king, by thoſe letters patent, appointed the firſt twenty-four aldermen; and preſcribed the mode of electing a mayor, namely, on Friday after the feaſt of St. Dennis, yearly, by a majority of the mayor, aldermen, and common councilmen aſſembled. The plea then ſtated, that that charter was accepted and agreed to by the ſaid citizens and inhabitants: and the defendant regularly deduced a title as alderman under it.—The proſecutor replied, that king Charles the Second did not grant in manner and form, &c. That thoſe letters patent were not duly accepted by the ſaid citizens and inhabitants. That the defendant was not duly elected an alderman, as in his plea alledged. And that he was not admitted into the office of alderman, &c.—And the proſecutor added two new replications. In the firſt of which he ſtated, that the ſaid late king Charles the Second, in the ſame letters patent in the ſaid plea of the defendant above mentioned, *further* willed, and by the ſame letters patent provided and reſerved full power and authority to himſelf, his heirs and ſucceſſors from time to time and at all times thereafter, *at the free will and pleaſure of the ſaid late king* Charles *the Second*, his heirs or ſucceſſors, the mayor, recorder, common clerk, *or any one or more of the aldermen, common councilmen, ſheriffs, coroners, and juſtices of the peace of the ſaid city for the time being, by any order of the ſaid late king, his heirs or ſucceſſors, in privy council made, and under the ſeal of the ſaid privy council, to them reſpectively ſignified, to amove or declare them or any of them to be amoved* accordingly; and that as often as the ſaid late king, his heirs or ſucceſſors, by any ſuch order made in privy council, ſhould declare any ſuch mayor, recorder, common clerk, and any one or more of the aldermen, common councilmen, ſheriffs, coroners, or juſtices of the peace of the ſaid city for the time being, to be amoved from his or their reſpective offices, that then and from thenceforth the mayor, recorder, common clerk, aldermen, and common councilmen, ſheriffs, coroners, and juſtices of the peace for the time being, and *all or any of them ſo amoved*, or declared to be amoved, from

Power of amotion.

from their reſpective offices, ſhould indeed and in fact, and without any further proceſs, actually, and to all intents and purpoſes whatſoever, be amoved from their reſpective offices; *and ſo from time to time as often as the caſe ſhould ſo happen*; any thing in the ſaid letters patent contained to the contrary notwithſtanding: *And that in every ſuch caſe other fit perſon or perſons, within a convenient time after ſuch amotion or amotions, ſhould be choſen, ſworn, and appointed*, in ſuch manner as by the ſaid letters patent was before directed, into the place and office, or places and offices reſpectively, of any ſuch perſon or perſons ſo amoved; as in and by the ſaid letters patent, &c. That after the making of the ſaid letters patent of the ſaid late king Charles the Second, to wit, on the 12th day of Auguſt, 1688, under and by virtue of the ſaid laſt mentioned letters patent, *Hugh Starkey*, Eſq. was one of the aldermen of the ſame city, and a juſtice of the peace of and within the ſaid city of Cheſter, and county of the ſame city; and that *Richard Leving*, Eſq. was then and there recorder of the ſaid city, and alſo one of the aldermen of the ſaid city, and a juſtice of the peace of and within the ſaid city of Cheſter, and county of the ſame city; and that the right honourable *William* Earl of *Derby*, &c. (mentioning them by name ſeverally) were alſo aldermen, and each of them was an alderman of the ſaid city of Cheſter (and thus enumerating all the other officers in the corporation); and that no other perſon or perſons whomſoever then were or was aldermen, or common councilmen, or an alderman, or common councilman, of the ſaid city of Cheſter. That the ſaid laſt mentioned perſons, ſo being aldermen and common councilmen of the ſaid city, and there being no other perſon or perſons whomſoever, aldermen or common councilmen, or an alderman or common councilman, of the ſaid city of Cheſter, his ſaid late majeſty king *James* the Second, afterwards, to wit, on the 12th day of Auguſt, 1688, by his order in privy council made, in execution of the power reſerved to the ſaid late king *Charles* the Second, his heirs or ſucceſſors, in and by the ſaid letters patent, made in the thirty-ſeventh year of king *Charles* the Second, in the defendant's plea mentioned, was pleaſed to order, and did thereby order that the ſaid *Hugh Starkey*, &c. &c. (naming them as before, ſhould be, and they were thereby removed and diſplaced from their aforeſaid offices and employments in the ſaid city of Cheſter. The replication then ſtated, that that order was ſignified to each of them reſpectively (naming them), and thereby they and each of them, ſeverally and reſpectively, became and were amoved from their reſpective offices and places of aldermen and common councilmen before mentioned; *wherefore the ſaid power in the ſaid laſt mentioned letters patent, as to the election of aldermen of the ſaid*

Order of amoval by king *Jac.* 2.

Wherefore the power of electing aldermen under charter *Car.* 2. ceaſed.

ſaid city of Cheſter, ceaſed and determined. The ſecond replication ſet forth a charter of incorporation granted by king *Henry* the Seventh, in the 21ſt year of his reign, to the citizens and commonalty of Cheſter; who were to elect, annually, a mayor, recorder, twenty-four aldermen, forty common councilmen, two ſheriffs, &c.; which letters patent were accepted, &c. It then ſtated a charter of confirmation in the 16th of *Elizabeth*, which was alſo accepted. And that both theſe charters were in full force, ſtrength, and effect, before, and until, and at the time of the judgment hereinafter next mentioned, &c. The replication then ſtated, that in Trinity Term, in the thirty-fifth year of the reign of *Charles* the Second, Sir *Robert Sawyer*, knight, then attorney-general, filed a certain information in the court of king's bench, againſt the ſaid mayor and citizens, *by the name of the mayor and citizens of the ſaid city of Cheſter*, by which ſaid information the ſaid attorney-general of the ſaid late king gave the ſaid court there to underſtand, and be informed, that the ſaid mayor and citizens of the ſaid city of Cheſter, by the ſpace of one month then laſt paſt, and longer, had uſed, and did then uſe, and claimed to have and uſe, without any warrant, or royal grant, within the ſaid city and the liberties and precincts of the ſame city, divers liberties, privileges, and franchiſes, in the ſaid information mentioned, that is to ſay, *to be in themſelves one body corporate*, and politic, in law, fact, and name, by the name of the mayor and citizens of the city of Cheſter; and by the ſame name to plead and be impleaded, anſwer and be anſwered unto; and alſo to have ſheriffs of the ſaid city, and the county of the ſame city, &c. (ſpecifically ſtating all the privileges claimed): All and ſingular which liberties, privileges, and franchiſes, the ſaid mayor and citizens of the ſaid city, for all the time aforeſaid, againſt the ſaid lord the late king had uſurped, and did then uſurp, in contempt of the ſaid lord the late king, &c.; and thereupon the ſaid attorney-general for the ſaid lord the late king prayed the advice of the court there in the premiſes, and that due proceſs of law might iſſue in that behalf againſt the ſaid mayor and citizens, to anſwer to the ſaid lord the late king, to ſhew by what warrant they claimed to have and exerciſe the liberties, privileges, and franchiſes aforeſaid, &c. It then ſtated, that ſuch proceedings were thereupon had in the ſame court, that afterwards, to wit, in the term of *Saint Hilary*, in the 35th and 36th years of the reign of the ſaid late king *Charles* the Second, *for the default of the ſaid mayor and citizens in not appearing in the ſaid court of the ſaid lord the late king, before the king himſelf, to anſwer to the ſaid lord the late king, touching and concerning the premiſes, it was then and there by the ſame court of the ſaid lord the late king, before the king himſelf, conſidered that the liberties, privileges,*

Quo warranto information, 35 Car. 2.

Judgment *quouſque*, &c.

privileges, and franchiſes, in the ſaid laſt mentioned information above ſpecified, ſhould be ſeized into the hands of the ſaid lord the late king, until the ſaid court there further ordered, as by the records and proceedings thereof remaining in the court, &c. appears. That after the ſaid judgment, and after the making of the ſaid letters patent in the defendant's plea mentioned, to wit, on the 19th day of October, 1688, his late majeſty king *James* the Second, by a certain order in council, bearing date the 19th of October, 1688, being graciouſly reſolved that the city of Cheſter, and the mayor and citizens thereof, ſhould be reſtored to their ancient charters, rights and franchiſes, notwithſtanding the judgment and proceedings againſt them in an information in the nature of a *quo warranto* in the court of king's bench in the reign of the late king *Charles* the Second, &c. was pleaſed to order, *according to the power to him reſerved in the late charters, patents, and grants, and it was thereby ordered accordingly,* that all mayors, ſheriffs, recorders, aldermen, common councilmen, &c. and all other officers and members of the ſaid city of Cheſter, conſtituted, named, appointed, or elected, by virtue of any charter, patent, or grant, ſince the year 1679, from the late king, or his then majeſty, and all and every perſon and perſons, having or claiming, any office or place by the ſame, *be removed, diſplaced, and diſcharged; and they, and every of them were thereby removed, diſplaced, and diſcharged accordingly.* And it was further ordered by his ſaid late majeſty king *James* the Second, by the ſaid order in council, that Mr. *Attorney*, or Mr. *Solicitor General*, ſhould prepare a bill, inſtrument, or inſtruments, for his majeſty's royal ſignature, for the granting, confirming, and reſtoring, of the ſaid city of Cheſter, and the mayor and citizens thereof, to their ancient charters, rights, franchiſes, offices, and places, had or uſed by them before the ſaid judgment given, and proceedings againſt them, and to pardon, diſcharge, vacate, annul, and reverſe the ſaid judgments and proceedings. The replication then ſtated a charter of reſtoration, dated the 26th of October, 1688, purſuant to the laſt mentioned order in council, whereby the judgment in *quo warranto* was pardoned and releaſed, and their former liberties reſtored to the mayor and citizens of the old corporation, &c. Which ſaid letters patent the ſaid mayor and citizens of the ſaid city of Cheſter accepted and agreed to; with an averment that the information, and the judgment *quouſque*, in the replication, and in the charter of *James* the Second, mentioned, were the ſame. Wherefore the ſaid letters patent of the ſaid late king *Charles* the Second, by the ſaid *Thomas* above in his plea mentioned, from and after the ſaid granting and acceptance of the ſaid letters patent of the ſaid late king *James* the Second, herein-before mentioned, did ceaſe,

King *James*, the Second's order in council for reſtoring the mayor and citizens of Cheſter.

Charter of reſtoration in 1688.

ceaſe, determine, and become void, and of no further effect, to wit, &c.—The defendant in his rejoinder ſtated that the order in council under the privy ſeal of the ſaid privy council, in the replication mentioned, was not ſignified to the ſaid *Hugh Starkey*, &c. (naming them) in manner and form in the replication alleged, &c. on which iſſue was taken. To the ſecond replication he rejoined that ſuch further proceedings were had upon the ſaid information in that replication mentioned in the ſaid court of the ſaid lord the late king *Charles* the Second, before the king himſelf, that afterwards, to wit, in Trinity term, in the 36th year of *Car.* 2. it was conſidered by the ſaid court of the ſaid lord the late king, before the king himſelf, that the ſaid liberties, privileges, and franchiſes, in the laſt-mentioned information ſpecified, *ſhould be ſeized into the hands of the ſaid lord the king, and the ſaid mayor and citizens be excluded and amoved therefrom*; the record of which ſaid laſt-mentioned judgment is loſt or deſtroyed, and is not now remaining in the ſaid court of the ſaid lord the now king before the king himſelf. With an averment that that judgment is ſtill in force, and not reverſed; by reaſon whereof the ſaid community and body corporate of the mayor and citizens of the ſaid city of Cheſter in that replication mentioned became and was totally diſſolved and deſtroyed long before, and until, and at the time of the ſuppoſed granting and acceptance of the ſaid ſuppoſed letters patent of the ſaid late king *James* the Second, in that replication mentioned, to wit, at, &c.—Surrejoinder, taking iſſue on the final judgment of Trinity term, 36 *Car.* 2.—On the trial the jury found that king *Charles* the Second, granted, &c. as in the defendant's plea; and that that charter was accepted by the citizens and inhabitants. That the order of removal of all the officers by king *James* the Second in council was duly ſignified to them. That the defendant was duly elected, and admitted, under that charter. That the order of privy council of king *James* the Second, dated the 12th of Auguſt, 1688, mentioned in the replication, was ſignified to the members. And that there was no final judgment of Trinity term 36 *Car.* 2.

Final judgment, Tr. 36 Car. 2.

Verd. &.

The pleadings and verdict on the information againſt *J. Monk*, for exerciſing the office of common councilman, were the ſame as thoſe againſt *Amery*, *mutatis mutandis*; and the arguments and judgment of the court were equally applicable to both.

A rule having been obtained in Eaſter term, 27 *Geo.* 3. to ſhew cauſe why the poſtea ſhould not be delivered to the defendant, in order that he might enter up his judgment on it, and that in the mean time it might remain in the aſſociate's hands. This matter was very elaborately argued in Trinity term, 1787.

And the counſel for the proſecutor made two general points

FIRST, that it appears upon the whole of the record that the charter

charter of *Charles* the Second, from which the defendant deduces his title, never had any legal exiſtence. SECONDLY, that if it had, it was completely done away by the order of amoval in the reign of *James* the Second, or by the charter of reſtitution, and conſequently was not the ſubſiſting charter which regulated the corporation of the city of Cheſter at the time of the defendant's election.

UNDER THE FIRST HEAD OF ARGUMENT, IT WAS CONTENDED, FIRST, That no judgment whatever could be given on the *quo warranto* information, which was filed in the reign of *Charles* the Second; or at leaſt that no judgment of ſeizure could be given on it: if any, it ſhould have been a judgment of ouſter; Becauſe it appears upon this record that the *quo warranto* information which was filed in the 35th *Car.* 2. was totally falſe and unfounded. That there are only two ſorts of proceedings againſt a corporation. The firſt caſe is when a corporation, legally created, abuſe any of the franchiſes to which they are entitled; or uſurp others to which they have no claim: there the information is brought againſt the corporation as ſuch, and there a judgment of ſeizure is given. But when a body of men aſſume to themſelves to be a corporation by any given name, and the information is brought againſt them for uſurping to be a corporation, it cannot be brought againſt them by their corporate name, but it muſt be againſt them in their individual names; becauſe it is in diſaffirmance of the corporation; and in ſuch caſe there muſt be a judgment of ouſter. For it would be abſurd to ſay that they have forfeited that which never exiſted.—SECONDLY, that there cannot be a final judgment againſt a corporation, as ſuch, before appearance, becauſe the proceſs in an information is by venire and diſtringas: but in the writ of *quo warranto*, it is by ſummons; and for default of appearance the liberties ſhall be ſeized. THIRDLY, That the judgment *quouſque* in *Charles* the Second's reign, not followed up by a final judgment, or by ſeizure, did not ſuſpend the functions of the corporation. For the difference between the effect of a judgment *quouſque* and a final judgment appears from the forms of the different judgments. The former is, "that the liberties, &c. ſhall be ſeized *till The Court ſhall "further order*;" the latter, that they ſhall be ſeized into the king's hands. *Ryl. Plac. Parl.* 6. 188. 277. So that after the judgment *quouſque* in this caſe, the liberties and franchiſes of the corporaration were at the diſpoſal of the court; and as no order was made by them, the king could not grant them to another deſcription of perſons till final judgment. FOURTHLY, That ſuppoſing there was a ſuſpenſion, the judgment *quouſque* did not operate as a diſſolution of the corporation, ſo as to enable the crown to grant another charter; for a corporation cannot be diſſolved, either by its own acts, by the acts of the crown, or by a judgment in a court of law. For even ſuppoſing that the judgment *quouſque* is in itſelf a ſeizure, and that no writ of execution

The judgment given againſt the old corporation void.

No final judgment againſt a corporation before appearance.

Judgment *quouſque* do ſuſpend the functions of the corporation.

The judgment *quouſque* did not diſſolve the corporation.

cution is neceſſary (the franchiſe being an incorporeal hereditament), and that the award of the court is in itſelf an execution, ſo as to render it neceſſary for the party to come in and replevy in order to protect himſelf againſt final judgment, yet as in this caſe the crown did not take advantage of it, by obtaining final judgment, the corporation itſelf was not diſſolved, though its liberties may have been ſuſpended. And, if ſo, the crown could not legally grant a new charter to the citizens and inhabitants of the ſame place, there exiſting in contemplation of law, at the time of ſuch grant, another corporation. For a judgment *quouſque* does not occaſion a forfeiture: the liberties are only kept by the court as a mean of compelling the corporation to appear and anſwer the charge. But even if it had been followed up by a final judgment, that would not have worked a diſſolution of the corporation. For it appears from all the authorities, that a corporation once duly and legally exiſting, cannot be diſſolved either by their own acts, the acts of the crown, or by any judgment in a court of law, if by the word "diſſolve" be meant an entire deſtruction and annihilation of the corporation in its corporate capacity. 1ſt, A corporation cannot annihilate itſelf; it cannot ſurrender up its corporate capacity and exiſtence. 3 *Co.* 73. 2 *And.* 165. 3 *Co.* 76. *Palm.* 491. *Sir W. Jo.* 166. 8 *Mod.* 358. *Lond. Cas.* 10. 2dly, The king cannot by his prerogative deſtroy or diſſolve a corporation. *Palm.* 501. *Bro. tit. Corporation, pl.* 78. 3 *Burr.* 1656. 3dly, A corporation cannot be diſſolved or annihilated by a judgment in a court of law. *Skinner,* 310. 274. 4 *Inſt.* 228. FIFTHLY, That in point of fact the charter of *Charles* the Second was granted to the old corporation, and not to the citizens and inhabitants as a new deſcription of perſons; for in point of law he could not grant it to the citizens. And that the charter was granted to the old corporation is clear for many reaſons; 1ſt, It gives the ſame name of incorporation with the prior charters; 2dly, There was an exception of certain perſons in the charter, who were members of the old corporation, which would not have been neceſſary, if the new charter had been directed to a different ſet of men; 3dly, From the groſs abſurdity of ſuppoſing that the king would grant to two different bodies the ſame juriſdiction and privileges in the ſame place at the ſame time; 4thly, The ſuppoſition of their being the ſame body will account for the king not proceeding to final judgment; becauſe, as the old corporation had accepted his new charter, his purpoſe was anſwered, and the corporation always remained. There is alſo a ſtrong reaſon why the court ſhould incline in favour of this opinion, becauſe by theſe means only the ancient preſcriptions may be preſerved; for there can be no privity between two diſtinct corporations, exiſting under different acts of creation. *Pollexfen's Argument,* 105. and 113.; 1 *Inſt.* 102. *b.*; and 2 Lord *Raymond.*

mand, 1239. 3 *Burr.* 1870. *Sir T. Raym.* 439. But even ſuppoſing that the charter of *Car.* 2. was in fact granted to the citizens and inhabitants of Cheſter as ſuch, the legal effect of it, when granted to the inhabitants of a city where there was at that time a ſubſiſting corporation under prior charters, neither of which was affected by the judgment *quoſque*, is, that the acceptance of ſuch a charter, in point of fact, cannot go beyond the legal operation of the charter itſelf which was accepted. But, SIXTHLY, admitting that king *Charles* the Second could, in point of law, and did, in point of fact, grant the charter to the citizens and inhabitants of Cheſter, as a new body of perſons, it was void in law, on account of the power reſerved to the crown of removing any or all of the corporators. If this clauſe be illegal, it muſt be preſumed that the king was deceived in his grant, from the circumſtance of having done that which is illegal; in which caſe the grant itſelf is void. For if the king's grant contain an illegal condition, the whole is void; though in the caſe of a ſubject, the condition only is ſo. 2 *Rol. Abr.* 164. 2 *Inſt.* 533. 1 *Co.* 43. *b.* 5 *Co.* 55. *b.* 9 *H.* 6. 28. 2 *And.* 155, 6. 2 *Freem.* 17. 1 *H.* 7. *caſe* 26. *Hob.* 223. *And.* 155. *Co. Lit.* 77. *a.* But even ſuppoſing that the king did not reſerve to himſelf the power of removing the whole corporation, ſuch a power confined to a few, or even to one, would equally avoid the grant; the reſervation is unconſtitutional in its nature, and in the mode in which the exerciſe is reſerved. 1ſt, The king cannot remove from a freehold without cauſe, or legal proceſs in his courts (1). 2dly, He cannot reſerve to himſelf that power by charter, where, according to the common law and eſtabliſhed principles of the conſtitution ſuch office would be a freehold of courſe, were it not for ſuch power reſerved (2). 3dly, He cannot delegate this power, even if he poſſeſs it himſelf, to the members of a corporation, or to any other perſon (3). 4thly, He cannot exerciſe it under the great ſeal, or by order of the privy council (4). *Dav.* 75. *a. Plowd.* 236. 2 *Inſt.* 36. *R. Sawyer, p.* 15. 2 *Inſt.* 282. 49 *Ed.* 3. *c.* 49. *Owen.* 90. 6 *E.* 3. 5. *Stamf. Prærog.* 74.

Sixthly, The charter of *Car.* 2. was void on account of the power reſerved to the crown of amoving all or any of the members.

UNDER THE SECOND HEAD OF ARGUMENT, it was contended that, even if the charter of *Car.* 2. ever had any legal effect, it was completely put an end to by the order of amoval, or by the charter of reſtitution, by which the old corporation were reſtored to their former liberties; ſo that the charter of *Car.* 2. was not the ſubſiſting charter which regulated the corporation of the city of Cheſter at the time of the defend-

Charter of *Car.* 2. put an end to by the order of amoval or by the charter of reſtitution.

(1) 6 *Ed.* 1. *c.* 1. *Mag. Chart. c.* 29. 25. *Ed.* 3. *c.* 4. *ſt.* 5. 28 *Ed.* 3. *c.* 3. and 42. *Ed.* 3. *c.* 3.

(2) *Bro. Tit. Patent*, 100. 49 *E.* 3. 4. 49. *Owen.* 90. 2 *And.* 156. *Hobart*, 121. 1 *Leo.* 250. *Bagg's* caſe, 11 *Co.* 98. *b. Warren's* caſe, *Cro. Jac.* 540. *Bract. l.* 2. *c.* 24. *ſt.* 56. 2 *Rol. Abr.* 212.

(3) *Bagg's* caſe, *Co.* 98. *Warner's* caſe, *Cro. Jac.* 549.

ant's election. First, It was urged that it had been ſhewn that by the order of council all the corporators were in fact amoved, and thus the defendant's title failed. Or, ſecondly, that the old corporation was reſtored by the charter of reſtitution, which was equivalent to a judgment of reſtitution; and that after a judgment of ſeizure it could not be contended that a judgment of reſtitution would have no effect, even if the king had in the interim granted another charter to a new corporation. That by the reſtoring charter of *James* the ſecond, therefore, the old corporation were in of their former rights, *Sawyer* 30, 31, 37. *Pat. Rol.* 19. cited in *Cro. Car.* 252. *London*, caſe 106, 7. The *King* v. *Larwood*, *Skin.* 574. and the *King* v. *Maſſory*, *Andr.* 295. IT WAS THEREFORE CONTENDED THAT JUDGMENT OUGHT TO BE GIVEN FOR THE CROWN.

THE COUNSEL FOR THE DFENDANT reduced the objections that were taken by the counſel for the proſecution, to three heads, viz. 1ſt, That *Charles* the Second had no right to grant the charter under which the defendant claims, there being at that time an exiſting corporation in Cheſter.—2dly, That the charter is either void upon the face of it, in reſpect of the power of amotion reſerved therein; or that if the power reſerved were legal, the corporation claiming under that charter have been actually deſtroyed and done away by the exerciſe of that power.—3dly, That the ſubſequent charter of reſtitution, which was accepted by the members of the old corporation, reſtored them to the exerciſe of their franchiſes; and, conſequently, did away the charter of *Charles* the Second. I. The power which *Charles* the Second had to grant his charter depending upon the judgment under which that power aroſe, it was contended on this head, 1ſt, That a corporation cannot be diſſolved at all—2dly, That it cannot be forfeited if ſued by its corporate name—3dly, Nor by a judgment of ſeizure—4thly, Nor before appearance—5thly, That the judgment *quouſque*, &c. makes it mere proceſs to enforce appearance, and not a definitive operative judgment—6thly, That the king had not even the temporary poſſeſſion of the liberties of the old corporation without a writ of ſeizure—7thly, That, even allowing the judgment its utmoſt force, the liberties of the corporation were not ſo veſted in the king by judgment of ſeizure, as that he could grant them out to another body. That for all or ſome of theſe reaſons, the grant of the charter of *Charles* the Second was void; that the old corporation was never extinct, but at moſt only ſuſpended; and that as two governing corporations with the ſame powers and juriſdiction cannot ſubſiſt in the ſame place, the latter grant muſt be null and void.

1ſt. The power of Charles the ſecond to grant the charter.

IN ANSWER TO THESE PROPOSITIONS, THE DEFENDANT'S COUNSEL CONTENDED, 1ſt, That every franchiſe has a tacit condition annexed to it in law, that it be exerciſed properly. That of being a corporation is a principal franchiſe, where-

A Corporation may be diſſolved.

where ſuch an exerciſe of it is peculiarly neceſſary. 1 *Black. Com.* 485. 1 *Show.* 280. 2dly, That as to the corporation in this caſe having been ſued by its corporate name; ſuch informations have never yet been decided in a court of law to be erroneous; it has only been thrown out in argument; and there are many precedents to warrant ſuch proceedings.—3dly and 4thly, To ſhew that a corporation may be diſſolved by judgment of ſeizure, before appearance: It was ſtated, that formerly, before the ſtatute of Glouceſter, *6 Ed.* 1. the king exerciſed a power of ſending commiſſions to inquire into the right to franchiſes, and if no charter were produced, the liberties were ſeized into the king's hands without any formal trial. 2 *Inſt.* 280. This being much complained of, the ſtatute of *quo warranto* was made, in order to remedy the grievance. This ſtatute ſeems to have been the foundation of the proceedings in *quo warranto:* the method is there ſet forth. It directs that ſuch as had liberties ſhould be permitted to uſe them, ſo as they made no encroachments on the crown, till the coming of the juſtices in eyre; and directs the ſheriff to make a proclamation that all thoſe who claimed liberties ſhould be before the juſtices in eyre at the next aſſizes, to ſhew *quo warranto* they held them, &c. and they were allowed a certain time. But if the party came not before the juſtices in eyre, the franchiſes ſhould be ſeized into the king's hands *nomine diſtrictionis*; which the party in the ſame eyre might replevy; but if he did not replevy them while the eyre ſat in that county, the franchiſes were loſt and forfeited for ever. 2 *Inſt.* 282. And then Lord *Coke* goes on to ſay; therefore, if the party now upon the *venire facias*, which this act gives, come not while the eyre ſat in that county, the franchiſes are loſt for ever. And ſo it is in the king's bench, if the party come not in upon the *venire facias* during that term, and replevy his franchiſes, they are loſt for ever. 15 *Ed.* 4. 7. *Cro. Eliz.* 591. 2 *Bro. Abr.* tit. *Quo warranto, pl.* 11. *p.* 186; and under title "Extinguiſhment," *pl.* 42. *Rex v. Staverton. Yelv.* 192. 30, 1. 31. *Sawyer* 30, 1. *Co. Entr.* 527. and 529. 4 *Mod.* 58. *Smith*'s caſe, 4 *Mod.* 54. 12 *Mod.* 19. 1 *Show.* 280. Year Books 15 *Ed.* 4. 7; *Dy.* 197, 8. 5thly, It is ſaid that, by the words *quouſque curia alias ordinaverit*, it appears that this judgment was mere proceſs to enforce appearance, and not a definitive judgment. Now ſuppoſing that the judgment of ſeizure either diſſolves the corporation, or ſeizes them into the king's hands, the queſtion will be, whether the nature and effect of ſuch a judgment is altered by the addition of thoſe words. The natural conſtruction of them is, that the liberties are ſeized into the king's hands till the court ſhall make a further order; therefore if no ſuch order be made they remain in the king's hands. 2 *Inſt.* 282. *Brigg*'s caſe, 2 *Rol. Rep.* 46. 15 *Ed.* 4. 7. 6thly, It has been objected that a writ of ſeizure does not appear

Corporation ſued *ea nomine.*

A corporation may be diſſolved by judgment of ſeizure before appearance.

Addition of the words *quouſque curia, &c.* makes no difference.

to have iſſued on that occaſion, becauſe it is not ſtated on this record; but comparing the language of this record with thoſe produced by the counſel on the other ſide, it does not appear but that, if a writ of ſeizure were neceſſary, it did iſſue in fact. There is no entry to be found of a record at large; and there are no inſtances mentioned, in any of the records, in expreſs words, of writs of ſeizure having iſſued, except in the caſes of Oxford, 32 *H.* 3. and Wincheſter (1). But there is a vaſt variety of inſtances of ſuch ſeizures, where no mention is made on the record of any writ having iſſued. If it had been neceſſary, they certainly would have been mentioned. If it ought to have iſſued, there is every reaſon to ſuppoſe that it did in this inſtance. For the king had a right to ſeize, and it appears that his grantees were in poſſeſſion for ſeveral years. That, therefore, was an actual ſeiſin. But even if the Court ſhould think it neceſſary, yet if they ſee that it is not uſual to ſtate the writs of ſeizure on the record, they will not adjudge the want of its appearing to be a ſubſtantial defect. But it ſhould rather ſeem that a writ of ſeizure was not neceſſary at all in this caſe; for it could not poſſibly have any effect upon franchiſes that were neither viſible nor tangible. How could the ſheriff have ſeized ſuch? The judgment itſelf is a ſeizure in law, and that is ſufficient.

Writ of ſeizure.

7thly, it remains next to ſhew, that, if the king had a right to ſeize the liberties, he had a right to grant them out again to another deſcription of perſons. Even if the corporation itſelf, that is, the ideal ſoul, were not diſſolved by the judgment of ſeizure, according to what is ſuggeſted by *Eyre* in *Smyth*'s caſe (2), yet all the franchiſes being abſolutely veſted thereby in the king's hands, and the ſeparation between the natural and political body complete, the old corporation was out of its place, and the king might ſubſtitute a new body in its room. For even admitting for a moment that the judgment of ſeizure *quouſque* is only in the nature of a *diſtringas* to compel an appearance, yet undoubtedly the effect of it was to diſplace the members of the old corporation for a time; and it was then competent to the crown to grant another charter to another body, to exerciſe thoſe rights for the benefit of the public. For though two corporations cannot exiſt in the ſame place with the ſame powers, yet here the old corporation having been legally ſuſpended and deprived of all their powers, the exerciſe of ſuch rights by a new ſet of members could not at all interfere with them; becauſe they had no powers left, and were a mere *caput mortuum*. Conſequently two bodies with ſimilar powers could not be ſaid to exiſt at the ſame time in Cheſter. II. The ſecond

The king's power to grant the forfeited liberty to another body.

(1) Sir *R. Sawyer*'s argument p. 29 (2) 1 *Show.* 274.

HEAD

HEAD OF OBJECTIONS RAISED BY THE PROSECUTOR TO THE DEFENDANT'S TITLE, viz. That whatever right king *Charles* the Second might have to grant the charter under which the defendant claims, yet that that charter was void upon the face of it, in reſpect of the power of amotion reſerved therein being illegal; or, ſuppoſing it to be good, that it has been ſince avoided by the actual exerciſe of that power by *James* the Second. It was anſwered by the defendant's counſel, That it is a well-known principle in conſtruing the king's grants, that where one conſtruction will make it good, and another bad, the firſt ſhall be adopted, 1 *Co.* 45. 10 *Co.* 67. *b. That if this clauſe be only to amove ſome of the corporators, it is good; if to amove the whole corporation, it is bad: and that therefore the court ought to adopt that conſtruction which will make it good, if they be by any means warranted in ſo doing; ut res magis valeat quam pereat.* That *Charles* the Second could not mean to reſerve a power of deſtroying the corporation, as he expreſsly provided for a continuation of it under every exerciſe of the power reſerved; for in the ſame clauſe in which the power is contained there is a proviſion made for filling up the vacancies by the remaining electors, *which could not be if all were to be amoved.* That the king might reſerve a power of amoving ſome, provided he left a ſufficient number to elect and fill up the vacancies; and that this was the true conſtruction of the charter. And as to whether the king were deceived or not in this grant, it was ſaid, that there is a difference to be obſerved in all caſes where the king is ſaid to be deceived in his grant: if the matter, which is falſe in the letters patent, be ſuggeſted on the part of the grantee, and that to the prejudice of the king, there the king ſhall be ſaid to be deceived in his grant, ſo as to make it void; *King* v. *Kemp*, *T.* 7 *W.* & *M.* 12 *Mod.* 78. But where the words of the letters patent are the words of the king, *ex certâ ſcientiâ et mero motu*, as in this caſe, although the king appear by his inference to be miſtaken in his law, yet the king ſhall not be ſaid to be deceived ſo as to avoid his grant. 1 *Rep.* 49. *Jenk.* 255. 3 *Com. Dig.* 452. 4 *Bac. Abr.* 210. 6 *Rep.* 55. *Skin.* 663. 8 *H.* 7. fo. 3. *Dy.* 197. 352. 11 *Rep.* 2. *Curle*'s caſe. *Hob.* 220. And here the grant was *ex certâ ſcientiâ et mero motu.* But that, ſuppoſing upon one or other of the grounds contended for that the charter of *Charles* the ſecond was voidable; that the king could not have rightly made that grant; or that it was voidable for matter appearing on the face of it; yet it was good till the letters patent were repealed. They ought to have been repealed either by petition or *ſcire facias*. *Bro. Abr.* tit. *Petition*, pl. 12. tit. *Juriſd.* 102. tit. *Sci. Fa.* 58. 63. 173. 3 *Lev.* 220. So in *Dy.* 197, 8. *Keilw.* 134. *Bro.* tit. *Traverſe of Office*, 52.

Power of amotion reſerved in the charter of Charles the ſecond.

Letters patent valid till repealed.

III. The judgment being eſtabliſhed to be a valid exiſting judgment againſt the old corporation, it is contended, that

Charter of reſtitution.

its effect was done away by the charter of reſtitution. But it appears that the king had granted out the ſame franchiſes to another body of men in the mean time: which he might well do if the judgment were good. However, it appears moſt evidently that thoſe two charters were directed to, and accepted by, two different deſcriptions of men. For, firſt, the charter of *Charles* the Second was not addreſſed to the corporators as a diſtinct body, but generally to the citizens and inhabitants: that, therefore, if the ſecond charter were good at the time it was granted, and if no legal courſe of proceedings appear to ouſt the grantees under that charter, nor any previous removal of the members whereby that corporation ceaſed to act, it was not competent to the crown to re-grant the ſame franchiſes again to another body, who had been legally diſpoſſeſſed of them, which he had before granted. That the judgment which had been given in this court was a ſecurity to the new grantees of the crown, which the king, of his own authority, could not then reverſe, and which the Court themſelves could no longer do away after the old corporation had failed, to come in within the courſe of the next term. That it ſtill remained of record againſt them. And the king was precluded, by his intermediate act, from reſtoring the old corporation. CUR. ADV. VULT.—ASHHURST, J. afterwards delivered the opinion of the Court. After ſtating the pleadings as above, he ſaid, on theſe pleadings three queſtions naturally ariſe. FIRST, Whether king *Charles* the Second, at the time of granting the charter mentioned in the plea, had the power of creating a new corporation in the city of Cheſter? SECONDLY, Whether the charter itſelf be a good one? and if it be, What is the effect of the amotion of all the Members? THIRDLY, What was the effect of the charter of reſtitution by king *James* the Second? The firſt of theſe queſtions muſt depend on the effect of the judgment *quoſque* given in Hilary term, 1683, which judgment clearly remained in force in February, 37 *Car.* 2. 1684-5, when the charter was granted under which the defendant claims. That the judgment of ſeizure was legal at the time it was given, is clear from the authorities in all the books. It was founded on the default of the corporation, who then had not, nor did at any time afterwards, appear to the information. A year elapſed before the crown did any act in conſequence of the judgment of ſeizure, and then the crown granted a new charter. THE QUESTION then is, WHETHER, *without a previous* final judgment, *the king had a power of granting this charter?* One thing ſeems clearly eſtabliſhed in the caſe in the year-book, 15 *Ed.* 4. namely, that when the proceeding was in the court of eyre, if the party did not come in during the eyre, the franchiſe was forfeited for ever; and though the judges

differed

differed in opinion as to the practice in the king's bench, none of them denied that the law was ſuch in the court in eyre. This then clearly eſtabliſhes this poſition, that a final judgment of ſeizure as forfeited, is not eſſentially neceſſary to create the forfeiture; for, if it were, ſuch judgment could never have been given in the court in eyre, for the corporation had a right to appear at any time during the eyre, to the very laſt inſtant; and after the iter was determined, the power of the juſtices in eyre was at an end, and they never could enter a final judgment. If then a final judgment be not of the eſſence of the forfeiture, why ſhould ſuch final judgment be eſſentially neceſſary in the court of king's bench? The cauſe of forfeiture is the contumacy of the corporation in not appearing at the time prefixed to them for that purpoſe; and that contumacy equally exiſts when the proceedings are in the king's bench, if the corporation do not come in and appear in due time. The juſtices in eyre, after the eyre determined, ſhall ſend their records in bank, which is *Banco Regis;* and the ſame execution, and the ſame form of execution, as before the juſtices in eyre, ſhall be purſued as before the juſtices in bank. *Bro. Abr.* tit. Judges, *pl.* 8. The information filed by ſir *Robert Sawyer*, called upon the mayor and citizens to ſhew by what authority they claimed to be a corporation. *Non conſtat* by that information that there was any corporation in Cheſter, either by charter or preſcription. The information imports the contrary; for it charges them with having uſurped the name, privileges, and authority, of a corporation without any legal right. If any charter or preſcription exiſted, it was incumbent on the defendants to have appeared and ſhewn it; and by not doing ſo, they admitted that there was neither charter nor preſcription to warrant ſuch uſurpation. *All franchiſes may be loſt by non-uſer or neglect; and the ſtrongeſt caſe of non-uſer or neglect is that which appears on record, when the parties are called upon in a court of juſtice to ſtate their right, and they neglect or refuſe to do it.* In the year-book 15 *Ed.* 4. it is ſaid, that if a perſon outlawed obtain his charter of pardon, and ſue a *ſcire facias* againſt the plaintiff, who, being ſummoned, does not appear, the charter of pardon ſhall be allowed for ever, and it ſhall not be allowed *ſalvo jure petentis;* for, by common intendment, when he is ſummoned and will not come, he will not purſue his writ. Again, it is ſaid that letters patent ſhall be avoided by reaſon of the party's neglect, and if he forceaſe his time, it is reaſon that he ſhall loſe his franchiſe, and the judgment ſhall be, that the franchiſe ſhall be ſeized, &c. and this ſhall enure by way of extinguiſhment. So in the preſent caſe, the corporation, having forceaſed their time, ſhall loſe their franchiſes for ever. But, it is ſaid, that in many of the caſes cited, a final judgment was entered in the

term after the judgment *quousque* was given, and that these inſtances prove the neceſſity of ſuch judgment. To this it may be anſwered, that there is no formal adjudication that ſuch judgment is neceſſary; but, as there had been ſome contrariety of opinions, it might be done *ex abundanti cautelâ*, or to ſhew the election of the crown to take advantage of the forfeiture. But that does not prove the abſolute neceſſity of it; and there is no reaſon why it ſhould be abſolutely neceſſary in the king's bench, when it clearly was not ſo in the courts in eyre. The authority of Lord *Coke*, 2 *Inſt.* 282. ſeems ſtrong to this point. Lord *Coke* there ſays, if before the juſtices in eyre the party came not, the franchiſes ſhould be ſeized into the king's hand *nomine diſtrictionis*, which the party in the ſame eyre might replevy; but if he did not replevy them while the ſame eyre ſat in the county, the franchiſes were loſt, and forfeited for ever. Therefore, if the party now upon the *venire facias* come not whilſt the eyre ſit in that county, the franchiſes are loſt for ever; and ſo it is in the king's bench, if the party come not in upon the *venire facias* during that term, and replevy his franchiſes, they are loſt for ever. There have been ſome doubts whether they might not come in during the next term, though the authority of Lord *Coke* is to the contrary: but that is not material to be conſidered in the preſent caſe, becauſe they never did appear previous to the granting of the charter, which was a year after. If then the parties could not come in but during the term in which the *venire* was returnable, or at all events in the next term, unleſs by grace and favour of the crown, the only poſſible uſe of a final judgment muſt be to ſhew the crown's election to take advantage of the forfeiture; and if that be the caſe, any other matter of record, ſhewing that election, may equally anſwer the purpoſe. The granting of a new charter, therefore, inconſiſtent with the former, will amount to a declaration on record, that the crown elects to take advantage of the forfeiture; and that is all that can be neceſſary where the corporation had no means of ever redeeming the forfeiture. It would be endleſs to go through all the caſes which have been cited at the bar, in which there is a great deal of confuſion and contradiction; and therefore, though we have conſidered them, we think it better to ſtate the authorities on which we rely, and which ſeem to us to have the ſtrongeſt reaſon on their ſide.

This, then, being our opinion on the firſt point, the next queſtion is, Whether there be any defect in the charter itſelf which is ſufficient to vitiate it? The objection which has been taken to it is, that the power of amotion reſerved in it, as it extends to the amotion of the whole body, is repugnant to the charter, and therefore makes the whole void. But we are of opinion, that on the ſound conſtruction of the charter, taken

taken altogether, no ſuch repugnancy will occur; for that charter having in one part provided, that on every amotion the corporation ſhall proceed to a new election according to the mode preſcribed, the power of amotion reſerved muſt be underſtood *ſub modo*, namely, ſo as not to deſtroy the whole body at once, and thus make it impoſſible to elect others. And taking that to be the conſtruction, the ſubſequent amotion of all the members at once was arbitrary, illegal, and void.

The third and laſt queſtion then will be, What is the effect of the ſubſequent charter of reſtoration by king *James* the Second? and as to that, we are of opinion that it was a void charter, and of no effect. For though it be competent to the crown to pardon a forfeiture, and to grant reſtitution, that can only be done where things remain in *ſtatu quo*, but not ſo as to effect legal rights properly veſted in third perſons, which is the caſe here; for *Charles* the Second, whilſt the forfeiture exiſted, had incorporated a new body of men in the town, and inveſted them with new rights; which being done, it would not have been in the power of *Charles* the Second, and, of courſe, it was not in the power of his ſucceſſors, to defeat an intereſt once legally veſted in ſuch new corporation; and there cannot exiſt in the ſame place two independent corporations with general powers of government: and therefore we think that ſuch charter of reſtoration was abſolutely void, and of no effect. Therefore, on the whole, there muſt be judgment for the defendant.

JUDGMENT was accordingly entered for the defendant; but it was afterwards reverſed in the houſe of lords, April 20th, 1790, on a writ of error. 4 *Ter. Rep.* 122.

The King *v.* Thomas Amery. Same *v.* John Monk. 1 *Ter. Rep.* Hil. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 575.

If it appear in evidence that a charter has been accepted, and acted under for ſome years, it ſhall be taken to have been accepted as far as it could, and muſt ever afterwards be taken to have been accepted.—The firſt of theſe was an information in the nature of a *quo warranto*, calling upon the defendant, *Thomas Amery*, to ſhew by what authority he claimed to be an alderman of the city of Cheſter. The defendant, after having pleaded that the corporation of Cheſter was a preſcriptive corporation, ſet forth a charter granted in the 37th year of king *Charles* the Second, by which the citizens and inhabitants of the city of Cheſter were incorporated. That the charter directed that the corporation ſhould conſiſt *(inter alia)* of a mayor, recorder, twenty-four aldermen, and forty common-councilmen, &c. and it appointed the firſt twenty-four aldermen by name. The defendant then averred that the ſaid charter, as to the election of aldermen of the ſaid city, was duly accepted and agreed to by the ſaid citizens and inhabitants; and then deduced a regular title as alderman under that charter.—Replication 1ſt, That the mayor and citizens, at the time of making the ſaid charter, were not,

not, nor had from time immemorial been, a body corporate, &c.; and iſſue. 2dly, That king *Charles* the Second did not grant the charter mentioned in the plea; and iſſue. 3dly, That the charter 37 *Car.* 2. as to the election of aldermen, was not duly accepted by the citizens and inhabitants; and iſſue. 4thly, That certain perſons in the ſaid charter mentioned did not become, nor were aldermen of the ſaid city; and iſſue. 5thly, That the mayor, aldermen, and common-council, have not exerciſed the franchiſe of electing aldermen according to the intent of the ſaid charter; and iſſue. 6thly, That the defendant was not, at the time in the plea mentioned, a citizen, and one of the common council; and iſſue. 7thly. That the defendant was not elected an alderman by the major part of the then mayor, aldermen, and common-council, &c.; and iſſue. 8thly, That the defendant was not duly admitted, &c.; and iſſue.—The ſecond replication ſtated, that in the 35th year of the reign of *Car.* 2. an information was filed in the nature of a *quo warranto* againſt the mayor and citizens of Cheſter; that in Hilary term, 35 & 36 *Car.* 2. there was a judgment by default, by the court of king's bench, that the liberties, privileges, and franchiſes in the ſaid laſt-mentioned information ſhould be ſeized into the hands of the king, until the ſaid court there further ordered. That in Trinity term, 36 *Car.* 2. it was adjudged by the ſaid court, that the ſaid liberties, &c. ſhould be ſeized into the hands of the king, and remain in his hands, and that thoſe liberties, &c. ſhould be extinguiſhed, and the ſaid mayor and citizens expelled and removed therefrom; which judgment was in force at the time of making the charter of *Car.* 2. It then alleged, that there were other matters in the charter of *Car.* 2. and particularly, that the king willed that the charter ſhould be ſealed, as well under the great ſeal of England, as under the ſeal of his county palatine of Cheſter (1), which were not ſtated in the defendant's plea; and that the charter, not being accepted by the ſaid citizens and inhabitants as to thoſe, as well as all other matters therein contained, was void. The third replication ſtated, that *Car.* 2. by his ſaid charter reſerved full power to himſelf, his heirs, and ſucceſſors, at his and their free will and pleaſure, to remove the mayor, recorder, common-clerk, or any one or more of the aldermen, common-councilmen, &c. of the ſaid city, by an order of privy council to them reſpectively ſignified; and that as often as he, his heirs, and ſucceſſors, by any ſuch order made, ſhould declare any ſuch mayor, &c. to be amoved from his or their reſpective offices, that then and from thenceforth

(1) The king died on the 6th of February, 1684, two days after this charter. *Vid. Poſt.*

the mayor, &c. and all or any of them, ſo amoved from their reſpective offices, ſhould, without further proceſs, actually be amoved, &c. and that in every ſuch caſe ſome other fit perſon or perſons, within a convenient time after any ſuch amotion, ſhould be choſen, &c. in ſuch manner as by the letters patent was before directed, into the place and office, &c. of any perſon ſo amoved. That king *James* II. by an order of privy-council, dated the 12th of Auguſt, 1688, according to that power, amoved all the corporators then in being, which was regularly ſignified to them; wherefore the power in the ſaid charter, as to the election of aldermen, ceaſed and determined. The fourth replication ſtated a charter of 21 *Hen.* 7. which was accepted, and a confirmation of it in the 16th *Elizabeth*, which was alſo accepted; that both thoſe charters were in force at the time of the judgments in *quo warranto*; and that thoſe judgments were in force on the 17th of October, 1688. That king *James* II. afterwards, on the 26th of October, 1688, granted a charter of reſtoration to the mayor and citizens of Cheſter, which was accepted: wherefore the charter of 37 *Car.* 2. after the granting and acceptance of the charter of reſtoration, was of no further effect. The fifth replication ſtated a charter of incorporation in 21 *Hen.* 7. with a power of electing aldermen annually by the corporation at large, which was accepted; a confirmation of it in the 16th *Elizabeth*, which was alſo accepted; and that both thoſe charters were in force at the time when the charter of 37 *Car.* 2. was granted; wherefore it was of no force as to the election of aldermen. Rejoinder, that the charter of 37 *Car.* 2. was accepted by the citizens and inhabitants as to all the matters contained therein; and 9th iſſue thereon. That the order in council was not ſignified as ſtated in the replication, and 10th iſſue thereon. That the charter of 37 *Car.* 2. continued in full force as to the election of aldermen from the time of the granting and acceptance thereof until the time of exhibiting the information; traverſing the acceptance of the charter of *James* II.; 11th iſſue thereon. That after the granting of the charters of *Hen.* 7. and *Elizabeth*, there were judgments of ouſter againſt the mayor and citizens in the 35th *Car.* 2. &c. traverſing the charters of *Henry* the 7th and *Elizabeth* being in force at the time of the charter of *Car.* 2. and now; 12th iſſue thereon.—"This cauſe was tried before *Eyre*, "baron, when the jury found a verdict for the proſecutor, "on the 3d, 5th, 9th, 10th, 11th, and 12th iſſues; and, "for the defendant, on the 1ſt, 2d, 4th, 6th, 7th, and "8th iſſues." The pleadings in the other cauſe of the *King* v. *Monk* were ſimilar to theſe, excepting that they were relative to the office of common-councilman.—On a motion for a new trial, it appeared from the report of the

the judge, that the ſelect body named in the charter of *Car.* 2. aſſumed their corporate functions, and acted under that charter for about three years, during which time about thirteen of the old freemen were admitted under the new charter. That upon the order of council of *James* II. the old corporation reſumed their functions, and the members of the other retired. The reſtored corporation returned to their ancient mode of proceeding in moſt articles; but in ſome inſtances, and particularly in the election of aldermen and common-council, they had, in general, continued to proceed according to the method directed by the charter of *Car.* 2. excepting during four years ſoon after the revolution; during which time they proceeded nearly, though not entirely, according to the charter of *Hen.* 7. They likewiſe continued to hold the hoſpital lands, and a fair, to which it did not appear that they had any title, but under the charter of *Car.* 2. It alſo appeared, that the election of aldermen by the ſelect body had been made previous to the charter of *Car.* 2. by virtue of a by-law under the charter of *Hen.* 7. It is alſo to be remarked, that the charter of *Charles* the Second did not appear to have the ſeal of the county palatine, according to the directions of the charter; and evidence was given to ſhew, that there was no entry in the ſeal-keeper's books of the county palatine, of any fees having been paid for affixing the county palatine ſeal. The judge, after ſtating particularly all the evidence, concluded his report with obſerving, that, in his directions to the jury, he had told them that *the right of election of aldermen in this corporation, in the mode contended for on the part of the defendant, ought to be ſupported, if poſſible.* That the uſage had prevailed in Cheſter for a great number of years, and was reaſonable in itſelf. But that, on a general view of the caſe in evidence, he found it extremely difficult to ſupport it under the charter of *Car.* 2. the granting of which appeared to have been a meaſure of the times, and which, from the moment when it became neceſſary to tread back thoſe ſteps in the latter end of the reign of king *James*, ſeem to have been entirely laid aſide. That in ſumming up the evidence, he had aſſumed that there was no contrariety. That the jury might conclude upon it, that the corporation of Cheſter was a corporation by preſcription, and under charters, at the time of the judgment in *quo warranto*; in which, however, he ſtated, that he had differed from the counſel on both ſides. That the franchiſes of the corporation were, in fact, ſuſpended by that judgment. That the charter of *Charles* II. was acted upon for three years next after the granting of it. That, after the charter of reſtitution was granted, the officers of the old corporation reſumed their places; and that from that time they went on without appearing to advert in any one inſtance to the char-

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ter of *Charles* II, as the authority under which they were to act. For though it was true that one of the witneſſes had ſtated in his evidence, that, as he underſtood it, the ſelect body was now ſomewhat differently conſtituted from what it appeared to have been before the charter of *Charles* II, in reſpect of the two ſheriffs making or not making a part of the forty common-councilmen; and the elections of mayor, and recorder, are now approved of by the king, which is conformable to the charter of *Charles* II, and is not required by the charter of *Hen.* 7; that thoſe, and a few other inſtances which might occur of apparent conformity to the charter having obtained, without any actual reference to it; and in a multitude of other inſtances, the uſage being in direct contradiction to the charter, he had thought there was in effect no evidence that the old corporation had ever recognized that charter. As to the election of aldermen, it was clear, that the uſage had exiſted a great number of years before the charter of *Charles* II. That the operation of law upon this ſtate of the fact, applicable to the iſſues in this cauſe, was the next thing to be conſidered; and his Lordſhip in his report, here proceeded to ſtate in what manner he had directed the jury therein. AFTERWARDS THE COURT recommended it to the counſel to confine themſelves in their arguments to the third, fifth, and ninth iſſues, on the acceptance of the charter of *Charles* the Second; becauſe, if it ſhould turn out either to be a verdict againſt evidence, or that the queſtion was not properly left to the jury, as to thoſe iſſues, to exerciſe their judgment upon, that would be a ſufficient ground for a new trial, and the queſtions of law would be open hereafter. THE CASE was very fully argued on the verdict on thoſe iſſues, as it was warranted by the evidence alone. And the only queſtions for the conſideration of the Court were, 1ſt, Whether the jury had done right in finding their verdict as they had done, againſt the acceptance of the charter of *Charles* the Second? 2dly, Whether the judge, who tried the cauſe, was or was not correct in his manner of ſumming up to the jury? ASHHURST, J. As to the manner in which the queſtion was left to the jury upon this part of the caſe, I am of opinion that the judge was, in ſome degree, miſtaken; for he has ſtated to us pointedly, that he told them that he thought there was in fact no evidence that the old corporation had accepted the charter of *Charles* the Second. In a matter of ſuch conſequence, I ſhould have thought, that if it were only a queſtion of fact, at all events there was evidence on this point ſufficient to be left openly and fully to the conſideration of the jury, without any ſuch ſtrong directions as were given. In the firſt place, I think the learned judge was miſtaken in telling the jury, that the queſtion was, whether the charter of *Charles* the

the Second was accepted by the old corporation or not. That was not the iſſue upon the pleadings; for the words of the iſſue are, "That the letters patent were not duly accepted, "and agreed to, by the citizens and inhabitants of the city "of Cheſter;" which could not mean the old corporation. For it could only be accepted by the perſons to whom it was directed at the time it was made; but the old corporation did not exiſt at that time; for they were diſſolved by the judgment in the *quo warranto*. They no longer exiſted as a body. If they were not diſſolved, the queſtion might have been different; therefore, in reaſon, the only queſtion could be, Whether this charter was accepted by the perſons to whom it was addreſſed, who were the citizens and inhabitants? Now this queſtion was not left to the jury at all, the only queſtion having been, Whether the charter was accepted by the old corporation? Now, with regard to the facts which were laid before the jury in proof of the iſſue, reſpecting the acceptance by the new corporation, there were many inſtances: indeed, the judge himſelf ſays, that the evidence was all one way during three years. Several inſtances are ſtated of acts done by the new corporation, which could only have been done under the charter of *Charles* the Second [which Mr. J. *Aſhhurſt* here enumerated]. Theſe were ſuch a degree of evidence, as ſhould have been left to the jury; and it does ſeem to me that the evidence was all on one ſide during that period. The evidence of thoſe acts ſhould, at any rate, have been left to the jury, whatever verdict they might ultimately have given. And if they had been of opinion, that the charter had been accepted and acted under during thoſe three years, that would have been concluſive. For the charter once accepted, and acted under for three years, was accepted as much as it could be, and muſt ever afterwards be taken to have been accepted; and the corporation could not afterwards determine upon keeping thoſe franchiſes which were beneficial to them, and rejecting others which were not ſo. At all events, this evidence ſhould have been left to the jury. And I agree with the learned judge, in the opinion which he has delivered, that courts and juries ought to lean in favour of ancient uſages, eſpecially, if they tend to preſerve the peace and quiet of corporations.

BULLER, J. "This is an information in the nature of a "*quo warranto* againſt the defendant, to ſhew by what au- "thority he claims to be an alderman of Cheſter. The "defendant, in anſwer to this information, has ſtated a char- "ter of the 37th of *Charles* the Second, which he ſays was "granted, not to the mayor and citizens, who were the old "corporation, but to the citizens and inhabitants, and ac- "cepted by them; he has then derived his title under it. "On this plea three iſſues have been taken, 1ſt, That the

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"charter was not granted. 2dly, That it never was ac-
"cepted by the citizens and inhabitants. 3dly, That in this
"charter there was a clauſe which enabled the king and his
"ſucceſſors, by an order of privy-council, to put an end to
"this corporation by a power of amoving them without
"aſſigning any cauſe; and that king *James* the Second made
"ſuch an order, which was notified to the corporation."
On theſe three iſſues the event of the cauſe muſt finally de-
pend. The others might have been diſpenſed with. Though
I have ſtated thoſe three iſſues, they are more than are ne-
ceſſary in order to diſpoſe of the queſtion now before us.
For as to the objection, which was taken by one of the
counſel againſt the rule, that the charter of *Charles* the Second
was void, becauſe it had not the ſeal of the county palatine
of Cheſter affixed to it, there is no foundation for it; for it
does not follow, that, becauſe the king may create a corpo-
ration within the county palatine under the duchy ſeal, he
cannot do ſo under the great ſeal. Beſides, caſes which ariſe
within the county palatine of Lancaſter are not applicable
to the preſent. They depend on a particular ſtatute (1),
which is confined to the county palatine of Lancaſter. With
reſpect to offices granted under the great ſeal of England, to
be exerciſed in Cheſter, it is ſaid, that they depend on the
ſtat. 34th and 35th *Hen.* 8. c. 26. which (as it was contended)
enacts, that offices in Cheſter ſhall be granted under the
great ſeal of England, and the chief juſtice is particularly
mentioned. But on adverting to that ſtatute, the argument
does not appear to be well grounded; becauſe that act relates
only to Wales, and not to Cheſter. Beſides, before the
paſſing of that ſtatute, the crown had uſed to grant offices
in Wales under the great ſeal; for there is a clauſe (2) in
that ſtatute which ſays, that commiſſions under the great
ſeal, already granted, ſhall be in force. Another circum-
ſtance, worthy of obſervation, is, that the ſheriffs of Cheſter
are appointed at Weſtminſter in the ſame manner as the
other ſheriffs in England. It is alſo to be remarked, that
the charters of *Charles* the Second, and *James* the Second, are
neither of them under the ſeal of the county palatine of
Cheſter; but they are both under the great ſeal alone.
However, this is not the point now before the Court, WHICH
is only as to the acceptance of the charter of Charles *the Second.*
And as to that, it is material, firſt, to conſider to whom that
charter was granted; and, ſecondly, by whom it is ſaid to
have been accepted. I think there was a miſtake at the trial
by the judge, in leaving the queſtion to the jury, whether the
old corporation had accepted this charter? Nothing is more

(1) 1 *Ed.* 4. (2) *S.* 11.

clear

clear than that the crown, at the time of granting this charter, conſidered the old corporation of Cheſter as totally annihilated and extinguiſhed. It was not granted to them, as to a corporation then in exiſtence. And with regard to the term "citizens," the counſel in ſupport of the rule has given the true anſwer to that obſervation (1). Then the queſtion is, Whether the citizens and inhabitants had accepted the charter of *Charles* the Second, or not? As to the facts of the acceptance ſtated to have been proved, there is ſuch a body of evidence during the courſe of three years, as in my opinion leaves the queſtion without a doubt. And *if the corporation accepted the charter only for an hour, that is concluſive for ever; it cannot afterwards be ſaid that they had not accepted.* I agree with the learned judge, that the election of the defendant ſhould be ſupported, if it can be ſo. If on the evidence there is no ground for ſaying, that the charter was accepted, it will be impoſſible to ſupport it. But all the evidence goes to ſhew an acceptance; and there was no contrariety. Another objection has been made, that it does not appear that the charter was accepted by a majority of thoſe named in it. I am by no means ſatisfied that it was neceſſary that it ſhould be accepted by a majority of them. I hold that there is a great difference between a charter granted in general terms to incorporate the inhabitants of a city, and a charter like the preſent, which creates diſtinct parts of the corporate body, fills up ſome of the offices by name, and leaves it open to them to elect a number of freemen. What is ſaid by Mr. J. *Yates*, in the caſe of the *King* v. *Aſkew* (2), exactly agrees with what I have juſt laid down. That was the caſe of the college of phyſicians. In the charter granted to them, ſix perſons by name, and all others of the faculty, of, and in the city of London, are made a body corporate; but the Court held, that all the practiſing phyſicians in London were not, by virtue of this charter, members of the corporation. Lord *Mansfield* ſaid, that the corporation were only bound to admit every perſon whom they, on examination, thought fit to be admitted; and that any perſon who came within that deſcription, had a right to be admitted. *Yates*, J, ſaid (3), "I am far from thinking that all the men "of, and in London, then practiſing phyſic, were incorpo-"rated by the charter. The immediate grantees under the

(1) Viz. That the word "citizens" does not mean "freemen," as freemen of the old corporation; for they were extinct at that time: but that the expreſſion might be accounted for in this way; there had been a city, and a corporation; and, common parlance, the inhabitants were known by the name of citizens of Cheſter: that the word "inhabitants," was added for the purpoſe of preventing any miſtake; and that they were uſed as convertible terms.

(2) *Vide* Title PHYSICIANS. (3) 4 *Burr.* 2199.

"charter,

"charter, were the ſix perſons particularly named in it. "The reſt were to be admitted by them. They were not "*ipſo facto* made members. They were firſt to give their "conſent, before they became members; they could not be "incorporated without their conſent." Now that charter ſeems applicable to the preſent caſe. For the king, by this charter, appointed a certain number of aldermen, and a certain number of common-councilmen. Theſe then, according to the language of Mr. J. *Yates*, are the immediate grantees of the crown; and a power is afterwards given to them to ſwear freemen upon their requeſt, they firſt taking the oaths. Therefore, it appears to me, that theſe freemen ſtand in the ſame light in which thoſe perſons do, who practiſe phyſic in London. The corporation have a power delegated to them to ſwear in certain perſons on their doing particular acts. But if the law were not ſo; if any number of freemen had accepted, it would have been ſufficient; for the freemen are an indefinite body. And, in a corporation conſiſting of different integral parts, if any of the freemen, being an indefinite body, attend the meetings of the corporation, it is ſufficient. It is not required in all caſes, that a majority of the whole body ſhould be preſent. And if a ſmaller number than a majority of an indefinite part of the corporation be ſufficient to conſtitute a lawful aſſembly for doing corporate acts, after they are incorporated, it will be difficult to find a reaſon why the ſame number may not accept the charter. Whether, after hearing the opinion of the Court on theſe points, the parties may chooſe to go to trial again in this caſe, is for their conſideration. But if the cauſe ſhould be tried again, theſe pleadings are ſo defective, that I recommend it to both parties that they ſhould be amended. To begin with the plea: it ſets out with ſtating, "that the mayor and citizens of Cheſter have, from time "immemorial, and by divers charters and grants of divers "kings and queens of England, been a body corporate and "politic, in deed and in fact." It is impoſſible to ſuggeſt any reaſon why this averment was made; it was likely to have the effect which it produced at the trial, of embarraſſing the cauſe, and raiſing the doubt whether the charter of *Charles* the Second, ſhould or ſhould not be conſidered to have been granted to a corporation then in being. It is true, that the plea has not actually ſtated, that they were a corporation at the time when the charter of *Charles* the Second was granted; but this allegation is altogether unneceſſary. The defendant's caſe is, that this was an original charter of incorporation; and therefore it was immaterial for him to ſtate a prior corporation. The defendant has then ſtated the charter in the proper way, "that it was accepted by the "citizens and inhabitants." But this is followed by another

averment, which is quite new, and which is the foundation of another iſſue, namely, "that the mayor, aldermen, and "common-councilmen, or the greater part of them, did "exerciſe the liberty, privilege, and franchiſe, of making, "electing, and chooſing of aldermen of the ſaid city, ac- "cording to the direction of the ſaid charter." Now this is perfectly nugatory and unneceſſary; for if the charter were accepted, they were bound to act under it; this court would have compelled them to act under it. But the plea, in ſpeaking of the manner in which it was accepted, only ſays, that the charter, as to the election of aldermen, was duly accepted. It is impoſſible to ſupport this iſſue in any way. The averment proceeds on a miſtake, by ſuppoſing, that a charter may be accepted in part, and rejected as to the reſt. The only inſtance in which I have ever heard it contended, that a charter could be accepted in part only is, where the king has granted two diſtinct things, both for the benefit of the grantees: there, I know that ſome have thought, that the grantees may take one and reject the other. However that may be, it cannot extend to this caſe. This corporation muſt either have accepted *in toto*, or not at all; if they could have accepted a part only of the charter, they would have been a corporation created by themſelves, and not by the king. If a charter directed that the corporation ſhould conſiſt of a mayor, aldermen, and twenty-four common-councilmen, they could not accept the charter for the mayor and aldermen only, omitting the common-councilmen. It is impoſſible to ſupport this part of the plea; therefore this allegation, confining the acceptance of the charter as to the aldermen only, ought to be amended. In the replication, the proſecutor has taken the iſſue on the firſt averment larger than the plea; for it ſays, "that the ſaid mayor and citizens, "at the time of the making of the ſaid letters patent in the "ſaid plea mentioned, were not, nor have, from time im- "memorial, been a body corporate," &c. neither can this be ſupported. There are three other replications; one of which introduces the order of privy-council for amoving the corporation. I read that part of the charter in a different ſenſe from that in which it is underſtood by the counſel on either ſide; for the charter ſtates, that the king reſerves to himſelf, "a power by any order of him, his heirs or ſuc- "ceſſors, in privy-council made, under ſeal, to them re- "ſpectively ſignified, to amove them, or any of them." But in looking farther into the charter, it appears to me, that that clauſe does not warrant a general amoval of the whole corporation. It only means, that the king intended, and has by the words of the charter reſerved to himſelf, the power of amoving one or more of the individuals of the corporation who miſbehaved, and not of deſtroying the corporation

itſelf;

itſelf; for it afterwards directs, that in caſe of ſuch amoval, the remainder of the corporation ſhould elect others in their room in the manner directed by the charter. If that be the true conſtruction of the charter, one of the replications is entirely out of the queſtion. With reſpect to the other replication, it is idle on this record to ſtate what was the ancient conſtitution of the corporation before the judgment of oufter in the *quo warranto*; becauſe the defendant has by his plea put his election upon the charter of *Charles* the Second; he muſt ſtand or fall by that; and, therefore, it was nugatory to ſtate the charter of *Henry* the Seventh, or any other charter granted to this corporation.—Rule abſolute.

The Company of Carpenters, Brickmakers, Bricklayers, Tylers, and Plaiſterers of Shrewſbury, v. Hayward, Ea. Ter. 20 Geo. 3. B. R. 1 *Doug.* 373.

To prove the exiſtence of an aggregate corporation, conſiſting of different trades, entries of admiſſion into the ſeparate trades, as *into the company of carpenters*, *into the company of plaiſterers*, are evidence to be left to a jury. But a perſon who has acted in breach of an alleged cuſtom, is not a competent witneſs to diſprove the exiſtence of the cuſtom.—This was an action in the caſe againſt a carpenter, for the breach of a cuſtom, which was laid to be, that none but members of the company (being a corporation by preſcription), or their apprentices or journeymen, ſhould exerciſe in Shrewſbury, or within a certain diſtrict round that town, any of the trades mentioned in the title of the company. On the trial of the cauſe, a verdict was found for the plaintiffs. A rule to ſhew cauſe, why a nonſuit ſhould not be entered, or a new trial granted, having been obtained: on ſhewing cauſe, the ground for the nonſuit appeared to be, that the plaintiffs had not proved the exiſtence of ſuch a company as that deſcribed on the record. The evidence on this head conſiſted of entries of admiſſions (ſome as far back as the reign of *Henry* 8.) of perſons, ſome into the carpenters' company, ſome into the bricklayers' company, ſome into the plaiſterers' company, &c. of inſtances of fines paid for having worked in thoſe trades, without being free of the carpenters' company, of the bricklayers' company, &c. and of the teſtimony of one witneſs (who was only twenty-four years of age), who ſaid, he had been employed to call meetings of the company, and that they were called by the aggregate name ſtated in the declaration. The judge told the jury, that the companies might be diſtinct corporations for ſome purpoſes, and yet form but integral parts of one great corporate body; that ſuch a corporate body might legally exiſt; and whether, in fact, it did exiſt, was a queſtion for their deciſion. For the defendant it was objected at the trial, and now, that the evidence given was only proof, at moſt, of ſeparate incorporated companies, there being no inſtances of admiſſions into the aggregate body; no common ſeal, nor any proof of any corporate parole act done by them. The

evidence of the witneſs was ſaid to be of ſo recent a nature, that it ought not to have had any weight. 2. The ground for a new trial was, that a competent witneſs was rejected, who was offered on the part of the defendant, and that many others of the ſame deſcription were ready to have been produced. The witneſs rejected was reſident in Shrewſbury, and was called to prove, that he had worked without moleſtation as a carpenter in Shrewſbury, although he was not free of the company, nor an apprentice or journeyman. The judge thought the witneſs was incompetent. For the defendant, it was contended, that he was not intereſted in the cauſe, and that if the ſort of intereſt he might have could render him incompetent, there could be no ſuch thing as a diſintereſted witneſs in ſuch a cauſe; the only perſons likely to know the facts applicable to the caſe, being either perſons who had worked themſelves in breach of the ſuppoſed cuſtom, or who hath employed others; and, if the firſt claſs were conſidered as intereſted, becauſe liable to be ſued, the ſame objection might be made to the ſecond.—PER CUR. It was properly left to the jury to conſider, whether the evidence produced was ſufficient to ſhew, that there was ſuch a company; for that was a mere queſtion of fact, and they were to decide on its exiſtence, and whether it was originally created by a charter from the crown, or was only a voluntary ſociety. There was evidence of its exiſtence as a corporation. 2. The witneſſes rejected were clearly intereſted in the queſtion. If the company had failed in eſtabliſhing the cuſtom, they would have been diſcharged from actions to which they are liable for the breach of it; nor is it true, that the defendant could have had no other ſort of witneſſes. The employers might have been witneſſes.—Rule diſcharged.

How Corporations are to ſue and be ſued.

Tetterdell and Harris, Maſters of the Taylors' Company at Bath, v. Glazby, Tr. Ter. 5 Geo. 3. B. R. 2 *Wilſ.* 256.

A corporation cannot make a by-law, and give a penalty to be ſued for by any other but the corporation.—In an action of debt for a penalty upon a by-law; the declaration ſet out, that the city of Bath is a corporation, and ſtated the charter and power to make by-laws. That there had been a guild and company of taylors free of the city, and two maſters for the government thereof, and a cuſtom time out of mind in that city, that no perſon whatever ſhall exerciſe the trade of a taylor within that city (1); and that a by-law had been made by the mayor, aldermen, and commons of the

(1) *Vide* p. 507. *ante.*

city

city of Bath, for the better preſerving the ſaid cuſtom, which gives a penalty of 3*s.* 4*d.* per day, againſt any one exerciſing the trade, not being free thereof, to be levied by diſtreſs, or recovered by action of debt *by the maſters of the ſaid company*, for the time being, for the uſe of the poor of the company of taylors. That the defendant, not being a freeman, had exerciſed the trade of a taylor there, &c. Upon *nil debet* pleaded there was a verdict for the defendant. On a motion for a new trial, the counſel for the defendant urged, that upon the face of the record the by-law was a bad one; and if the plaintiff had a verdict, he could not have judgment, for theſe taylors are not the corporation of Bath, and therefore, the by-law is ill in giving the action to the maſters of the taylors company for the time being, who are ſtrangers to the corporation of Bath, the by-law ought to have given the action to the corporation of Bath; for to give it to any body elſe, is like aſſigning a *choſe in action*, which the policy of the law will not endure (1). AND upon this objection a new trial was denied by the Court.

The maſter, wardens, and commonalty of a company, cannot ſue for a penalty forfeited to the maſter and wardens, to the uſe of the maſter, and wardens, and company.

The Maſter, Wardens, and Commonalty of Feltmakers v. Davis, Mic. Ter. 38 Geo 3. C.B. 1 *Pal* et *Bof.* 98.

The firſt count in this declaration which was in debt for a penalty under a by-law, ſet forth the charter impowering the company to make by-laws, the by-law made, and the breach of it: The ſecond count, omitting the above particulars, ſtated the penalty as being forfeited "under and by virtue of a certain by-law of the company before that time duly made," &c. and this count was on ſpecial demurrer held bad. —This was debt on a by-law for 20*l.* The 1ſt count in the declaration ſet out a charter of 19 *Car.* 2. incorporating the feltmakers' company, giving a power to the maſter, wardens, and aſſiſtants to make by-laws, and directing that the wardens ſhould be choſen out of the aſſiſtants. It then ſtated that a by-law was made impoſing a fine of 10*l.* on every member of the company, who being choſen renter-warden ſhould refuſe to take upon himſelf that office, to be paid to the maſter and wardens for the time being, *for the uſe of the maſter, wardens, and company*; that the defendant became a member of the company, was elected aſſiſtant, and took upon himſelf that office, and was afterwards elected renter-warden, which office he refuſed to ſerve, &c. whereby, &c. The 2d count and the breach were as follows: "And whereas alſo the ſaid *William Davis*, ſo being a member of the ſaid company heretofore, to wit, on, &c. at, &c. was indebted to the ſaid maſter, wardens, and commonalty of the

(1) 6 *Co. Lit.* 214. *a.* Bodwick and Fennell, Mic. Ter. 28 Geo. 2. B. R. and Elton v. Chancy, 9 Geo. 2.

art or myſtery of feltmakers of London aforeſaid, in the ſum of other 10*l.* which he as ſuch member of the ſaid company had before then forfeited *to the ſaid maſter and wardens* of the ſaid company *for the uſe of the ſaid ſociety*, under and *by virtue of a certain by-law* or ordinance of the ſaid company before that time duly made, ratified, allowed, and approved, for having refuſed to take upon him, and for not taking upon him the office of renter-warden of the ſaid company, to which ſaid office he the ſaid *W. Davis* had before then been duly elected and choſen, to wit, at, &c. By reaſon of which laſt-mentioned premiſes an action hath accrued to the ſaid maſter, wardens, and commonalty to demand and have of and from the ſaid *W. Davis*, for the uſe of the ſaid company or ſociety, the ſaid laſt-mentioned ſum of 10*l.* ſo forfeited as laſt aforeſaid, being the reſidue of the ſaid ſum of 20*l.* above demanded, to wit, at, &c. Yet the ſaid *W. Davis* (although often requeſted) hath not yet paid the ſaid ſum of 20*l.* above demanded, or any part thereof, to the ſaid maſter and wardens, for the uſe of the ſaid ſociety, or to the ſaid maſter, wardens, and commonalty, or to any or either of them; but to pay the ſame or any part thereof to the ſaid maſter and wardens, for the uſe of the ſaid ſociety, or to the ſaid maſter, wardens, and commonalty, or to any or either of them, he the ſaid *W. Davis* hath hitherto wholly refuſed and ſtill doth refuſe to the ſaid maſter, wardens, and commonalty, their damage of 10*l.*" To the 1ſt count the defendant pleaded *nil debet*, and to the 2d demurred ſpecially. In ſupport of the demurrer, four objections were taken; and the firſt objection was, That this count did not ſet out the by-law, which is the ground of the forfeiture. The words here are, "by virtue of a certain by-law;" and *non conſtat* that the by-law alluded to is a good one. The ſecond objection was, That it did not appear that the feltmakers' company had any authority to make the by-law in queſtion. The third objection was, That the liability of the defendant is not ſtated. It is only averred that he was a member of the company, but in order to incur this penalty he muſt not only be a member of the company, but one of the aſſiſtants. *Per Curiam*, As to the ſecond objection, the power of making by-laws is incident to every corporation (1), either by the body at large or by a ſelect part; and it is in the latter caſe only that the power need be ſhewn. The court of lord mayor and aldermen, which made the by-law, relied on in the plea in 1 *Burr.* 235, was collateral to the company

(1) 10 *Co.* 31. a. *Norris* v. *Staps. Hob.* 211. *City of London* v. *Vanacre.* 5 *Mod.* 439. 12 *Mod.* 270. S. C. 1 *Salk.* 142. S. C. *Carth* 482. S. C. *Lord Raym.* 495. S. C. *Holt*, 431. S. C.

of

of vintners; it was a different body, having no such neceſſary relation to the vintners' company as the Court could take notice of judicially. As to the third objection, the preſent defendant is ſtated to be "ſuch member," *i. e.* that member which is before deſcribed in the firſt count. EYRE, Ch. J. The forfeiture in queſtion is to be paid to the maſter and wardens, to the uſe of the maſter, wardens, and company. If the by-law is badly framed, it is the fault of thoſe who framed it. If they have choſen to empower their maſter and wardens to ſue, the Court cannot look any further: no regulation with reſpect to the payment of the money by them to any other perſons will vary the right of action. As to the caſe put at the bar, of a promiſe to *A.* for the benefit of *B.* and an action brought by *B.* there the promiſe muſt be laid as being made to *B.* and the promiſe actually made to *A.* may be given in evidence to ſupport the declaration. The maſter and wardens may bring the action, and apply the money to the uſe of the company. They may ſue in the ſame manner as the chamberlain of London (1) does for the corporation of London; and they would probably declare both in their natural and official capacities. But, in truth, this is but one of many objections. I think this count is perfectly new, and cannot be ſupported. I would go as far as poſſible to prevent loading the record with unneceſſary matter; but if I find myſelf obliged to pronounce that the matter omitted is neceſſary (and as at preſent adviſed it does appear ſo to me), and that no reference is made to the by-law on which the forfeiture accrues, I muſt hold the count bad, unleſs a ſeries of authorities could be ſhewn to prove the contrary. It is not ſtated in this ſecond count, that the by-law under which the forfeiture accrued, which is the ground of that count, is the ſame by-law as that mentioned in the firſt count: it only ſays, "by a certain by-law." Now if we cannot refer to the firſt count in order to get at the conſtitution of the corporation, which is to determine where the power of making by-laws reſides, and that the by-law in queſtion was actually made according to that conſtitution, this demurrer muſt prevail. I never yet ſaw a count on a forfeiture of this kind which did not ſtate all theſe circumſtances. It may not have been amiſs to try if one of theſe general counts could be ſlipped into practice, but here unfortunately the blot has been hit. In the caſe of tolls, I ſuppoſe the Court proceeded on the idea that they were known to conſtitute a right of action, and calling them tolls generally was held ſufficient. *But in debt on bond, if the plaintiff were to ſtate generally in*

(1) *Vid.* The Chamberlain of London's caſe, 5 *Co.* 62. and *Hethingt* v. *Tungerend*, cited 1 *Wilſ.* 235. which was debt on a by-law by the Chamberlain of Briſtol.

his declaration, that the defendant "was indebted to him on a certain bond," *it would not be good.* This claim for a penalty under a by-law ariſes on ſomething in the nature of a ſpecialty. It is true that in *aſſumpſit* greater latitude is allowed; becauſe after all it comes to a queſtion upon evidence what legal conſideration there is either to ſupport or to raiſe the *aſſumpſit.* I muſt confeſs I think that it was an extraordinary propoſition to admit, that theſe general counts were good in caſes of tolls and fines, and I wonder that the courts ever went that length.—Judgment for the defendant.

The Mayor of Lynn. *v.* Denton, Ea. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 689.

The corporation of Lynn brought an action of *aſſumpſit* againſt the defendant for tolls upon coming into their port. The defendant claimed an exemption as a freeman of London, and moved the Court on a preceding day in this term for leave to inſpect the corporation books of Lynn. And *The Court* ſaid, That it had been the general practice for many years paſt to grant applications of this nature, notwithſtanding a contrary practice might formerly have prevailed (1). They ſaid that it had been decided in a great many caſes (2); and the foundation of the rule was, that as the court of Chancery would order inſpection merely for aſking, this Court had alſo adopted the like regulation, in order to ſave expence to the parties. And it having been purſued ſo long, they would not now enter into a diſcuſſion of it (3). *The Court* at the ſame time gave the plaintiff leave to inſpect the corporation books of London.

Election of corporate Officers.

The King *v.* Miller, Ea. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 268.

The conſtitution of a corporation as ſettled by act of parliament, cannot be varied by the acceptance of any charter inconſiſtent with it.

And where an integral part of a corporation compoſed of a definite number is required to vote at an election of a corporate officer, a majority of ſuch integral definite part muſt attend, otherwiſe there can be no elective aſſembly, although other parts of the corporation alſo join in ſuch election, and a majority of the whole exiſting body actually attend: but a majority of thoſe preſent, when legally aſſembled, will bind the reſt.

An information in nature of a *quo warranto*, was filed againſt the defendant for exerciſing the office of mayor of the town of Northampton; in which information it was alleged, that there exiſted in that town a corporation by the

(1) *Vide* 3 *Wilſ.* 398. and 5 *Mod.* 395. (2) *Vide* 2 *Stra.* 1223.

(3) In caſes of *criminal proſecutions*, ſuch as the *King* and *Parnel*, 1 *Wilſ.* 259. 2 *Blac. R.* 37. S. C. *The King* v. *Heydon*, 1 *Blac.* 351. and in an action for a penalty againſt a poſt-maſter, on 9 *Anne* c. 10. leave to inſpect books has been denied, 2 *Stra.* 1005.

name

name of the mayor, bailiffs, and burgeſſes of Northampton, which conſiſted of "a mayor, two bailiffs, and alſo forty-eight burgeſſes, who have been and are called the company of eight-and-forty of the ſaid town, and an indefinite number of freemen." To this the defendant pleaded, firſt, That the mayor, bailiffs, and burgeſſes of Northampton before and at the time of making the act of parliament of the 4 *H.* 7. were a body corporate; and by that act it was (amongſt other things) enacted, that the election of the mayors, bailiffs, and other officers, and alſo the aſſeſſing of all lawful charges and impoſitions in that borough ſhould be had and made in form following, *viz.* "the mayor and his brethren for the time being that then of times paſt had been mayors, or the more part of them, upon their oaths, ſhould chooſe forty-eight perſons of the moſt wiſe, diſcreet, and beſt diſpoſed perſons of the inhabitants of the town, other than had been mayors and bailiffs thereof, and the ſame perſons, or part of them, from time to time thereafter ſhould change as often as ſhould ſeem moſt neceſſary; which ſaid perſons ſo by them choſen, and the mayor and his brethren, and ſuch perſons as then ſhould have been mayors and bailiffs of the ſaid town for the time being, or the more part of them, ſhould make yearly election of all the future mayors and bailiffs, &c." The plea then ſtated a charter in the 15th of *Car.* 2. to the corporation; wherein it was ordained and granted, that from thenceforth there ſhould be one mayor, two bailiffs, to be choſen in the manner therein mentioned, and forty eight of the inhabitants, not having been mayors or bailiffs, who ſhould be the company of eight-and-forty; and that the mayor, bailiffs, and burgeſſes having been mayors or bailiffs, together with the ſaid company of eight-and-forty, ſhould be the common-council of the ſaid town. Certain perſons were therein nominated to be the firſt mayor, the new aldermen, and new bailiffs of the ſaid town; and it was ordained that the mayor, bailiffs, and burgeſſes, having been mayors, ſhould nominate ſo many and ſuch burgeſſes as to them ſhould ſeem neceſſary and convenient to be the forty-eight burgeſſes of the ſaid town, who ſhould be the company of eight-and-forty; and *Car.* 2. further granted, that the mayor and bailiffs for the time being, and the burgeſſes thereof having been mayors or bailiffs, or the major part of the ſame, from time to time ſhould have power yearly, within ten days next after the firſt of Auguſt in every year, to aſſemble themſelves, or the major part of them, in the Guildhall or other convenient place, then and there to continue till they or the major part of them, then and there aſſembled according to the form of the ſtatute aforeſaid, ſhould have elected and nominated one of the burgeſſes of the ſaid town to be mayor for the year enſuing.

That

That that charter was duly accepted by the ſaid mayor, bailiffs, and burgeſſes. It then ſtated, that on the 10th of Auguſt, 1791, the number of burgeſſes of the ſaid town having been mayors or bailiffs, beſides the then mayor and two bailiffs, was thirty-nine, and the number of burgeſſes of the company of eight-and-forty was nineteen, and no more. That on the ſaid 10th of Auguſt, 1791, the then mayor and two bailiffs, and twenty-eight of the ſaid burgeſſes having been mayors or bailiffs, and three of the ſaid burgeſſes of the company of eight-and-forty, making together a majority of the then mayor and bailiffs, the then burgeſſes having been mayors and bailiffs, and the then burgeſſes of the company of eight-and-forty, did meet, &c. and elect the defendant to be mayor, &c. The ſecond (1) plea ſtated, that the ſaid act of *H.* 7. and charter of *Car.* 2. were made and granted, and the ſaid regulations, matters, and things concerning the ſaid mayor, bailiffs, and burgeſſes, and the election of mayors were enacted, done, and ordained by the ſaid act and charter as are ſet forth in the firſt plea; that the ſaid charter was duly accepted, &c. That from the making of the ſaid act of parliament hitherto the mayor has been elected in manner following, *viz.* "the mayor and two bailiffs together with ſo many of the burgeſſes, as well of thoſe who before the time of every ſuch election had been mayors or bailiffs, as of thoſe who at the time of every ſuch election were of the company of eight-and-forty, as made together with the mayor and two bailiffs a major part of the then mayor and bailiffs, the then burgeſſes who before that time had been mayors or bailiffs, and the then burgeſſes of the ſaid company of eight-and-forty, have aſſembled and met together at every ſuch election, and every ſuch election has been had and made by the mayor and two bailiffs, together with ſo many of the burgeſſes, as well of thoſe who before the time of every ſuch election had been mayors or bailiffs, as of thoſe who at the time of every election were of the company of eight-and-forty, as made together with the mayor and bailiffs, a major part of the then mayor and bailiffs, the then burgeſſes who before that time had been mayors or bailiffs, and the then burgeſſes of the ſaid company of eight-and-forty, whether the major part of the burgeſſes of the ſaid town being of the company of eight-and-forty for the time being were or were not preſent at every ſuch election." It then ſtated the ſituation of the corporation at the time of the election of the defendant, and the fact of his election in manner as before mentioned in the firſt plea. There were three other pleas on which iſſues were taken, and to the two

(1) *Vid.* 32 *Geo.* 3. c. 58. ſ. 1.

firſt

firſt above ſtated the relator demurred. On the arguments in ſupport of the demurrers, the objections to the defendant's election were two: 1ſt, The improper interference of perſons who had no right to vote in the election, whether under the ſtatute, or under the charter; for if the ſtatute election be relied on, then the bailiffs having joined in it will avoid it; or if the charter election be contended for, then the interference of ſome of the forty-eight was equally illegal: 2dly, If the only legal mode of election muſt be according to the directions of the ſtatute, then the election of the defendant was void for want of the concurrence of a major part of the forty-eight. Lord KENYON, Ch. J. When it is ſtated that the uſage in this corporation for the laſt three centuries has been conformable to the mode of election on which the defendant's title is founded, it is deſirable that the election ſhould be ſupported; but we muſt take care, in indulging our wiſhes, not to trangreſs the limits of the law. If we were inclined to ſpeculate upon the views and objects of the legiſlature, when they paſſed this act of parliament, we could not do better than adopt what has been ſuggeſted by the counſel for the crown; having contemplated the form of the government of the country, and (though it was not then ſo completely modelled as it is at preſent), having obſerved that it went a great way to attain the ends of a juſt government, the legiſlature wiſhed to imitate that form in the conſtitution of this corporation; that there ſhould be a kind of ſupreme magiſtrate, to be aſſiſted in the exerciſe of his functions by thoſe of the ſuperior orders in the town, and by a certain number of other perſons choſen from the inferior claſſes of the inhabitants at large, who could beſt know and take care of the wants and rights of the whole, in order that after diſcuſſing and deliberating upon the rights of all the reſult of this meeting, thus compoſed, might be favourable to the rights of the town. And, therefore, this act of parliament directed, that the mayor and his brethren, thoſe who had been in a ſuperior ſtation in the corporation, and a definite number of perſons, forty-eight, who were not of the ſuperior claſſes of the town, ſhould conſtitute a legal aſſembly for the election of the future mayors. If it were neceſſary for us to decide on the meaning of the word "brethren" in this part of the ſtatute, I ſhould feel inclined to ſubſcribe to the conſtruction put upon it by the defendant's counſel, and ſay, that it meant "bailiffs;" it is not neceſſary, however, to decide that point. In the determination of this caſe, we muſt not forget, that this corporation differs from many of thoſe that have given riſe to queſtions of this kind: *the conſtitution of the aſſembly for the election of a mayor was created by an act of parliament, and it could not afterwards be altered by the king's charter.*

Where

Where a corporation takes its riſe from the king's charter, the king by granting, and the corporation by accepting another charter, may alter it, becauſe it is done with the conſent of all the parties who are competent to conſent to the alteration. But no ſuch alterations could be made in this caſe by the king's charter alone, becauſe the mode of election was introduced by act of parliament. Then let us conſider what the act of parliament requires to be done; it directs, that "the mayor and his brethren for the time being, that then of times paſt had been mayors, or the more part of them, ſhould name and chooſe forty-eight perſons of the moſt wiſe, diſcreet, and beſt-diſpoſed perſons of the inhabitants, other than before that time had been mayors and bailiffs, which ſaid perſons ſo by them choſen and named, and the ſaid mayor and his brethren, and ſuch perſons as then ſhould have been mayors and bailiffs, or the more part of them, ſhould have and make yearly election of mayors and bailiffs, &c." Then as the election is to be made by the aſſembly thus conſtituted, it is neceſſary that a major part of that aſſembly ſhould concur in the election. The diſtinction between thoſe caſes where a corporate act is to be done by a definite number, and thoſe where by an indefinite body, has been eſtabliſhed in a variety of caſes. Without going through them all I refer generally to that of *R.* v. *Bellringer* (1); not becauſe I pay a greater deference to the judgments given in this court ſince I have been here, but becauſe it is the lateſt deciſion, and was founded on principles eſtabliſhed in the time of our predeceſſors. That caſe does not introduce any new law upon the ſubject, but is a deduction from all former authorities and ſettled principles. And this propoſition ſeems to be now clearly eſtabliſhed, that where there is a definite body in a corporation, a majority of that definite body muſt not only exiſt at the time when any act is to be done by them, but a majority of that body muſt attend the aſſembly where ſuch act is done. Now in this caſe the definite body of forty-eight did not exiſt in its majority when the defendant's election took place, it having been then reduced to the number of nineteen. I am therefore bound to ſay (unleſs we abandon the caſe of *R.* v. *Bellringer*, and the caſes on which it was determined), that the defendant's election cannot be ſupported, and that there is an end of this corporation. One of the integral parts of the corporation failing, the whole failed. The framers of this corporation could never have intended that it ſhould be in the power of the corporation to reduce one of its integral members, becauſe that would be altering the governing power meant to be conſtituted. As well, therefore, on the words of this act of parliament as on the reaſon of the thing, and conformably with all the authorities referred to,

(1) See this caſe in following page.

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I am of opinion that this corporation had received its death wound before the defendant's election took place, and consequently that this election cannot be supported. The judges ASHHURST, GROSE, and LAWRENCE concurred. —Judgment for the crown.

The King v. Bellringer, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 810.

So in this case, where a charter required that the mayor and common clerk for the time being, and the common-council for the time being, or the major part of them, should elect; and the common-council was a definite body consisting of thirty-six; it was held that a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election can be had at all.—In this case, an information in nature of a *quo warranto* was filed against the defendant, calling upon him to shew by what authority he claimed to be a capital burgess of the number of twenty-four, in the borough of Bodmin. The plea set forth that Bomin was an ancient borough, and was incorporated by the name of the mayor and burgesses of the borough of Bodmin. That there ought to be twenty-four capital burgesses of the number of twenty-four, and that the office was an office of trust, touching the government of the borough, and the administration of public justice. It also set forth a charter of the 5th of *Elizabeth*, incorporating the borough by its ancient name, and ordaining that there should be twelve capital burgesses and counsellors of the borough, and twenty-four other capital burgesses of the number of twenty-four, which twenty-four together with the twelve should be the common-council for the government of the borough, and for assisting the mayor for the time being. And another charter of the 36th of *Elizabeth*, whereby she granted that the mayor and thirty-six capital burgesses being the common council of the borough, together with the common clerk for the time being (1), or the major part of them, from time to time, and in all times to come, should yearly, *viz.* on the 24th of September, choose one honest man of the number of the twelve capital burgesses at that time in the borough inhabitant, who should be mayor for a year following, and that he after his election and before his admission, should take his oath of office before the last mayor, in the presence of the aforesaid thirty-six capital burgesses for the time being, or the major part of them. And that the mayor and common clerk for the time being, and the common-council for the time being, or the major part of them, should elect all the officers and ministers of the borough; and that such officers and ministers should be sworn in before the mayor and com-

(1) In this, and all other parts of the charters where these words occur, the original is abbreviated *pro tempore existent.*

mon

mon clerk, and the common-council for the time being, or the major part of them. And in case of the death or amotion of the mayor for the time being within the year, that it might be lawful for the said common clerk and thirty-six capital burgesses, being the common-council of the said borough, or the major part of them for the time being, to elect one of the aforesaid twelve capital burgesses to be mayor, and that he should take his oath before the common clerk and capital burgesses, or the major part of them. It then gave power to the mayor and common-council for the time being, or the major part of them, to commit or fine such as refuse to serve the offices. And if it should happen that any of the aforesaid capital burgesses for the time being, or any other officer, &c. for the time being, or any burgess of that borough, in their functions should misbehave or commit any crime for which he should be thought worthy by the sentence of the mayor and thirty-six capital burgesses, or the major part of them for the time being, from his office to be removed, then and so often it should be lawful for the aforesaid mayor and thirty-six capital burgesses, or the major part of them, such person, &c. to amove. The plea stated the acceptance of these charters; and that on the 25th of June, 1790, there were only six capital burgesses and counsellors, and only twelve capital burgesses of the number of twenty-four, then living and surviving: and that on the same day the defendant was elected one of the twenty-four by a majority of the then capital burgesses and counsellors, and of the then capital burgesses of the number of twenty-four, &c. by reason of which, &c. and so claimed title. To this it was replied, 1st, That from the granting of the letters patent in the 39th *Elizabeth*, hitherto a certain usage and custom touching and concerning the election of the said officers and ministers in those letters patent mentioned hath prevailed within the said borough, *viz.* that during all the time aforesaid, nineteen at least of the said mayor, common clerk, and common-council, in those letters patent mentioned, have been used and accustomed, and ought to assemble themselves and meet together, and have during all the time aforesaid assembled themselves and met together, at every election of the said officers and ministers or any of them in those letters patent mentioned, except at the said supposed election of the said defendant, in the said plea mentioned, *viz.* at, &c. concluding with a verification (1). 2d Replication, That from the

(1) On the first argument the Court being of opinion, that at any rate this usage was not well pleaded in the replication, because, for aught that appeared to the contrary, the fact of a smaller number than nineteen having met for the purpose of election, and attempted in vain to make an election, had never occurred, leave was given to amend the pleadings, and the two other replications were added before the second argument.

granting

granting of the ſaid letters patent of 36th of *Elizabeth*, hitherto a certain uſage and cuſtom, touching and concerning the election of the ſaid officers and miniſters, in thoſe letters patent mentioned, hath prevailed within the ſaid borough, *viz.* that during all the time aforeſaid, no election of any of the ſaid officers or miniſters hath been, nor ought to have been had or made by a leſs number than nineteen of the ſaid mayor, common clerk, and common-council in thoſe letters patent mentioned; and that during all that time, whenever a leſs number than nineteen of the ſaid mayor, common clerk, and common-council, have aſſembled and met together for the purpoſe of electing any of the ſaid officers or miniſters, ſuch aſſembly and meeting hath during all the time aforeſaid been uſed and accuſtomed to be, and ought to have been broken up and diſſolved, and ſuch intended election omitted and poſtponed for want of a ſufficient number of the ſaid mayor, common clerk, and common-council, to proceed to ſuch election, to wit, at, &c. The 3d replication ſtated the cuſtom to be, That every election of any of the ſaid officers or miniſters, in thoſe letters patent mentioned, ſhould be had or made by nineteen at the leaſt of the ſaid mayor, common clerk, and common-council, &c. To each of theſe there was a general demurrer and joinder. After this caſe had been twice argued, THE COURT took time to conſider, and afterwards Lord KENYON, Ch. J. delivered their unanimous opinion, as follows: Two great queſtions were made in the argument of this caſe: (1ſt, As to the uſage which was pleaded to controul the conſtruction of the charter; 2dly, As to the true conſtruction of the charter independently of the uſage). The firſt on the validity of the replications, which ſtate a cuſtom that has prevailed in this borough ſince the granting of the charter, in the 36th year of the reign of Queen *Elizabeth*. I ſhall diſpoſe of this queſtion by laying it out of the caſe, becauſe our judgment is given upon the other point. That contemporaneous uſage has always been conſidered as of great importance in the conſtruction of charters, a variety of caſes at all times abundantly evince. But the manner of putting this on the record is perfectly novel. It has been argued very much at length; but as there may be conſiderable doubts about it, and as we are not called upon to decide whether or not the uſage be well pleaded in this caſe, we wiſh to avoid giving any opinion upon the ſubject. On the ſecond queſtion, on the fair conſtruction of the charter, we have no doubt. The queen, when ſhe thought fit to grant this charter, granted it to a body, conſiſting in the whole of thirty-ſeven, a mayor, twelve capital burgeſſes and counſellors of the borough, and twenty-four other capital burgeſſes, ſomewhat ſubordinate, for the government of the borough. The defendant's argu-

ment

ment ſuppoſes that any number of the corporators (however reduced that number may be) are competent to do the ſeveral acts for which the corporation was created; and that all acts done by a majority of the corporators, though reduced, are valid. Without viewing this charter with the eye of a lawyer, it cannot be ſuppoſed that the queen ever intended that any ſmall number of the corporation, however minute, would be ſufficient for the purpoſes for which the charter was granted; and that the ſurvivors, by refuſing to fill up the vacancies as they happened, might monopolize the whole government of the borough to themſelves. A queſtion lately aroſe in another corporation in this very county, where the number of corporators was reduced to two or three, who claimed the excluſive privilege of electing members of parliament for the borough. When the caſe came before us, we were ſtaggered with the propoſition that thoſe were ſtill legal corporators; and after argument we decided that they had no title, and gave judgment of ouſter againſt one of them (1). Even without the aſſiſtance of any authority upon this point, I could never have thought that the whole government of the borough could devolve on ſo minute a number as two or three; and yet, if the defendant's argument were to prevail in this caſe, the conſequence that it might ſo devolve would neceſſarily follow. But the caſes which were cited in the argument of this caſe are all one way, that there muſt be a major part of the whole number, conſtituted by the charter, in order to make the elections, and to do the ſeveral other acts under it. In *R.* v. *Varlo* (2), Lord *Mansfield obſerved upon the diſtinction, which is extremely well founded, between corporations conſiſting of a definite and an indefinite number; that in the latter a major part of thoſe who are exiſting at the time is competent to do the act, but that where the body is definite (as it is in this caſe) there muſt be a major part of the whole number.* His Lordſhip's words are, "Upon the words of the charter alone, I myſelf have no doubt about the conſtruction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made. It is in the nature of all corporations to do corporate acts, and where the power of doing them is not ſpecially delegated to a particular number, the general mode is for the members to meet on the charter-days, and the major part who are preſent do the act. But where there is a ſelect body, it is a different thing, for there it is a ſpecial appointment. All the reaſoning therefore is different." It appears to me, therefore, that it was his opinion, and that of the Court, that

(1) *Rex* v. *Paſmore*, *ante* 667. (2) *Comb.* 250 and p. 726 where

where there is a definite body, there muſt exiſt at the time when the act is done a major part of that definite body: it is not neceſſary indeed that they ſhould all concur in the election, or other act done, but they muſt be preſent; and the election at ſuch meeting is in point of law an election by the whole. In the caſe of *R.* v. *Monday* (1), Lord *Mansfield* aſked this queſtion, "Is there any caſe where the charter has directed the election to be by the majority of the body, in which it has been held that a leſs number than a majority of the whole corporate body can elect? For inſtance, ſuppoſe the corporate body conſiſted of twelve, and two were dead; is there any inſtance where the charter has ſaid that the election ſhall be by a majority of the body, in which it has been held that ſix, which are a majority of the remaining ten, were ſufficient to elect?" This queſtion was immediately anſwered by *Aſton*, J. who ſaid, that "in *R.* v. *Reeſe*, and *R.* v. *Newſham*, it was clearly underſtood, that if the major part of the corporation had been dead, it would have been in fact diſſolved, or at leaſt thoſe who ſurvived could not have aſſembled for the purpoſe of an election." Now thoſe caſes referred to, underwent, perhaps, more diſcuſſion than any caſe agitated at that time; and Mr. J. *Aſton*, who cited them, had the conduct of thoſe cauſes, and therefore intimately well knew what points had been made in the argument, and the grounds on which the Court proceeded in giving judgment, as well as the opinion of the Court upon every point canvaſſed in the cauſes, though not expreſsly decided. The ſame doctrine was again entertained by this Court in *R.* v. *Grimes* (2). And we do not find a ſingle deciſion in oppoſition to all the caſes, conſidering that this election ſhould have been made by a ſelect definite body. Therefore on the words of the charter of *Elizabeth*, on the intention of the queen in granting it, as it is to be collected from thence, and on theſe authorities, we are all of opinion, that the defendant's was not a legal election, becauſe at the time when it took place there was not a major part of the ſelect body then in exiſtence.—Judgment for the king.

A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. The King *v.* Hoyte, Mic. Ter. 33 Geo. 3. B. R. 6 *Ter. Rep.* 430.

And in a preſcriptive corporation, an uſage to this effect is evidence of ſuch a charter.

Conſequently, in either caſe, a perſon is well elected by a majority of the ſubſiſting members, as diſtinguiſhed from a majority of the full body.

A rule was obtained, calling on the defendant to ſhew cauſe why an information in the nature of a *quo warranto*

(1) *Comp.* 537. *vide* p. 727, *infra*. (2) 5 *Burr.* 2598. *vide* p. 723, *infra*.

ſhould not be filed againſt him, as a capital burgeſs of Grampond, on affidavits which ſtated, that *the borough was a borough by preſcription*, conſiſting of a recorder, nine capital burgeſſes; one of whom hath always been the mayor; a town clerk, and an indefinite number of freemen; that the capital burgeſſes have been elected by the mayor and the capital burgeſſes for the time being, out of the freemen of the borough; and that only the mayor and three other capital burgeſſes met at the election of the defendant. The affidavits againſt the rule ſtated ſix inſtances, beginning in 1751, and ending in 1782, in which a leſs number than five had met and elected, and that ſuch elections had been acquieſced in, and the perſons elected exerciſed their offices; and ſtated the reputation and preſcriptive uſage of the borough to be, that the mayor and a majority of the exiſting capital burgeſſes aſſembled, in purſuance of notice by the mayor, have always exerciſed the right of electing capital burgeſſes; and that the defendant had been elected by the mayor and three capital burgeſſes, there being only one other capital burgeſs living at that time. On ſhewing cauſe, it was inſiſted, that though in the caſe of a corporation by charter, requiring the elections of officers to be made by a majority of a definite body, this might be an objection, there was a great difference between ſuch a caſe, and that of a borough by preſcription, where the uſage is evidence of the charter of the borough. That in the caſe before the Court, the uſage was all one way; and not one ſingle inſtance was produced of a meeting breaking up, becauſe five members were not preſent. Lord KENYON, Ch. J. In theſe caſes, if any reaſonable doubt can be raiſed, the rule ſhould be made abſolute for ſending the matter to trial, becauſe the parties have no other method of conteſting their rights; but if the queſtion be perfectly clear, they ought not be put to farther expence. The caſes which have been referred to in ſupport of the rule, are caſes of conſtruction upon the words of charters, and may therefore be laid out of our conſideration; where the words are plain, they muſt be conformed to; where, indeed, they have been doubtful, we have had recourſe to the reaſon of the thing to turn the balance in the conſtruction of them. But that is not to be carried any further than where ſome doubt may fairly be raiſed on the meaning of words uſed in a charter. Now here it was properly admitted, that the king might grant a charter, giving power to a leſs number than the majority of a definite body to elect; that, therefore, puts an end to the queſtion; for this being a borough by preſcription, without any charter, we are to tranſcribe the law and conſtitution of the corporation from the uſage only. It is ſaid, that the uſage does not go far back. I know not how far that argument was intended to be purſued. The inſtances brought forward, are not indeed very ancient,

but

but ſtanding unoppoſed by any other evidence, they are concluſive. We can preſcribe no other conſtitution for the borough, than that which the uſage points out, which is evidence that the original charter of incorporation warranted this mode of election. The rule, therefore, muſt be diſcharged; and as the party who applied for it kept back the evidence of the uſage with which he might have been furniſhed from the books of the corporation, the rule ought to be diſcharged with coſts. GROSE, J. In the caſe of the *King* v. *Bellringer*, we determined againſt the uſage, becauſe the words of the charter were clear; and for the ſame reaſon we muſt determine with the uſage here, becauſe that being the only evidence before us of what the charter was, and it being all one way, we muſt conclude, that the words of the charter were ſuch as the uſage points to. LAWRENCE, J. If this information were to be granted, it would anſwer no other purpoſe than that of putting the parties to great additional expence; for all the evidence being one way, the jury could not do otherwiſe than find a verdict for the defendant; or if a ſpecial verdict were found, the Court muſt give the ſame judgment. And as to the ſuppoſed miſchief likely to enſue from leſſening the number of the corporation, it may eaſily be remedied by applying to this Court for a *mandamus* to compel the corporation to elect the proper number of their body. —Rule diſcharged with coſts.

Where a charter directs an election to be by the majority of the whole number of ſubſiſting burgeſſes, an election by the minor part of them is void.—This caſe came before the Court upon a very long ſpecial verdict upon an information, and the argument turned upon theſe two iſſues, viz. 1ſt, "*Whether the defendant was duly elected?*" and 2dly, "*Whether* John Leigh *was mayor, at the time when the defendant was elected?*" The clauſe in the charter which directs the mode of electing a mayor, is expreſſed in the following words:—"*Quod major et* undecim *capitalium burgenſium burgi prædicti pro tempore exiſten'* vel major pars EORUM (*quorum majorem burgi prædicti pro tempore exiſten' unum eſſe volumus*) *de tempore in tempus perpetuis futuris temporibus imperpetuum, poteſtatem et auctoritatem habeant et habebunt, annuatim et quolibet anno, in feſto* Sancti Mathæi Apoſtoli, *in le Guildhall burgi prædicti* ſeſe aſſemblandi et congregandi *et ibidem* continuandi *quouſque ipſi* vel EORUM major pars IBIDEM ADTUNC aſſemblat' *eligerent, & nominaverint unum majorem*, de ſemetipſis, *pro anno ſequen'*; *et quod eligere et nominare ibidem poſſint et valeant unum* de ſeipſis *qui erit major burgi præd' pro uno anno integro ex tunc prox' ſequen' et deinde quouſque ipſe vel aliquis alius burgens' de burgo prædicto ad officium illud debito modo elect' præfect' et jurat' fuerit*; *quodque ille, poſtquam ſic ut præfertur elect' et nominat' fuerit in majorem burgi prædicti, antequam ad officium*

Rex v. Grimes, capital Burgeſs of Yarmouth, in the Iſle of Wight, Ea. Ter. 10 Geo. 3. B.R. 5 *Burr.* 2598.

" *illud exequend' admittatur, ſacrūm corporal' ſuper ſanctum* " Dei Evangelium *annuatim in die lunæ prox' poſt præd'* " *feſtum ſcī* Mathæi Apoſtoli, *coram ultimo majore prædeceſſore* " *ſuo adhunc pro tempore exiſten', aut in abſencia ejuſdem ma-* " *joris, coram burgenſibus burgi prædicti qui tunc preſentes* " *fuerint vel majori parte eundem pro tempore exiſten', ad offi-* " *cium illud rectè benè et fideliter in omnibus officium illud tan-* " *gen' exequend' præſtabit; et poſt hujuſmodi ſacrūm ſicut pre-* " *fertur præſtit', officium majoris burgi prædicti pro uno anno* " *integro tunc prox' ſequen' ſuſcipiat et exequi valeat et poſſit.*" Then follows a clauſe, that upon the death or amotion of a mayor, the burgeſſes, for the " Time being, *or the major* " *part of them*, may elect *unum alium de ſeipſis, in tempore* " *convenien' poſtquam ipſe ſic obierit vel ab officio ſuo amot' fue-* " *rit*;" who is to hold during the reſidue of the year, and " to be ſworn in *forma prædictâ*." The ſpecial verdict finds the whole proceedings (at length) of an information in nature of *quo warranto* againſt *John Leigh*, who preſided as mayor at the election of the defendant into the office of capital burgeſs; and the judgment againſt the ſaid *John Leigh* thereupon. It alſo finds, that on the the 1ſt of September, 1759, and continually from thence until, and upon, the 7th of April, 1760, there were, and exiſted, eleven chief burgeſſes of the ſaid borough, namely, *Benjamin Leigh*, *Henry Holmes*, *Barnabas Eveleigh*, *John Leigh*, *Thomas* Lord *Holmes*, *Maurice Bockland*, *George Bockland*, *Robert Warner*, *Dennis Clarke*, *Charles Holmes*, and *Thomas Throughear*; and that upon the 21ſt day of September, 1759, the ſaid day being the feaſt of *St. Matthew*, the apoſtle, in that year, the ſaid *Benjamin Leigh*, the then mayor of the ſaid borough, and three of the ſaid chief burgeſſes of the ſaid borough, namely, *Henry Holmes*, *Barnabas Eveleigh*, and *John Leigh*, only, then being the minor part of the then chief burgeſſes of the ſaid borough, aſſembled themſelves together at the guildhall of the ſaid borough, in order to elect a mayor of the ſaid borough for the year then next enſuing; and being ſo aſſembled, did then and there, in the abſence of the other chief burgeſſes of the ſaid borough, being ſeven in number, namely, *Thomas* Lord *Holmes*, *Maurice Bockland*, *George Bockland*, *Robert Warner*, *Dennis Clarke*, *Charles Holmes*, and *Thomas Throughear*, chooſe and elect the ſaid *John Leigh*, then being a chief burgeſs of the ſaid borough, into the office of mayor of the ſaid borough for the year then next enſuing. The verdict finds, that the ſaid *John Leigh*, being ſo elected as aforeſaid, did afterwards take the oath of office; and took upon himſelf to execute the office of mayor of the ſaid borough. The jurors further find, that the ſaid *John Leigh*, being ſo choſen and ſworn into the office of mayor, and acting and attending as mayor, together with five other chief burgeſſes, namely, &c. &c. on the 7th of April, 1760, met and

and aſſembled together in the guildhall, in order to elect a chief burgeſs in the room of *James Blake*, then dead; there being then five other chief burgeſſes not preſent at the ſaid meeting. That at that time (of the ſaid laſt meeting) no one of the eleven chief burgeſſes then exiſting was an inhabitant of the borough; and that no one of the ſaid five chief burgeſſes not preſent at the ſaid meeting, was then within the ſaid borough. They find that notice in writing, "To meet "on the ſaid 7th of April, to elect a capital burgeſs in the "room of *James Blake*," was left at the dwelling-houſe of two who did reſide in the iſland, but not in the borough; and that two others dwelt within the iſland, but not within the borough; but no notice was left at their houſes, nor were they then in the iſland. That from the year 1743, to the time of finding the verdict, the method of giving notice "To "aſſemble" (except upon a charter or preſcriptive day), hath been and is, "To deliver or leave a notice in writing "for each reſpective chief burgeſs then living in the Iſle of "Wight, although not within the borough; except ſuch "chief burgeſſes as eſpouſed the intereſt of Mr. *Holmes* and "Mr. *Leigh*, being the major part of the chief burgeſſes." They find, that ſix chief burgeſſes, ſo aſſembled on the 7th of April, 1760, elected the defendant *Grimes* into the office of a free burgeſs in the room of *Blake*, and that *no other notice* was given, except as abovementioned.—The COURT, after hearing two arguments, unanimouſly gave judgment for the king againſt the defendant.—An objection having been made, by the proſecutor's counſel, to the election of the defendant *Grimes* into the office of a capital burgeſs in the room of *Blake*, "For want of due notice of "ſuch election being given to the electors;" THEY HELD the objection to be ſufficiently anſwered by its being found, "That no one of them was then reſident within the "borough." For, if they were not within ſummons, it was "not neceſſary to ſummon them."—Secondly, a queſtion having been made, "Whether the ſpecial verdict found "on the information againſt *John Leigh*, for uſurping the "office of mayor, and the judgment given thereupon againſt "him, were evidence in the preſent cauſe againſt *Grimes*, for "uſurping the office of capital burgeſs; and to what degree it "ought to be allowed?" THEY HELD it to be admiſſible, but not concluſive (1).—Thirdly, THEY HELD that *John Leigh*'s election to his mayoralty was not purſuant to the directions given by the charter, for the election of a mayor; it having been made by four only of the electors, when there were eleven exiſting. The reaſonable conſtruction of the charter they held to be, that the mayor, and the major part of the

(1) *Vide Rex* v. *Hebden*, 2 *Strange*, 1109.

ſubſiſting burgeſſes muſt meet; the directions of the charter are, "That the mayor and eleven burgeſſes, *vel major pars* "*eorum*, are to meet, in order to proceed to ſuch election." After the major part of the ſubſiſting number are ſo aſſembled together, then, indeed, the major part of thoſe who are ſo aſſembled, are to elect and nominate; and the majority amongſt thoſe ſo aſſembled, involves the whole number; who are all bound by the determination of the majority of ſuch a meeting. But here the mayor, and a major part of the ſubſiſting burgeſſes did not meet. For, at the time of *John Leigh*'s election to the office of mayor, there were eleven chief burgeſſes ſubſiſting; and the meeting at which he was elected, was compoſed of the minor part of them, namely, *Benjamin Leigh*, the then mayor, and three of the others; being only four in all; whereas, the whole number was eleven, of whom ſeven were abſent.—Judgment for the king.

Rex *v.* Varlo, Ea. Ter. 15 Geo. 3. B. R. *Cowp.* 248.

So in this caſe, upon ſhewing cauſe why an information in nature of a *quo warranto* ſhould not be granted againſt the defendant, to ſhew by what authority he claimed to exerciſe the office of mayor of the borough of Portſmouth, the conſtitution of the borough, as far as reſpected this queſtion, was admitted on both ſides to be as follows: that the corporation was a corporation by preſcription, and alſo by charter of *Car.* 1, and conſiſted of a mayor, twelve aldermen, and an indefinite number of burgeſſes, and the mode of electing the mayor, as preſcribed by the charter, was as follows: that the mayor, aldermen, and burgeſſes, *or the greater part of them*, ſhould from time to time have a power of aſſembling themſelves, *or the greater part of them*, at ——, and ſhould there continue till they *or the greater part of them*, then there aſſembled, ſhould chooſe one of the aldermen to be mayor.—The election of the defendant was by a majority of the mayor, aldermen, and burgeſſes aſſembled, but the the mayor, aldermen, and burgeſſes ſo aſſembled, did not conſtitute a majority of the whole corporation.—THE QUESTION was, Whether upon the true conſtruction of the words of the charter, a majority of the mayor, aldermen, and burgeſſes only, who were aſſembled, or whether a majority of the major part of the whole corporate body, ought to concur in the election?—Lord MANSFIELD, In this corporation there are an indefinite number of freemen, and it is a corporation in which honorary freemen may be made.—It is in the nature of all corporations to do corporate acts, and where the power of doing them is not ſpecially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part who are preſent do the act. But where there is a ſelect body it is a different thing, for there it is a ſpecial appointment.—Suppoſe the words of the charter are doubtful, the uſage in this caſe

caſe is of great force, not that uſage can overturn the clear words of a charter; but if they are doubtful, the uſage under the charter will tend to explain the meaning of them; eſpecially in a caſe like this, where, before the charter, the coporation conſiſted of an indefinite number of burgeſſes by preſcription, and where the charter itſelf added no new members, but only incorporated the old ones. ASTON, J. In the caſe of an indefinite number of burgeſſes as there are in this corporation, I cannot conceive that the charter meant a majority of that indefinite number ſhould be preſent; the uſage anterior to the charter of *Car.* 1. cannot alter the charter, but it will guide the conſtruction in a caſe where it does not plainly appear that the charter meant to vary ſuch former uſage. WILLES, J. and ASHHURST, J. concurred. —PER CURIAM, If the parties are deſirous to try the queſtion, it ought to be put upon the record, and on the trial the uſage will be found.—Rule abſolute.

On the trial of the above information, the jury found a ſpecial verdict, the material facts of which were as follows: "That by a charter made in the 13th year of *Charles* the Firſt, "the mayor, burgeſſes, and inhabitants of Portſmouth, were "declared to be incorporated by the name of the mayor, "aldermen, and burgeſſes of the ſaid borough, and were "to conſiſt of a mayor, twelve aldermen, &c.; that after "nominating the firſt mayor and twelve aldermen, the char- "ter provided for the future election of the mayor and "aldermen as follows: that the mayor, aldermen, and bur- "geſſes for the time being, *or the greater part of them*, from "time to time may, and ſhall, have power and authority "yearly, on every *Monday* ſeven'night, before the feaſt of "St. *Michael* the Archangel, to aſſemble themſelves together, "or the greater part of them, at the guildhall, &c. and to "continue there till *they*, *or the greater part* of them then "and there aſſembled, ſhall name and elect one of the alder- "men of the borough, &c. to be mayor of the ſaid bo- "rough. That if at any time it ſhould ſo happen that "any one or more of the aldermen of the ſaid borough for "the time being, ſhould die or be removed, that then and ſo "often it ſhould be lawful for the mayor, and *the reſt of the* "*aldermen for the time being*, *or the greater part of them*, to "elect or prefer one or more others of the burgeſſes of the "ſaid borough for the time being, to be an alderman or "aldermen of the ſaid borough, &c." The ſpecial verdict then ſtated, that from the time of the granting and acceptance of the ſaid charter, whenſoever it has happened that any alderman hath died or been removed, the mayor and all the other aldermen, *or the major part of them*, have aſſembled themſelves together, &c. and have *concurred*, and have uſed and been accuſtomed to concur in ſuch election.—That on the

Rex v. Monday, Hil. Ter. 17 Geo. 3 B R. Comp. 530.

the 3d of May, 1775, there was only a mayor, viz. *Philip Varlo*, and five aldermen, viz. Sir *Ed. Hawke*, *John Carter*, *Ed. Linzie*, *T. White*, and *W. White*, and no more, the ſeven remaining officers being vacant by death; that on the ſaid 3d day of May, 1775, *Philip Varlo*, *John Carter*, *Ed. Linzie*, *T. White*, and *W. White* (the ſaid Sir *Ed. Hawke* being abſent, and reſiding without the reach of ſuminons), aſſembled themſelves at the guildhall, for the purpoſe of electing ſeven burgeſſes to fill up the vacancies; that previous to any election being had, *J. Carter*, *T. White*, and *W. White*, proteſted againſt the meeting, that *Varlo* the mayor called on *Carter* and the two *Whites* to nominate proper perſons to fill up the vacancies, which they then omitted to do; that thereupon *Varlo* the mayor, and *E. Linzie* delivered in a liſt of ſeven perſons, of which the defendant, *Monday*, who was duly qualified, was one; that two, viz. *Varlo*, the mayor, and *Linzie*, one of the aldermen, ſo met, elected thoſe ſeven, but that the other three aldermen, viz. *Carter* and the two *Whites*, proteſted and voted againſt them, that *Monday* was placed firſt on the liſt, as being the propereſt perſon to be ſenior aldermen; that then *Carter* and the two *Whites*, delivered in a liſt of ſeven other burgeſſes, upon which *Varlo* and *Linzie* made an objection to *three* of them for not having taken the ſacrament, and to *three* others for non-reſidence, both which grounds of objection were known to *Carter* and the two *Whites* at the time of the election; that in other reſpects the above ſix perſons were all duly qualified, and that *Goodwin*, who was the ſeventh, was qualified in every reſpect whatſoever. Lord MANSFIELD, The general queſtion is, WHETHER the defendant *Monday*, was duly elected an alderman? which depends upon two particular queſtions: 1ſt, Whether the aſſembly was duly conſtituted according to the directions of the charter, for the purpoſe of an election? 2dly, If it were, whether the body ſo aſſembled have proceeded duly and regularly to the election of the defendant? As to the firſt it has been argued on both ſides, that a majority of the mayor and aldermen *for the time being*, are ſufficient to conſtitute the aſſembly, though they do not make a majority of the whole corporate body appointed by the charter. I will take it for granted, that a majority of the mayor and aldermen for the time being, were ſufficient to conſtitue the corporate aſſembly; and the fact found by the ſpecial verdict is, that the majority of thoſe in being did meet: when the aſſembly are duly met, I take it to be clear law, that the corporate act may be done by the majority of thoſe who have once regularly conſtituted the meeting. The remaining queſtion is, Whether the defendant was duly choſen by a majority of the perſons ſo aſſembled? —There are different kinds of elections; elections of members

members of parliament, verderors, corporators, &c. and different queſtions may ariſe out of each, therefore they muſt not be confounded together, and the preſent caſe muſt ſtand upon its own circumſtances: upon the election of a member of parliament, or a verderor, where the electors *muſt* proceed to an election, becauſe they cannot ſtop for that day, or defer it to another time, there muſt be a candidate or candidates; and in that caſe there is no way of defeating the election of one candidate propoſed but by voting for another: but in the buſineſs of corporations it is a different thing: this is a motion in the ſhape and under the nature of a propoſal, made to the body by the mayor, who is the preſiding officer, with the concurrence of one of the aldermen; but the eſſential part is, that it is made by the mayor, and he propoſes ſeven perſons together in one liſt, to fill up ſeven vacancies. The queſtion put upon theſe ſeven perſons ſo propoſed, is not, which of them ſhall be elected alderman, but whether the ſeven ſhall be aldermen? the only anſwer to be given to ſuch a queſtion is *yes* or *no*. Suppoſe he had put it upon one individual; "I propoſe *J. S.* is it your pleaſure that *J. S.* ſhall be choſen alderman?" the anſwer muſt have been *yes* or *no*. It is not a queſtion which of two candidates ſhall be propoſed; but whether theſe ſeven perſons ſo propoſed ſhould be choſen: upon that motion, there is a majority againſt them both in ſubſtance and form; which makes an end of the whole, and renders it unneceſſary to go into the reſt of the caſe: but I will juſt obſerve upon it. What ſort of an election is this, where the mayor propoſes ſeven perſons at once? The electors might be inclined to vote for one, two, or three of them, and againſt the others; therefore they ought to have been put up in a regular way, and polled for one by one, and *yes* or *no* ſaid to the propoſal of each reſpectively. —Now, in this caſe, what have the majority in fact done? they have voted for one, who is clearly well qualified and duly choſen: ſo, indeed, are three more, to whom, in fact, there was no ſolid objection; for non-reſidence is no objection under this charter: if the doctrine of non-reſidence were to obtain, it would be of very extenſive conſequence indeed, and, perhaps, ſhake the conſtitution of half the boroughs in the kingdom. It is true, *in ſome* boroughs reſidence is a *precedent* qualification; in *fifty* others it is not. Here it is not a precedent qualification for a burgeſs to be elected an alderman, all the charter requires is, that after he is elected he ſhall be reſident. As to the objection to the three others, becauſe they had not taken the ſacrament according to the rites of the church of England; I incline to think—that the ſtat. 5 *Geo.* 1. c. 6. operates rather as a protection to the poſſeſſion, and as a bar to the remedy. If a man under this diſability has been in poſſeſſion ſix months, there ſhall be no remedy

remedy to turn him out; this title ſhall not afterwards be queſtioned on that ground: it is ſimilar to the rule laid down by this Court in reſpect of informations, where the party has been in poſſeſſion twenty years. But if this objection is made recently before any poſſeſſion; as ſuppoſe the party upon being refuſed to be ſworn in, was to apply for a *mandamus*, and the anſwer on the application ſhould be, that the ground of refuſal was becauſe he had not taken the ſacrament, I ſhould think it a ſufficient objection; it is the poſſeſſion only that is protected, and that, not till after the expiration of ſix months: the object of the act was to leſſen the rigour of the ſtat. 13 *Car.* 2. made in warmer times, and that has gone a great way.—Upon the whole, the election of the defendant cannot be ſupported, for there are clearly four of the other liſt duly elected: his poſſeſſion, therefore, is both againſt their *right*, and againſt the opinion of the majority. PER CUR.—Judgment *pro rege.*

Harriſon v. Evans, *cited* Hil. Ter. 16 Geo. 3. B. R. and Hil. Ter. 17 Geo. 3. B.R. *Cowp.* 392, 535.

And a perſon who has not taken the ſacrament within a twelvemonth preceding the election, according to the ſtat. 13 *Car.* 2. ſ. 2. c. 1. (1), cannot be compelled to take upon himſelf any office or place, concerning the government of any corporation to which he may have been elected.—This was an action of debt for a penalty of 600*l.* on a by-law, brought by the chamberlain of London, in the ſheriff's court, againſt the defendant, for not accepting the office of ſheriff; the defendant by way of plea ſtated, that he was a diſſenter from the church of England, and had always attended the adminiſtration of the ſacrament according to the forms of his own religion, and that he could not, in conſcience, receive it according to the rites of the church of England: the plaintiff in his replication ſet forth the ſtat. 5 *Geo.* 1. c. 6. ſ. 1. for quieting and eſtabliſhing corporations (2): to this replication the defendant demurred, and the plaintiff joined in demurrer: on argument in the ſheriff's court, judgment was given on the demurrer for the plaintiff: the defendant then brought a writ of error returnable in the court of huſtings of Common Pleas, in the city of London, and the judgment was affirmed by that court. Afterwards the defendant obtained a ſpecial commiſſion of errors, directed to Sir *John Willes*, CH. J. C. B. Sir *Thomas Parker*, CH. BAR. *Foſter*, J. B. R. *Bathhurſt*, J. C. B. and *Wilmot*, J. B. R. who after three ſolemn arguments before them, unanimouſly reverſed

(1) By the ſtat. 13 *Car.* 2. ſ. 2. c. 1. ſ. 12. No perſon is to be elected into any office who ſhall not, within one year before his election, have received the ſacrament of the Lord's ſupper, and in default thereof the election is declared void.

(2) By this ſtat. of 5 *Geo.* 1. c. 6. Perſons who have not taken the ſacrament within a year, are confirmed in their offices if they be not removed or proſecuted within ſix months.

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the ſeveral judgments of the ſheriff's court and the court of huſtings.—The plaintiff afterwards brought a writ of error returnable in parliament, where the judgment given by the commiſſioners' delegates, reverſing the judgments given by the ſheriff's court and the court of huſtings, was affirmed.—The queſtion on all theſe proceedings was, Whether the defendant was liable to the penalty of the by-law, or could ſerve the office? And from the ultimate deciſion thereon it is now clearly ſettled, "that the ſtatute of 13 *Car.* 2. is not only "addreſſed to *the elected*, and a prohibition againſt them, but "a prohibition laid down to the electors if they have no-"tice—that the legiſlature has commanded them not to "chooſe a non-conformiſt, becauſe he ought not to be "truſted, and that a party elected by refuſing to take the "ſacrament, negatives the election."

No election in corporations made by ſurprize on a by-day, can be valid.—This was originally a borough by preſcription, and afterwards obtained a charter. The charter preſcribed no particular place of election, but the uſual place was the guildhall; and the uſual notice was by the ringing of a bell, which uſed to ring at eight o'clock, at nine o'clock, and then to toll from ten o'clock till the time of meeting. But the election now in queſtion was not made at the guildhall, but at an inn, within the town; and was upon a by-day, and without the uſual notice; for, no bell was ever rung at all, upon the occaſion. But all the electors who were entitled to notice, had perſonal notice of this meeting at the inn, and of the buſineſs to be tranſacted at it; and all the electors were preſent, except two, and were unanimous in the election. The two abſent electors did not live within reach of ſummons; and therefore, it was ſaid, they had no right to notice, nor had any thing to do in this matter. Lord MANSFIELD, Nothing is more certain, than that there can not exiſt a valid election upon a by-day, by ſurprize. Notice muſt be given to every member who is within the limits of ſummons. And perſonal ſummons muſt allow reaſonable time to the perſon ſummoned—But this is only where no other method of ſummons or notice is eſtabliſhed; as, for inſtance, by a bell, a horn, &c. Here, by the uſage, the notice muſt be given by perſonal ſummons to thoſe who are within the limits of the borough. But that is only part of the uſual notice; there muſt alſo be a bell rung at eight and nine, and then to toll from ten to the time of meeting. This cannot be diſpenſed with; it is neceſſary to be complied with, unleſs every ſingle member be preſent, and conſents to waive it. The want of it vacates the election. THEREFORE, *the rule adopted and agreed to by the Court* was, that where there is an uſual method of notice, that uſual method cannot be diſpenſed with, nor can the election be good without complying

Rex v. May *et al.* and Rex v. Little, freemen of Saltaſh, Mic. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2681.

complying with it, unleſs all the perſons who have a right to notice are actually ſummoned and agree.

Rex v. Charles Malden, Mic. Ter. 8 Geo. 3. B. R. 4 *Burr.* 2130.

A corporate officer, elected under a mandamus, muſt be ſworn in before the officer preſiding at ſuch election.—This was an information in the nature of *quo warranto*, to ſhew by what authority he exerciſed the office of bailiff of Malden. His plea ſet forth letters patent of incorporation 1 & 2 *Ph.* & *Mary*; which directs, that the two bailiffs ſhould be annually elected on the Friday next after the Epiphany: at which the bailiffs for the preceding year have preſided. That on Friday, 6 *G.* 2. no election was made of bailiffs; and that thereupon, on the day next after it, divers of the then aldermen and head-burgeſſes, in purſuance of the ſtatute in ſuch caſe provided, did aſſemble together for the election of two bailiffs: at which meeting he, the ſaid *Charles Malden (the defendant himſelf)*, did preſide; having a right to vote, and being then the neareſt then preſent in place and office to the bailiffs of the ſaid borough, and no bailiffs of the ſaid borough for the preceding year being then preſent. Then he ſhews his election at this meeting. And that after his ſaid election, and before admiſſion, he did, at the ſame meeting take his oath before *Jonas Malden*, *William Smart*, and *John Edwick*, then and there being three other ſenior aldermen, and the only aldermen who were preſent at that meeting. The king's coroner and attorney replied ſix ſeveral matters: and, in his reply, took ſeveral iſſues: one of which was, "That *Jonas Malden*, "*William Smart*, and *John Edwick*, were not, nor was any "of them next in place and office to the bailiffs." The defendant rejoined, that *Jonas Malden*, before whom (together with *William Smart* and *John Edwick*) he, the defendant, took the ſaid oath, was the neareſt then preſent, in place and office, to the bailiffs of the ſaid borough, except him, the ſaid *Charles Malden*, who was the neareſt then preſent, and who preſided at the ſaid meeting, and who was elected to be one of the bailiffs. The king's coroner and attorney demurred to this rejoinder: and one of his cauſes of demurrer was, That the ſaid *Charles Malden* ought to have taken his oath before ſuch officer or perſon as preſided at the election. The defendant having joined in demurrer, it was argued for him. But the Court agreed that the defendant was not properly ſworn in before the preſiding officer, which is abſolutely neceſſary where the election is made under the ſtatute of 11 *Geo.* 1. c. 4. And Mr. Juſtice Aston cited *Rex* v. *Nance*, Trin. 1741, 14 & 15 *Geo.* 2. *B. R.* In which caſe the Court held, that the fourth clauſe of that act (which relates to ſwearing-in upon elections made under the ſtatute), is general and poſitive (without any exceptions or reſtrictions), "that the officer ſhall take the oath or oaths by law required, "at the time of his admiſſion into ſuch office, before ſuch "officer

" officer as ſhall preſide at ſuch election in purſuance of the " act." There, the Court did not, nor well could (as that caſe was circumſtanced), enter into a queſtion—" Whether " he could be ſworn in before himſelf?" Neither, indeed, is it neceſſary to determine it here; becauſe it is not alleged " that he was ſworn in before himſelf:" It is only alleged " that he did, at the ſame meeting, take his corporal oath " before *Jonas Malden*, *William Smart*, and *John Edwick*, " then and there being three other ſenior aldermen, &c." *Per Cur.* unanimouſly.—Judgment *pro rege*: (becauſe there was no proper ſwearing-in).

If a corporation chooſe only one bailiff where the charter directs two, the one alone cannot act.—This was upon an information in nature of *quo warranto* to ſhew by what authority the defendant exerciſed the office of an alderman of Malden.—This corporation conſiſted of three integral parts; the firſt of which was not a mayor, or a ſingle bailiff, but two bailiffs. The charter directed the time and manner of their election, as ſtated in the laſt caſe. The preſent defendant, Mr. *Smart*, was choſen an alderman at a corporate meeting, where *Jonas Malden* and this *Charles Malden* (who was afterwards ouſted) preſided as bailiffs. He was choſen by a majority of the collective body, then preſent. The whole corporation, when full, conſiſts of two bailiffs, ſix aldermen, and eighteen head-burgeſſes.—The queſtion was: " Whether the election of " the defendant was legal; ſince a judgment of ouſter had " been given againſt *Charles Malden*, who preſided at it, to-" gether with *Jonas Malden*, the other bailiff?"—The caſe was twice argued: After which lord MANSFIELD ſhortly ſaid—We are of opinion, " that two bailiffs are neceſſary as " preſiding officers." If the corporation had choſen but one bailiff, there had been no head-officer at all. There is no conſidering them in any other light, than if they had been a mayor.—Judgment for the crown.

Rex *v* Smart, Tr. Ter. 8 Geo. 3. B. R. 4 *Burr.* 2241.

The Court will grant a new trial in an information *quo warranto* if the queſtion has never been fully before the jury.—Upon an information in the nature of *quo warranto*, to ſhew by what authority the defendant claimed to be bailiff of Malden. There were, in all, five iſſues (1): and the preſent queſtion turned upon the third, fourth, and fifth iſſues; which were found for the proſecutor, ſubject to the opinion of the Court. The counſel for the proſecutor argued, that no new trial ought to be granted, there being ſufficient iſſues found, and now before the Court, upon which the Court might proceed to give judgment againſt the defendant.—*The third iſſue* was upon his being duly elected, viz. " Whether " the aldermen and head-burgeſſes aſſembled the day after the " charter-day did elect him?" which was directed and found

Rex *v.* Jonas Malden, Mic. Ter. 8 Geo. 3. B. R. 4 *Burr.* 2135.

(1) See the caſe of *Charles Malden*, ante.

againſt

againſt the defendant. On this iſſue, the firſt objection was, That there was not a ſufficient number of aldermen; two of them not being aldermen at the time of his election: and thoſe two appeared upon the evidence not to be aldermen, for there was no preſiding officer at their election.—*The fourth iſſue*, upon the ſwearing, was alſo a material iſſue, viz. "Whether *Smart* and *Edwick*, before whom he took the "oath, were aldermen?" The jury have found "that they "were not."—The judge admitted evidence to be read of the entry of their election to be aldermen; and held it to be void. They object, "that he ought not to have admitted it; "and that it was not ſufficient evidence." This entry entirely cut up the title they had inſiſted upon by their plea: For it proved, "that no bailiff was preſent at their election." And this fourth iſſue applies to the third iſſue, as it ſhews, "that he was not duly elected; they not being aldermen at "the time of his election." The fifth iſſue was, "That "*Jonas Malden* was not bailiff:" Which, they ſaid, was a ſubſtantial iſſue, and ought to have been fully and completely proved.—Lord MANSFIELD, It appears by the report, that there were but two objections made at the trial of this cauſe, and two queſtions ſtarted, viz. "Whether the ſwearing "could be before the three aldermen?" and, 2dly, "Whe-"ther *Edwick* and *Smart* were aldermen, for the purpoſes of "ſwearing him in?" And it was then agreed by the counſel to be put upon that foot.—But the whole of the litigation as to the two aldermen was immaterial: for, they had nothing to do with it.—The election and the ſwearing are diſtinct matters.—The ſwearing is not involved in the iſſue concerning the election. The fifth iſſue is only conſequential. In the caſe of the *King* v. *Roger Philips*, 1 *Burr.* 222. the election under the preſiding officer could not be gone into: for he had not alleged that he was ſworn in that manner.—At the trial of the preſent cauſe, the election was not at all objected to, upon the foot that has been now inſiſted on. Why was he not duly elected? It is now ſaid—"becauſe "two of the electors were not aldermen." But nothing was laid before the Court at the trial, how many aldermen were neceſſary to be preſent; or how many were actually preſent. It is not ſhewn on the evidence, that there was not a majority of the aldermen preſent.—It is not to be taken for granted, that the ſwearing before *Charles Malden*, as preſiding officer, could have been given in evidence upon the fifth iſſue. But, however (ſtripped of the pleading), the queſtion has never been before the jury: and the matter is now brought improperly before the Court.—In the caſe of *Philips*, the defendant alleged a ſwearing, which was not, in fact, true: and the finding and direction, in that caſe, were both right. Therefore they could not properly move for a new trial, but applied for ſetting aſide the verdict, and a re-

pleader.

pleader. The Court thought, that ſetting aſide the verdicts, and giving the defendant liberty to amend his plea, was a better method: and that method was accordingly there taken. —If we grant a new trial here, they will have it in their power to apply for an amendment or not, as they think proper.—If the ſwearing was, in fact, an improper ſwearing, that will appear upon the record: and judgment could not, in ſuch caſe, be for him; becauſe his title would appear to be a defective one.—Therefore, let there be a new trial, without coſts. Mr. Juſtice ASTON ſaid, He could not conceive how the third iſſue could be found againſt the defendant.—How does it appear upon this record, "that *Charles Malden* and "*Jonas Malden* were not the majority of the aldermen for "the time being?" It does not appear but that they two were the only exiſting aldermen: and it does not appear but that the defendant was well elected.—The ſwearing is a quite different matter from the election. The defendant is obliged to ſhew a complete title: and he here concludes, that "ſo "he had a good title." The king's coroner may traverſe all the particulars, if he thinks fit: but if he does not, all that is well pleaded by the defendant is admitted.—The defendant has here alleged, that he took the oaths before the preſiding officer; though, indeed, he adds—"and before the two "others," (who were not ſo).—On the fifth iſſue, which is conſequential, the proſecutor can not give in evidence defects of title not mentioned in the pleadings.—Therefore, if the iſſue upon the election is found wrong, that iſſue is alſo found wrong.—Whether they will apply to amend or no, is no part of the preſent conſideration: they may do as they think proper. But I think we ought to ſet aſide this verdict, and grant a new trial.—The caſe of *Philips*, mayor of Carmarthen, was not like this caſe. In *Goldwyer's* caſe (1), the fact of the perſon preſiding being a good mayor, or only an uſurper, was put in iſſue: and though the court did not give an explicit opinion "whether the preſiding of an officer *de facto* "was ſufficient to make a title in the defendant againſt the "crown," yet if he had been an officer *de facto* (and not a mere uſurper), they ſtrongly inclined, that the preſence of a mayor *de facto* recently proſecuted, and againſt whom judgment of ouſter had been obtained, would not be ſufficient to authenticate the defendant's election.—But I give no opinion on this point.—He thought that a ſwearing before *Charles Malden*, as preſiding officer, could not be given in evidence on the laſt iſſue, as the pleadings now ſtand.—Rule for a new trial abſolute.

It was moved to ſet aſide a judgment of ouſter, which had been ſigned againſt the defendant in this cauſe, by default, upon

Rex v. Dawes, Mayor of Winchelſea, Hil. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2227.

(1) Rex v. Life, 2 Stra. 1090.

upon the foot of his colluſion with the proſecutor.—The parties, on whoſe behalf this motion was made, were eight corporators, whoſe rights were dependent upon the right of *Dawes* to be mayor; which right of his, they therefore deſired to defend. Affidavits were produced to prove that the mayor neither had been, nor was to be, at any expence in defending his right to the mayoralty: notwithſtanding which, he had diſcharged his attorney from acting any further on his behalf, under a pretence, that being now doubtful about the validity of his title to the office of mayor, he had determined not to be at any further expence in defending it; though, in fact, he never had been at any expence at all, but his expences had been undertaken to be paid, and ſome of them actually paid, by other perſons. THE COURT thought the motion reaſonable; and made a rule upon both the proſecutor and the defendant *Dawes*, for them to ſhew cauſe why the judgment of ouſter ſigned againſt the defendant ſhould not be ſet aſide; and alſo, why *Thomas Orby Hunter*, eſq. ſhould not be admitted to defend, in the name of, and for the ſaid defendant; he indemnifying the defendant from all coſts.—AFTER ſhewing cauſe againſt the rule, THE WHOLE COURT were clear, that the corporation had ſuch an intereſt in the mayor's title to his office, and ſuch a connexion with it, and ſuch a right to ſee it ſupported, if it was really a good one, that he ought not (as an honeſt man, or as a juſt corporator) to deſert and give it up, in prejudice to the rights of the corporation in general, or of particular corporators, when he was offered a complete indiſputable indemnification on the part of thoſe who deſired to defend his right in order to ſupport their own. Under theſe circumſtances, they held that it was not in his power to give it up.—They did not, indeed, think him obliged to maintain his own right at his own expence, merely to ſupport the rights of thoſe who claimed under it; if he either really thought his title unſupportable, or found that the maintaining of it would be too expenſive for him to bear: but they were very clear that he ought not to be permitted to deſert it, either colluſively or voluntarily, when thoſe whoſe rights depended upon it were deſirous of maintaining it without any charge or expence to him.—Rule abſolute.

The King *v.* Godwin, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 396.

The Court will not decide on the validity of the election of a corporate officer, if the queſtion is new or doubtful, on a rule to ſhew cauſe for an information in the nature of *quo warranto*.—This was a rule to ſhew cauſe, why an information in the nature of *quo warranto* ſhould not be filed againſt the defendant, for taking upon himſelf the office of mayor of the borough of Portſmouth.—The material circumſtances of the caſe were theſe: By a charter of 3 *Car.* 1. the right of electing a mayor in this borough is veſted in the majority of the aldermen and burgeſſes. The aldermen are twelve in number, and the mayor muſt be choſen from among them.

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He is elected for a year, from Michaelmas to Michaelmas, and "until one other of the aldermen ſhall be in due manner "and form elected and ſworn mayor of the ſaid borough." The method of electing the mayor is this: A liſt is prepared of all the aldermen, except the mayor then in office. Each elector makes a mark, or ſcratch, againſt two names in this liſt; and the two aldermen who have the majority of ſuch ſcratches, are put in nomination. Then the electors ballot for thoſe two, and he who has the majority on the ballot, is declared duly elected. The mayor is the returning officer on the election of members to ſerve in parliament. By the ſtatute of 9 *Ann.* c. 20. ſect. 8. it is enacted, that no perſon who hath been, or ſhall be, in any annual office to which it belongs to preſide at the election, and to make return, of any member to ſerve in parliament, ſhall be capable of being choſen into the ſame office for the year enſuing; and where any ſuch officer is to continue for a year, and until ſome other perſon ſhall be choſen and ſworn in, if ſuch officer ſhall voluntarily and unlawfully obſtruct and prevent the chooſing another, he is to forfeit 100*l.* In September, 1777, *Linzee*, "an alderman," was choſen mayor, and ſerved the office till Michaelmas, 1778, when *Bliſſel*, "then acting as "an alderman," was elected to ſucceed him, and ſworn into the office. In the mean time, an information in the nature of *quo warranto* having been filed againſt *Bliſſel* for exerciſing the office of an alderman, iſſue was joined in that cauſe, and, on the trial, a verdict found for the crown. *Bliſſel* then applied for a new trial, but was refuſed (1), and judgment of ouſter was entered againſt him; which judgment, on a writ of error in the houſe of lords, was affirmed. He continued, however, ſtill to act as mayor, and, in September 1779, preſided as ſuch, at the election of a ſucceſſor, when *Linzee* was

(1) In that cauſe there were ſix iſſues, but the material one was, whether *Bliſſel* had been duly elected an alderman; and this, with three others, was found againſt him. One of the points on the motion for a new trial was this—In 1778, *Bliſſel* and one *Pike* were put in nomination at an election of aldermen. The aſſembly conſiſted of the mayor *(Linzee)*, and three aldermen; *Pike* was chamberlain of the corporation, and the mayor objected to him as ineligible on that account, becauſe the auditors of the chamberlain's accounts are aldermen, and he could not hold an office in the exerciſe of which he would be liable to audit his own accounts. The three aldermen, however, voted for *Pike*; the mayor alone for *Bliſſel*; but he told the aldermen that their votes were thrown away, and declared *Bliſſel* duly elected, and ſwore him in. The anſwers given to the objection, juſt ſtated, to *Pike*'s eligibility were, 1. That, although the uſage ſince the charter of *Car.* 1. had been to appoint the auditors from among the aldermen, there was no proviſion in the charter rendering that neceſſary: and, before the charter, they had been ſometimes choſen from the burgeſſes at large. 2. That if the two officers were incompatible, then the acceptance of the higher of the two (that of alderman), *ipſo facto* vacated the other. For this ſeveral authorities were cited, *Com. Dig. Tit. Office, B.* 6.) and the court were of opinion that the law was ſo.—But it is now ſettled that this is not the criterion, but that, when two offices are incompatible, the ſubſequent acceptance of one vacates the other. See *Milward* v. *Thatcher, M.* 28 *Geo.* 3. 2 *Term Rep.* 81; inſerted *infra*, under title OFFICES.

re-choſen; but on the charter-day for ſwearing in the new mayor, *Linzee* did not attend, being adviſed (as he ſwore in his affidavit), that he was not duly elected. In conſequence of this, *Bliſſel* ſtill continued to act, till the 21ſt of October, 1779, when the aldermen, having given him previous notice, met and amoved him, by virtue of a power veſted in them by the charter, and elected *Carter*, another alderman, in his place. *Carter* acted for ſome time, till, being adviſed that his election alſo was illegal, he obtained a mandamus to the aldermen and burgeſſes to proceed to the election of a new mayor. In obedience to this mandamus, an election was held on the 10th of February, 1779, at which *Carter* preſided as ſenior alderman. On that occaſion, when the town-clerk and chamberlain (whoſe buſineſs it was) came to make out the liſt, *Carter* directed them not to inſert *Linzee*'s name in it, treating him ſtill as mayor under the charter, there having been no legal election ſince he was choſen in 1777. However, *Rickman*, a burgeſs (and the attorney in the preſent proſecution), was permitted to inſert *Linzee*'s name. The greateſt number of ſcratches were for him; the next for Lord *Hawke* (alſo an alderman), and the feweſt for the defendant; but *Carter* inſiſted, that notice having been given of *Linzee*'s being ineligible, the votes for him were thrown away: and that only lord *Hawke* (who had ſent a letter ſtating that he was ineligible, being confined by ill health, and not having taken the ſacrament (1) within a twelvemonth), and *Godwin* ſhould be ballotted for. *Rickman* inſiſted, on the part of *Linzee*, that as he had never acted ſince Michaelmas, 1778, and there had been intervening mayors, *de facto*, ſince his former mayoralty, he did not fall within the meaning of the act of queen *Anne*. Accordingly his friends proceeded to ballot for him, and, on reckoning the number of balls, there appeared to be twenty-one for *Linzee*, and only twelve for *Godwin*: but *Carter*, ſtill profeſſing to conſider *Godwin* as duly elected, he was ſworn in, and took upon himſelf the duties of the office.—Per Cur. The only queſtion now before the Court is, *Whether the caſe is ſo clear, as that we ought to refuſe an information to try the title, when it is admitted, that the perſon ſworn in had not the majority of votes?* It is contended, that *Linzee* was clearly ineligible under the act of queen *Anne*, becauſe, by the charter, he had a right to hold over, although, in fact, he did not act as mayor, and *Bliſſel* did. The object of the act undoubtedly is, that the ſame perſon ſhall not be returning-officer during two ſucceſſive years. But there has been no caſe on the conſtruction of this act, and the Court cannot, in a ſummary way, decide whether the intervention of a mayor, *de*

(1) *Vide* 13 *Car.* 2. ſtat. 2. c. 1. ſect. 12. 5 *Geo.* 1. c. 6. ſect. 3. and the caſe of *Harriſon* v. *Evans*, in page 730, *ſupra*.

facto,

facto, makes a difference. It is ſaid, *Bliſſet*'s election was fraudulent. But both ſides have not been heard; and fraud muſt be manifeſt and groſs before the Court will decide in the firſt inſtance. In the Cambridge caſe, *Hil.* 7 *Geo.* 3. 4 *Burr.* 2008. (1) the fraud was palpable. They had elected a gentleman who was juſt gone to America, and there was no ground ſtated of any belief, that he would return within the year. If he had choſen to return on purpoſe, near half a year muſt have elapſed before he could have had notice, ſo as to come back to England. However, in that caſe, the application was for a mandamus to proceed to chooſe a mayor, and making the rule abſolute, was not final, for the corporation might have returned to the mandamus, that there was a mayor, if they had thought the former election could be ſupported.—Rule abſolute.

Where reſidence is a neceſſary qualification for an election to a corporate office, an occaſional reſidence of it *bonâ fide* is a ſufficient legal reſidence to ſatisfy the qualification required.—Upon a rule to ſhew cauſe why an information in nature of *quo warranto* ſhould not be filed againſt the defendant for exerciſing the office of bailiff of the borough of Seaford. The conſtitution of this borough appeared from the affidavits to be, that the inhabitants and tenants, reſident in the town, pariſh, and borough of Seaford, on the feaſt of *St. Michael*, ſhould elect ſome perſon from among themſelves to be bailiff. And the affidavits on the part of the relator ſtated, "that the defendant was not reſident within the borough, "&c. at the time of his election, as is required and made "neceſſary by the charter, or according to the true meaning "or intent of the ſame." On the other hand, it was depoſed on the part of the defendant, that on the 24th of September, 1793, the defendant being at Seaford, requeſted *T. Harben*, the then bailiff of the borough, to hire a houſe for him there of Mr. *Spice*, for four years; that Mr. *Spice* agreed to let it to him for 7*l.* a year for that term, and that the defendant might have immediate poſſeſſion of the ſame. That on the 27th of the ſame month the defendant's attorney, by his directions, prepared an agreement to that effect; that on the 28th the defendant had a meeting with *Spice* for the purpoſe of executing the ſame; when the latter informed him, that being an old and infirm man, and not likely to outlive the term of four years, he had been preſſed by his family not to execute a leaſe for ſo long a term, as he intended that it ſhould be ſold at his death, but that he had no objection to grant a leaſe for one year, and would engage his word not to turn the defendant out during his (*Spice*'s) life; on which it was agreed, that the houſe ſhould be let for one year only from the 27th of September, and the leaſe for that year was

The King *v.* Sargent. Mic. Ter. 34 Geo. 3. B. R. 5 *Ter. Rep.* 466.

(1) See title MANDAMUS.

accordingly executed. That the defendant and his ſervant ſlept in the houſe on the night of the 28th of September, and quitted Seaford the next day after the election, but had ſince been there again, and reſided and ſlept in the ſame houſe on the 23d and 24th of October laſt. The defendant alſo ſwore that he had, from the time of making the agreement, the poſſeſſion of the houſe, and that he meant to retain the poſſeſſion of the ſame for the term he had therein, for the purpoſe of reſiding therein at ſuch times as he ſhould be called to the borough by his connexions there as a magiſtrate and repreſentative in Parliament of the borough. And further, that he made the agreement with *Spice* for the poſſeſſion of the houſe *bonâ fide*; and that long before he had any intention to become a candidate for the office of bailiff, he had determined to hire a houſe in the borough, and to reſide therein as often as he ſhould be called there by his connexions in the town: the defendant being a freeman, a jurat, and a magiſtrate, of the ſaid borough before his election to the office of bailiff. It alſo appeared, that the bailiff had a power of appointing a deputy.—Lord KENYON, J. It never can be contended, that in order to conſtitute a reſidence in any place it is neceſſary to reſide any given number of days, or even any great part of the year. It happens perpetually, that perſons have different places of abode, in ſome of which they reſide more or leſs as ſuits their convenience. Was it ever doubted that a fortnight's reſidence, or leſs time, did not as much conſtitute a reſidence, as any greater portion of time? This caſe would, I admit, furniſh ground of ſuſpicion, if the reſidence alone were nakedly conſidered. The coming down a day or two before the election, and going away again immediately after, would, if unexplained, appear ſuſpicious, and would be a fit queſtion for a jury to decide upon; but when the circumſtances are conſidered, the caſe is cleared of all doubt. His Lordſhip here recapitulated the facts ſworn to by the defendant, and obſerved, that though he engaged for a leaſe of the houſe for one year, on the eve of the election, yet if the houſe were *bonâ fide* taken for that period, that it was no objection. I remember a caſe which turned upon the queſtion of reſidence, where an inundation of voters were ſent out of Yorkſhire and Staffordſhire, to a diſtant part of the country, without having any houſe or family, or connection in the borough; and who were billetted about in the inns for the purpoſe of ſleeping there a night or two before the election; but there was no pretence to call that a reſidence. So too the caſe of Lord *Charles Fitzroy* (alluded to in the argument) was not at all like this. He had taken no houſe in the place where his reſidence was required, but came down juſt before the election, and lay in a room which was hired for him upon the occaſion. But this is the caſe of a perſon

connected

connected with the borough; who has actually hired a houſe there, in which he reſided before the election, and has done ſo ſince for two days in the ſucceeding month of October; and the affidavits in ſupport of the application, were ſworn in November; therefore, upon the ſound exerciſe of the Court's diſcretionary power, I ſee no reaſon for ſending this to a trial. ASHHURST, J. This has every appearance of a clear *bonâ fide* intention of reſidence at the time of taking the houſe, and not merely a colourable tranſaction for a particular occaſion. If the defendant does not hereafter reſide as much as is neceſſary, the corporation have a power of amoving him; but that does not impeach his title to be elected at the time. But if the borough do not complain, there is no reaſon why the Court ſhould interfere for this purpoſe. BULLER, J. No indictment for perjury could be founded on the affidavits produced on the part of the proſecutors; they ſwear to matter of law and not of fact; that the defendant did not reſide, &c. "as is required and made neceſſary by the charter, "or according to the true meaning or intent of the ſame." It is a negative pregnant. They admit, that there was ſome reſidence; and therefore, they ſhould have ſtated what that reſidence was. It would not have been ſufficient for the defendant to have anſwered generally, that he had reſided according to the intent and meaning of the charter; and therefore, it is not ſufficient for the proſecutor to found his application upon ſuch a general allegation. It is ſaid, that the defendant only took the houſe for the ſake of his election to the office. It might be ſufficient to ſay, that the contrary is ſworn. But ſuppoſing that were true, how does the fact ſtand? A perſon, who had been a long time a member of the corporation, was informed that he would be called upon to take a certain office which requires reſidence; upon which he agreed to take a houſe. Where is the fraud or colour in ſuch a tranſaction? He rented it for the purpoſe of taking this office upon him, and diſcharging the duties of it in a legal manner. I ſee no fraud or objection whatever to ſuch a taking, GROSE, J. agreed.—Rule diſcharged.

Rights of Corporators in their natural Capacities.

The writ *de effendo quietum de theolonio*, is not merely prohibitory, but remedial, on which the parties may plead to iſſue on a queſtion of right. The Mayor, &c. of London, *v.* The Mayor, &c. of Lenne Regis commonly called King's Lynn, in the County of Norfolk, Ea. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 206.

And a corporation to whom it is directed, cannot be attached for contempt, in their corporate capacity, for not returning it; but an attachment in the nature of a *pone*, is the proper remedy to compel them to appear, and the Court will not grant a trial at bar, in an iſſuable term.

Alſo in an action by one corporation againſt another, each may inſpect ſo much of the books and records of the other, as relates to the ſubject in diſpute.

Theſe points were determined in this caſe, which was an action on a writ (1), *eſſendo quietum de theolonio*, with an *alias* and *pluriès*. In Michaelmas term, 1787, a rule to ſhew cauſe, why the defendants ſhould not have a fortnight's time to return the writ, was made abſolute by conſent. On November the 17th, a rule was granted to ſhew cauſe, why the writ ſhould not be quaſhed, and all the proceedings on it ſtaid; chiefly on the grounds, that it was merely a prohibitory proceſs, iſſuing from the crown to its bailiffs, to whom, or to the collectors of the toll, it ought to be directed; that it was returnable in chancery, and not in this court; and that it was not calculated to bring the queſtion of right between the parties, fairly to iſſue on the record.—Cauſe was ſhewn, and in anſwer to the objections made on the part of the defendants, *Fitz. Nat. Brev.* 31. 33. 34. 518.—*Year Book*, 21 *Hen.* 7, 31.—2 *Inſt.* 654.—*Regiſtr. Brev.* 258. *b.*—*Bro. Abr.* tit. *Contempt*, *pl.* 7. were cited. AFTERWARDS Lord LOUGHBOROUGH, declared the opinion of the Court, that it was a remedial writ, on which the parties might plead to iſſue, on the authority of *Madox*'s *Firma Burgi*, c. 7. ſ. 10. p. 138. and therefore the rule was diſcharged; and afterwards a peremptory rule was granted, as of the laſt day of the preceding term, for the defendants to return the writ on the firſt day of the next term.

But no return being made, in Hilary term, 1788, January 28, a rule was granted to ſhew cauſe, why an attachment of contempt ſhould not iſſue againſt the defendants, by the title of the mayor and burgeſſes of Lynn, &c. February the 6th, cauſe was ſhewn, that a corporation could not be attached, in their corporate capacity. In ſupport of the rule it was urged, that proceſs of contempt would iſſue againſt the acting part of a corporation, for diſobeying a *mandamus*, &c. on which point were cited the ſtat. 9 *Anne*, c. 20. and the caſe (2) of *The King* v. *The Mayor of Truro*, where the mayor being reported in contempt for diſobeying a *mandamus*, to elect a burgeſs, the court impriſoned him three months, and ordered him to pay all coſts. February the 8th, Lord LOUGHBOROUGH ſaid, that upon conſideration, the Court were clearly of opinion, that the rule muſt be diſcharged. The very form in which it was drawn up, was a deciſive reaſon againſt it. For ſuppoſing an attachment of contempt would iſſue, it muſt be againſt the individual members of the corporation, and not againſt the defendants in their corporate character. But the proper remedy to be purſued, was an attachment in the nature of a *pone*, the ſame as was mentioned in *Fitz. N. B.* 518, *Regiſtr. Brev.* 258. and the *Year*

(1) So denominated in *Regiſtr. Brev.* 258. *b.*
(2) *B. R. Mich* 25 *Geo.* 3.

Beck,

Book, 21 *Hen.* 7. 31. This proceſs was uſed in the writ of *monſtraverunt* for tenants in antient demeſne, *de non ponendis in aſſiſis & juratis*, *de corodio habendo*, and others of a ſimilar kind. His Lordſhip obſerved, that it appeared from a note in *Fitzherbert*, that in a writ *de corrodio habendo*, which contained a clauſe, "*vel cauſam nobis ſignifices*," if the abbot returned cauſe at the "*ſicut aliàs*," and no one came to counterplead the cauſe on the part of the king, the abbot was diſcharged. But if any one came for the king, and counterpleaded the cauſe, they could not interplead thereon, but a *pluriès* and attachment iſſued, and on the attachment they pleaded. So that even where obedience was paid to the king's writ by returning the cauſe, the plea between the parties could not proceed, without an attachment, to give day in court, as the commencement of the ſuit. It was clear, therefore, that the attachment mentioned in the books, was not a proceſs of contempt, in not returning the writ, but iſſued merely to compel an appearance. Conſequently, the rule was diſcharged (1).—At length an appearance being entered, a declaration was delivered; and on iſſues being joined, it was moved, in Michaelmas term, to try the cauſe at bar; which was refuſed, that term being an iſſuable one.—Afterwards, in Hilary term, a rule was granted to ſhew cauſe why the trial ſhould not be had at bar, in Eaſter term following, which was made abſolute; and rules were made abſolute for each corporation to inſpect ſo much of the books and records of the other, as related to the ſubject in diſpute (2).—*Per Cur.* The rule was diſcharged.

See alſo the titles By-Law, Mandamus, Quo Warranto.

Coſts.

Where Coſts ſhall be allowed.

Where juſtices of the peace are complained of without reaſon, they ſhall have coſts.—Upon ſhewing cauſe why an information ſhould not be granted againſt two juſtices of the peace and others, for a miſdemeanour, relating to the conviction of a poacher, and the circumſtances attending it. The Court thought proper, upon fully hearing and conſidering all the affidavits, and what was urged by the counſel on both ſides, to diſcharge the rule, as to all the defendants;

Rex *v.* Palmer and Baine, eſqrs *et al.* Ea. Ter. 1 Geo. 3. B. R. 2 *Burr.* 1162.

(1) After this determination, the next effective ſtep taken by the plaintiffs, was the ſuing out a *diſtringas*, on which 40*l.* iſſues were levied, which (the writ being neither returned, nor an appearance entered) were on motion encreaſed to 40*l.* in conſequence of which the defendants appeared.

(2) 1 *Term. Rep.* 689. p. 712. *ſupra.*

with costs to be paid to the justices, but without costs as to the others.—And they were, upon this occasion, most explicit in their declaration, "That even where a justice of peace "acts illegally" (which, however, was not the present "case), "yet if he has acted honestly and candidly, without "oppression, malice, revenge, or any bad view, or ill in-"tention whatsoever, the Court will never punish him in this "extraordinary course of an information; but leave the party "complaining to the ordinary legal remedy or method of "prosecution, by action, or by indictment."

Bridges *v.* Raymond. Hil. Ter 12 Geo. 3 C.B. 2 *Black.* 800.

If a plaintiff has a verdict on one count only, yet he shall have costs on the whole declaration, for it is frequently prudent in a plaintiff to lay his demand in two different ways; and as costs at law are a legal right under the statute, and there is also a remedy by application to the Court, to strike out supernumerary counts in case they be frivolous or vexatious; it would be hard tie up a plaintiff in point of costs, to lay his case in such a way only as he is sure to prove. This was case: two counts: a verdict for the plaintiff on the second count only, and costs taxed for the plaintiff on both. And the Court agreed that it had been the invariable practice of C. B. to tax costs for the plaintiff only, in case he recovered on any one of his counts, and not to tax costs for a defendant in respect of the other (1).

Sir John Astley, Bart. *v.* Young. Tr. Ter. 1 Geo. 3. B. R 2 *Burr.* 1232.

In this case the plaintiff's declaration consisted of two counts. The defendant pleaded the general issue to the whole declaration, and a justification to the last count. The plaintiff demurred to the justification; and judgment was thereupon given for the defendant. The general issue was tried; and there was a verdict for the plaintiff. The question was, "Whether the defendant should "have his costs of his judgment on the demurrer?"—The Court agreed "that the defendant could have no costs."

But where there is double pleading, and each plea goes to the whole declaration; and there is a demurrer to any one plea which goes to the whole, and judgment for the defendant thereupon; there the defendant should have costs; for the plaintiff should not try his issue, after the defendant has had judgment upon a demurrer which goes to the whole.

Butcher *v.* Green, Ea. Ter. 21 Geo. 3. B. R. 2 *Doug.* 677.

So, when there are issues joined on several counts, and on some a verdict for the plaintiff, and on others for the defendant, the defendant shall not have costs on that part of the record on which the verdict is found for him.—This was an action on the case, in which there was one count in trover, and another for words (1)—Pleas; "not guilty," to the first count; and a justification to the second. Verdict for the

(1) See also the case of *Norris* v. *Waldron*, in vol. i. p.

(2) *Vide Dickon* v. *Clifton*, C. B. *M.* 7 *Geo* 3 2 *Wils.* 319. and under title *infra*.

plaintiff

plaintiff on the count for trover, and for the defendant on the other. On a rule to ſhew cauſe why the maſter ſhould not tax the defendant his coſts relative to the pleadings and proceedings on the ſecond iſſue which was found for the defendant, and why what ſhould be allowed to him on ſuch taxation ſhould not be deducted out of what ſhould be allowed to the plaintiff on the firſt iſſue, in caſe the ſame ſhould exceed the coſts allowed to the defendant. BULLER, J. ſaid, the practice of this court had been uniform not to allow the defendant coſts in caſes of this ſort. They differed, he ſaid, from caſes where different iſſues are joined on different pleas; for, in thoſe caſes, the defendant is allowed his coſts on the iſſues found for him.—Rule diſcharged.

But if there be two diſtinct cauſes of action in two counts, and as to one the defendant ſuffers judgment to go by default, and as to the other, takes iſſue and obtains a verdict, he is entitled to judgment for his coſts on the latter count, notwithſtanding the plaintiff is entitled to judgment and coſts on the firſt count.—In an action on the caſe for diſturbing the plaintiff in his right of common, the declaration contained two counts, for diſturbances in two diſtinct commons: as to the firſt of which, the defendant ſuffered judgment to go by default; and upon the ſecond he took iſſue, and upon trial obtained a verdict. Afterwards, the plaintiff obtained a rule *niſi* for the *poſtea* to be delivered to him, and for the maſter to tax his coſts thereon.—After cauſe ſhewn, THE COURT were clearly of opinion, that the plaintiff was not entitled to the coſts of the trial; but, whether the defendant was entitled to ſuch coſts, they ſaid would more properly come under conſideration upon a review of the maſter's taxation; they, therefore, directed that the *poſtea* ſhould be lodged in the hands of the maſter, that he might tax the plaintiff his coſts on the judgment by default, and tax the defendant his coſts on the verdict obtained on the ſecond count, which being afterwards done accordingly, a rule was obtained, calling on the defendant to ſhew cauſe, why the maſter's taxation of coſts for him on the ſecond iſſue ſhould not be ſet aſide. PER CUR. (after cauſe ſhewn), There will be no incongruity in this caſe on the record. If the Court ſee two ſeparate cauſes of action on the ſame record, on one of which the plaintiff ſucceeds, and the other is found for the defendant, they are bound to give two diſtinct judgments. So in an action for an aſſault and battery againſt two defendants, if one ſuffer judgment by default, and the other juſtify and obtain a verdict, there muſt be two ſeparate judgments on the record. Here the plaintiff will have judgment up to the whole extent to which he is entitled, by having judgment for his coſts on the firſt count, as to which the defendant made default; and as to the other count, which contains a ſeparate cauſe of action,

Day *v.* Hanks, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 654.

action, and which has been found for the defendant, he is equally entitled to have judgment for his costs incurred by the trial of that issue.—Rule discharged.

Braithwaite v. Bradford, Ea. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 599.

So where an inclosure-act directed, that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large." And a proprietor brought an action, claiming nine distinct rights, and recovered for three only. The Court held, that he should only have his costs on those issues found for him, and that the defendant should have his costs of the other issues.—By an act, 34 *Geo.* 3. c. 44, for dividing and inclosing the common fields of Skelton, the commissioners are authorised and required to allot the residue of certain waste grounds to the several owners and proprietors, as well of messuages and cottages, and the scites of messuages and cottages, as of the open fields, &c. having right of common. It then directed, that any proprietor, who should be dissatisfied with the determination of the commissioners, should bring an action to try the right; enacting, that "*if the verdict should be in favour of the commissioners'* determination, then the costs of such action or actions should be borne by the plaintiff or plaintiffs, and if against such determination, then by the proprietors at large." The plaintiff, being dissatisfied with the determination of the commissioners against him, brought this action to try his title to nine rights of common, and he succeeded only in three out of the nine rights.—The master taxed the plaintiff his costs, making deductions for the extra length of the briefs, &c. so far as related to the rights found for the defendant, but did not tax the defendant his costs on the issues found for him; on which a rule was obtained to shew cause, why the master should not review the taxation of costs, and why he should not allow the defendant costs on the issues found for him. Per Cur. Lord Kenyon, in the case of *Norris* v. *Waldron* (1), *De Grey*, Ch. J. said, "It seems hard on principles of natural justice, that a plaintiff should have his whole costs where he fails nine parts in ten," and that observation has never been contradicted; however, if such be an inveterate rule of law, we cannot get over it; it is better to adhere to it in general cases. But there is no such rule to govern this case; we are now to construe an act of parliament, which says, that if the verdict be in favour of the determination of the commissioners, the costs shall be borne by the plaintiff, if otherwise, then by the

(1) 2 *Black.* 1199. and *ante*, vol. 1. p. 227.

proprietors.

proprietors. Here the plaintiff set up a claim to nine distinct rights of common, and on the trial he only succeeded in three, but failed in the other six, and yet it is insisted on, that he is entitled to the costs of the whole, because he was obliged to bring his action to controvert the decision of the commissioners. To some of these rights he had no pretence of claim whatever, for he gave no evidence at all in support of them; and with regard to his being driven to the expence of this action, if he had only asserted his claim to those to which he was entitled, perhaps they would have been abandoned by the other side. But he, relying on his title to some of these rights, chose to make an experiment with respect to several others, and wished to take the chance of succeeding in those at the expence of the rest of the proprietors. It would, indeed, be contrary to natural justice, if he could succeed in this experiment. But the act on which this question depends, does not compel us to determine in his favour. The act says, if the verdict be for the plaintiff, he shall have the costs, that is, the costs up to the extent of the verdict which he obtains; and if the verdict be in favour of the commissioners' determination, then the costs, namely, the costs up to that extent, shall be borne by the plaintiff. This decision is according to the words and meaning of the act of parliament, and according to the justice of the case, and is contrary to no authority. Ashhurst, J. and Grose, J. concurred. Lawrence, J. The practice of allowing costs in this court, is, in some instances, different from that in the common pleas. There, if the plaintiff succeed on only one count in a declaration, he has his costs on all; but here, he does not receive costs on any count on which he does not succeed, though he does not pay them. There is a great deal of good sense in what was said by *De Grey*, Ch. J. in the case alluded to; but it is not necessary for us now to say what ought to be the rule in cases in general; though I cannot but observe, that the rule in *Astley* v. *Young*, was contradicted in the case of *Day* v. *Hanks*. Whatever may be the rule in other cases, we are to decide this according to the act of parliament under which the action is brought; and under that I think that each party is entitled to the costs on those parts on which he succeeded.—Rule absolute.

On a feigned issue, costs follow the verdict. But it seems that, in future, when the Court permit parties to try a feigned issue, they will compel them to consent, that the costs shall be in the discretion of the Court, and a feigned issue can not be tried without the consent of the Court.—These were two feigned issues; and on the trial the plaintiff succeeded on the first, and the defendant on the second issue: on a rule to shew cause why the master should not be at liberty to tax him his costs upon the second issue; and cause shewn,

Hoskins v. Lord Berkeley, Mic. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 402.

ſhewn, *The Court* at firſt thought themſelves bound by the authority of the caſe of *Herbert* v. *Williamſon*, 1 *Wilſ.* 324. where it was held, that on the trial of a feigned iſſue, coſts muſt follow the verdict, and that the Court had no diſcretion upon the ſubject: but they ſtrongly intimated an opinion that, as feigned iſſues were only granted with the leave of the Court, it would be prudent in future when they permitted ſuch iſſues to be tried, to compel the parties to conſent that the coſts ſhould be in the diſcretion of the Court. However, it afterwards appearing in this caſe, that theſe iſſues had been tried without the conſent of the Court, they ordered all the proceedings to be ſtayed; adding, that ſuch a proceeding was a contempt of the Court.

Sadler v. Evans, or Lady Windſor's caſe, Mic. Ter. 7 Geo. 3. B. R. 4 *Burr.* 1984.

In this caſe the queſtion before the Court was, "Whether, when a cauſe remains untried, without any fault in either party, the coſts of this going down to trial ſhall be paid by the unſucceſsful party to the party finally ſucceeding in the cauſe (as the other coſts are), or, whether each party ſhall abide by his own coſts, occaſioned without the default of either?" Lord MANSFIELD ſeemed at firſt to think, "That if neither ſide were in fault, neither ſide ſhould pay coſts." And this was made a *remanet*, for want of time to try it. But THE COURT and Maſter *Owen* agreed to the general rule, "*that coſts are to be paid, where the cauſe goes off upon a* remanet, *as well as any other coſts in the cauſe*;" and inſtanced ſome Maidſtone cauſes, which went off for want of viewers; ſo that neither party was in fault.—Cauſe having been ſhewn againſt the Maſter's reviewing his taxation.—Lord MANSFIELD ſaid: I think that *general rules imply an exception, in caſes where the general rule is uſed for oppreſſion, or where the hardſhip of the particular caſe is ſuch as that it would be manifeſtly unreaſonable and unjuſt to include it within the general rule*; provided the application is made within due time. And if this had come recently before the Court, I ſhould have thought that the plaintiff ought not to pay the coſts of the *remanet*. For it appears that the defendant treated the cauſe as likely to be of great length, though he intended to nonſuit the plaintiff, by an objection which he kept in reſerve; and this put the plaintiff to a great expence. It was a ſnare laid to prevent trying the right. Therefore I ſhould have inclined, upon a recent application, to have made this caſe an exception from the general rule, allowing the general rule to be right. But the application is now made a year after a judgment; and after a writ of error brought, and that writ of error non-pros'd. The caſes of *capiatur & miſericordia*, are not now law. They have been cured, upon account of their unreaſonable ſtrictneſs. If a manifeſt miſcomputation, or any plain miſtake in figures ſhould appear on the face of the record, with regard to coſts,

I ſhould

I ſhould think it might be amended; as (for inſtance) if the damages had been ſaid to be 60*l.* and the coſts 30*l.* which amount in the whole to 100*l.* But here is no ſuch manifeſt miſcomputation or miſtake on the face of the record. A proper diſtinction has been made between the damages given by the jury, and the coſts. And they certainly come too late; for *vigilantibus, et non dormientibus, jura ſubſerviunt.* Every thing was in their knowledge, from the firſt moment: there is no new diſcovery, nor new ground. They ſhould have complained during the taxation, or in due time afterwards; or elſe have ſhewn that it was not in their power to do ſo.—Therefore the granting this rule would be a bad precedent, though in a favourable caſe. Favourable caſes make bad precedents. Therefore, though I am ſorry for the hardſhip of the caſe, yet I am not for granting the rule.—The three other judges concurred that this was a favourable caſe; and if the application had come in time, they ſhould have thought it reaſonable to except it out of the general rule.—Here, it is ſubſtantially altering the judgment; not (as they obſerved) in a matter of mere miſtake, but of judgment. Therefore at ſuch a diſtance of time, it would be very inconvenient to alter it; it might be a bad precedent. And for that reaſon, and that only, they were againſt granting the rule. Mr. Juſtice ASHTON mentioned a caſe from Ireland, of *Byrne* v. *Byrne*, which, he ſaid, overturned all the caſes of *miſericordia.*—The opinion of THE COURT was ſhortly this.—The three other judges agreed with Lord MANSFIELD, that though the general rule ſtill ſubſiſts—"*That the coſts* of a *remanet* ought to attend the event of the cauſe;" yet that and every general rule muſt imply an exception of particular caſes under ſuch circumſtances as clearly diſtinguiſh them from being within the reaſon and principle of the general rule. And they alſo concurred that this particular caſe was one of thoſe which ought to have been excepted out of the general rule, if the application had come in time. But they were of opinion with his lordſhip, that in the preſent caſe, the plaintiff had by his own negligence omitted the proper opportunity, and therefore had now no title to relief, it being his own fault that he did not apply within due time. *Per. Cur.* unanimouſly—Rule diſcharged.

The COURT of C.R. in this caſe (in order to make the practice of the courts of B. R. and C. B. correſpond), directed that for the future, in all caſes where a cauſe goes down to trial, and goes off, upon any occaſion, without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial; the coſts of ſuch former abortive going down to trial ſhall be taxed and allowed to the party finally prevailing, in the ſame manner as if the cauſe had gone off upon a *remanet.* Burchall v. Ballamy, Hil. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2694.

So

Sparrow v. Turner, Mic. Ter. 8 Geo. 2. C.B. 2 *Wilf.* 366.

So alſo coſts are now in C. B. as well as B. R. allowed when a cauſe goes off and remains to be tried *pro defectu juratorum*.—This cauſe being at iſſue, the plaintiff moved for a ſpecial jury, when the cauſe came to be tried, all the jury did not appear, and neither ſide prayed a *tales*, ſo the cauſe went off, for that time, for want of jurors; at another day it came on to be tried, when a verdict was found for the defendant, and the prothonotary did not allow to the defendant his coſts, when the cauſe went off for want of jurors. *Per Curiam*, for the future it may be reaſonable to make the practice of this court conformable to that of the King's Bench, and therefore for the future we order that the practice be altered accordingly. The default was equal, for either the plaintiff or defendant might have prayed a *tales*, they both acted upon a preſumption that the practice was not to allow any coſts on either ſide, and that ſeems to be the reaſon why neither of them prayed a *tales*.

Lickbarrow v. Maſon, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 131.

But where a *venire de novo* is awarded, the party ultimately ſucceeding is only entitled to the coſts of the laſt trial; it was ſo conſidered in *Aſtle* v. *Grant* (1). So where the parties join iſſue on an immaterial point, no coſts are allowed upon a repleader. 2 *Ventr.* 196.

Melchart v. Halſey, Hil. Ter. 12 Geo. 3 C B. 2 *Black.* 741. 3 *Wilſ.* 149.

It was moved to ſtay proceedings, in an action on the caſe for promiſes for 10,000*l.* till the plaintiff paid the coſts of a nonſuit on the ſame cauſe of action, in a ſuit brought in the King's Bench: though this is uſually done only in ejectments, yet this was a ſpecial caſe, and the motion equally reaſonable. The plaintiffs were foreigners, and the cauſe of action aroſe upon ſome German contracts for forage in the late war. No claim was made by the plaintiffs, till after the commiſſion for liquidating thoſe demands was cloſed; and then they brought an action againſt the defendant, in his own right, ſuppoſing him perſonally liable. On a trial before Lord MANSFIELD at *Niſi prius*, the plaintiffs were nonſuited, but had leave to move for a new trial; which motion was, on ſolemn argument, rejected by the whole court of King's Bench.—The ſame action was now brought here; and it was urged that there was the ſame reaſon, after a nonſuit on the merits, to grant this rule, as in the caſe of ejectment; and more eſpecially as the plaintiffs being foreigners, no coſts could be recovered againſt them. DE GREY, CH. J. Before the plaintiff proceeds here, he ought to pay the expences ariſing from his falſe claim in the court of King's Bench, where the matter was fully heard and determined againſt him.—In ſome inſtances the Court has

(1) Reported in *Dougl.* 722. but it does not appear there that the queſtion relative to the coſts was diſcuſſed.

never

never ſcrupled to do it, particularly in the caſe of ejectments. But it is ſaid, they are more in the diſcretion of the Court. True, theſe being fictitious proceedings, the Court will ſo modify and correct them, that juſtice ſhall be effectually done. But if it is juſtice there, it is alſo juſtice in other caſes. —But it is not only in ejectments that the Court has ſhewn its readineſs to apply the remedy, if the caſe would bear it. Lord *Byron*'s caſe, *Baſs* and *Firmen*, 1 Lord *Raym.* 697, and others, were of this kind. The motions miſcarried, not becauſe improper in general, for then there would have been no rule to ſhew cauſe, but becauſe, upon examination of the circumſtances, they did not turn out to be proper caſes.—But, in *Groſvenor* and *Cape*, C. B. 9 *Geo.* 3. the Court was well ſatisfied, that the ſecond action was vexatious, and therefore, made the rule abſolute in that caſe (1). As many circumſtances concur in this caſe as in that, to ſhew the plaintiff ought to be ſatisfied with the determination of the former action: therefore I think the rule ſhould be abſolute; and though I do not ground my opinion upon the plaintiffs being foreigners, yet the circumſtance of their being foreigners, makes this ſecond action the more vexatious, becauſe there is no ſecurity or remedy for coſts. GOULD, J. The true ground of the preſent rule is, that the ſecond action is vexatious.—The principles of the common law warrants even ſecurity for coſts. The *plegii de proſequendo* aroſe from the law's jealouſy of the plaintiff. And in *Henry* 3d's time, the legiſlature provided for coſts, even before the ſtatute of Glouceſter.—In caſe of ejectments brought in the name of infants, the Court compels the *prochein amy*, to give ſecurity for coſts. BLACKSTONE, J. I lay the circumſtance, of the plaintiffs being foreigners, entirely out of the caſe. The king's courts ſhould be as open to them as to natives; and no diſcouragement ſhould be given to them when ſuing for a fair and juſt debt. Such a practice would ruin the national credit abroad, which is of the utmoſt importance to a trading country. Our merchants obtain the more extenſive credit, from the opinion which foreigners entertain of the juſtice of the Engliſh courts.—But, I think, that in all caſes, where the merits have been heard and fully determined, it would be a good rule, that it ſhould not be re-heard in

(1) This caſe was trover, and it was brought to try a queſtion of bankruptcy. The merits were fully gone into: and the opinion of the Court was with the defendant, and judgment had. Afterwards, an application was made to the court of chancery, which concurred in opinion with this Court. After which a new action was brought, in caſe, for money had and received, and not in trover, leſt the former action in trover ſhould be pleaded in bar: but profeſſedly, to try the ſame queſtion of bankruptcy over again. And *per Wilmot*, Chief Juſtice, *et Cur.* Before the Court permits this, you ſhall pay your coſts. The general rule is, indeed, otherwiſe; but this depends on the particular circumſtances of the preſent caſe.

another

another action, till the costs of the former were paid. The present action seems to be indeed vexatious, but if the plaintiff is dissatisfied with the former determination, he has a right to take the opinion of another court. But then he should pay all former costs, and set the defendant, as near as possible, in the same plight, as if no former litigation had been had.—NARES, J. cited Lord *Raym.* 865. *Elwes* and *Mocata*, where the Court hesitated, whether even an administratrix should not pay costs of a former action, on bringing a new *assumpsit*.—Rule absolute.

Weston *v.* Withers, Ea. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 511.

So in this case, the plaintiff being nonsuited in a former action of trespass, brought this second action for the same cause, and sued *in formâ pauperis*, being a prisoner in the King's Bench. It was moved for a rule to shew cause, why the proceedings in the second action should not be stayed till the costs of the former were paid; and after cause shewn, *The Court* made the rule absolute; and Mr. Justice *Buller* read two cases (1) from the master's note-book, in which the like rule had been made in other actions than ejectments.

Doe on the demise of Chadwick, *v.* Law, Tr. Ter. 27 Geo. 3. C. B. 2 *Black.* 1158.

And proceedings in ejectment may be staid the day before trial, till the costs of a former ejectment in *B. R.* be paid.—A former ejectment had been brought in the King's Bench, between the same parties, and in Hilary term, 13 *Geo.* 3. the defendant obtained a rule for costs for not proceeding to trial, which were taxed at 85*l.* 8*d.* after which, the cause was tried in the same term by a special jury, and there was a verdict for the defendant; and his costs were taxed on the *postea*, on the 11th of June, 1777, at 273*l.* 10*s.* Total 358*l.* 10*s.* 8*d.* no part of which was paid. And now it being moved to stay the proceedings in this cause, till the costs of the former were paid, it was urged on shewing cause, that the application was too late, as notice of trial was given for the 19th of June, and this motion for a rule *Nisi*, was not made till the 13th, when the plaintiff had prepared for trial, and was ready with his witnesses. But the Court, on considering all the circumstances, made the rule absolute.

Thrustout, on the demise of Williams, *v.* Holdfast, Ea. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 223.

If the defendant in a former ejectment, who was then evicted, bring another ejectment for the same premises, the Court will stay the proceedings until he pay the costs of the former cause; for it is immaterial for the purpose of the rule respecting the costs whether the present lessor of the plaintiff were the plaintiff or the defendant before.

English, q. t. *v.* Cox, Tr. Ter. 15 Geo. 3. B. R. *Cowp.* 322.

But the Court will not stay proceedings in a *qui tam* action till costs on a *non pros* in a former action, by a different plaintiff

(1) In *Moulton, qui tam*, v. *Bingham*, *Hil.* 17 *Geo.* 3. *B. R.* in an action on the statute of bribery, and *Baldwin* v. *Richards*, Hil. 19 *Geo.* 3. B. R. in an action for a malicious prosecution.

tiff againſt the ſame defendant be paid for, though the Court may, in ſome caſes, have been off their guard, and granted a motion of this kind, it has always been refuſed on conſideration; and the reaſon is, that the party is at liberty, if he pleaſes, to purſue the coſts of the former action.

Where a new trial has been granted, and nothing is ſaid in the rule concerning the coſts of the firſt, although the ſame party ſucceed on the ſecond trial, he ſhall not have the coſts of the firſt: for unleſs the coſts be reſerved in the rule to abide the event of the ſecond trial, the party ſucceeding is not entitled to receive them. Maſon *v.* Skurray, Tr. Ter. 20 Geo. 3. B.R. 2 *Doug.* 437.

So where a caſe is reſerved, and from the inſufficient ſtate of it, it is neceſſary to ſend it down to a ſecond trial, and nothing is ſaid reſpecting the coſts, the party ſucceeding on ſuch ſecond trial is not entitled to the coſts of the firſt; for this comes within the general rule, where, on ſending a cauſe down to be re-tried, and nothing is ſaid reſpecting the coſts, the party ſucceeding on the ſecond trial is not entitled to the coſts of the firſt. Hankey *et al.* Aſſignees of John and Benjamin Vaughan, *v* Smith *et al.* Mic. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 507.

So in this caſe, a ſpecial caſe was reſerved, but that not being ſufficiently ſtated, the court ſent it down to be tried again, without ſaying any thing reſpecting the coſts; and the maſter only allowed the coſts of the ſecond trial. THE COURT were of opinion, that the rule eſtabliſhed by the above caſes, *Maſon* v. *Skurray*, and *Hankey* v. *Smith*, ought to govern the preſent. Smith *v.* Hale, Mic. Ter 35 Geo. 3. B. R. 6 *Ter. Rep.* 71.

But where after the argument of a ſpecial caſe, the Court directed a new trial, becauſe the caſe was inſufficiently ſtated; and the defendant, without going to trial again, gave the plaintiff a cognovit; THE COURT held, that the defendant was liable to pay the coſts of the former trial; and ſaid that this was diſtinguiſhable from the foregoing caſes: they therefore made a rule abſolute for the maſter to review his taxation, and allow theſe coſts. Booth *v.* Atherton, Hil. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 144.

Where a cauſe having been once tried, a new trial is granted, but a juror withdrawn, on the party, who gained the verdict at the firſt trial, undertaking generally to pay the other his coſts, ſuch an undertaking includes only the coſts of the ſecond trial.—At the firſt trial of this cauſe, the plaintiff had a verdict. Afterwards a new trial was granted, but a juror withdrawn, the plaintiff undertaking "to pay the defendant his coſts" (which were the words of the order of *niſi prius*). And *The Court* held clearly, that the undertaking of the plaintiff extended only to the coſts of the ſecond trial. Rouſe *v.* Bardin, *et al* Ea. Ter. 31 Geo. 3. C. B. 1 *Hen. Black.* 639.

This determination was founded ſolely on the terms of the undertaking of the plaintiff. But the practice of the court of C. B. is, that where the ſame party who gains the firſt verdict, has alſo the ſecond, the prothonotary allows the coſts

of both trials; but where the first verdict is for one party, and the second for the other, there the costs of the former trial are not allowed, 1 *Hen. Black.* 639. (n. *b.*)

Parker *v.* Wells, Ea. Ter. 25 Geo. 3. C.B. 1 *Hen. Black.* 639.

This action of trespass was tried by a special jury, and a verdict found for the defendant. In the next term, a motion was made for a new trial, on the ground of the verdict being contrary to evidence, and a new trial granted, *the rule being silent as to costs.* It was tried a second time in *Middlesex*, by a special jury, and a verdict again found for the defendant. An application was again made for a new trial, in order to have a special verdict, to take the opinion of the court of King's Bench on the point of law which arose. *The Court*, with the consent of the parties, and to save expence, instead of granting a new trial, made a rule that judgment should be entered for the plaintiff with 1*s.* damages, and that a special verdict should be agreed upon. In taxing the costs on the *postea*, the prothonotary disallowed the costs of the first trial, and of the rule granting a new trial, with which the plaintiff's attorney being dissatisfied, applied to the Court for a rule to review the taxation. Lord *Loughborough* at first seemed to think the costs of the first trial ought to have been allowed, but directed the prothonotary to inquire, and report what was the practice in the King's Bench. Upon inquiry it appearing, that in the King's Bench, the costs of the first trial were not allowed, even where the second verdict followed the first, the Court said the prothonotary had done right, and refused the rule.

Trelawney *v.* Thomas, Ea. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 641.

So in this cause, where there were two trials, and in both a verdict was found for the plaintiff, and the costs of both were allowed him by the prothonotary, the rule for the second trial being entirely silent as to costs. *The Court* confirmed the practice above mentioned in *Parker* v. *Wells*, that where there are two trials, and the verdicts are the same way in each, the party in whose favour they are found, is entitled to the costs of both trials; but where the verdicts are different ways, there the costs of the former trial are not allowed.—Rule refused.

Swinglehurst *v.* Altham *et al.* Hil. Ter. 39 Geo. 3. B. R. 2 *Ter. Rep.* 138.

But where a cause has been referred by rule of *Nisi Prius, and the costs are directed to abide the event*, that must be taken to mean the *legal event.*—Upon a motion, that the master should tax full costs upon an award for the plaintiff, in a cause which had been referred at *Nisi Prius*, it appeared, that this was an action of trespass for pulling down the plaintiff's gate, and that the declaration contained five counts, the fourth and last of which also included an assault upon the plaintiff. Justifications were pleaded to all but the fourth, under different rights of way; and not guilty was pleaded to the whole. *On the reference the costs were directed*

titled to abide the event. The arbitrator afterwards awarded an occupation way to the defendants, over the plaintiff's closes; and that inasmuch as one of the assaults committed by the defendants was when he was passing with a cart and horses, the arbitrator awarded five shillings to be paid by the defendants to the plaintiff for that injury.—For the defendant, on shewing cause against the rule, it was contended, that the costs being to abide the event, must be taken to mean the *legal event*; and that as the arbitrator had only awarded five shillings, the plaintiff was not entitled to any more costs than damages, in the same manner as if a verdict had been found for so much. In support of the rule it was observed, that this was not a mere action for the assault, but that the ground of it was to try a right of way; and therefore, supposing the arbitrator to have been substituted in the room of the judge, he has, in effect, certified (1) that the assault was proved. PER CUR. The event of the suit must be taken to mean the legal event. Where the costs are directed to abide the event, they are not left in the discretion of the arbitrator, but must follow the rule of law. It appears strongly on the award, that the assault found was committed in the closes of the plaintiff, in asserting the way justified in the pleadings, and negatived by the arbitrator: but though we may think that was the fact, yet the way found must be intended to be the way pleaded, and that goes to the assault justified; so do the footways confessed. The assault found then must refer to the fourth count, to which there is no justification. On this we must take it, that there has been a verdict for the plaintiff of five shillings damages. But we cannot consider this finding of the arbitrator as the certificate of a judge under the statute 22 & 23 *Car.* 2. Then the damages awarded being under 40*s.* the plaintiff cannot be entitled to any more costs than damages.—Rule discharged.

To this action of trespass, the defendant pleaded the general issue, and three special pleas of justification. At the trial, a verdict was given for the plaintiff on the general issue and the two justifications, and for the defendant on the last justification. In the last term, a rule was made to enter up judgment for the plaintiff on the general issue, and the two first pleas of justification, notwithstanding the verdict for the defendant on the last justification, the same being insufficient in point of law (2). A rule had been obtained to shew cause, why the master in the taxation of costs should not allow such costs only as were incurred upon the issues

Kirk *v.* Nowill *et al.* Ea Ter. 26 Geo. 3. 1 *Ter. Rep.* 266.

(1) 22 & 23 *Car.* 2. c. 9.

(2) *Ante*, vol. i. p. 520.

found for the plaintiff, without allowing to the plaintiff any coſts upon the iſſue found for the defendant; and after cauſe ſhewn, BULLER, J. ſaid, all the late caſes are againſt the plaintiff. If the judgment had been arreſted, no coſts would have been given. The reaſon is obvious; the plaintiff has contributed to the coſts as well as the defendant. He ſhould have demurred to the defendant's plea, and by going on to trial, he is equally in fault. PER CUR.—Ruſe abſolute.

Duberley *v.* Page *et al.* Ea. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 391.

If one of ſeveral pleas pleaded by a defendant be adjudged bad on a demurrer to the plaintiff's replication, the plaintiff is entitled to have the coſts of thoſe pleadings deducted from the coſts taxed for the defendant upon the *poſtea*, if afterwards upon trial of the iſſues joined on the other pleas, the defendant ſhould have a verdict, even though it ſhould appear on the whole of the record, that the plaintiff had no cauſe of action.—Treſpaſs for breaking and entering a cloſe, lately part of a waſte in the manor. *The defendants pleaded not guilty*, and alſo ſeveral juſtifications; one, under a right of common, to which *the plaintiff replied a right of approving in the lord*, leaving a ſufficiency of common; another, under *a right of digging ſand or gravel upon the waſte*, which was traverſed by the replication. *The defendants alſo pleaded* a cuſtom within the manor, that if any perſon has been deſirous to approve or encloſe any part of the waſte of the manor, obtaining the conſent and licenſe of the lord, he might be preſented by the homage of the court baron at a general court; and if the homage thought that ſuch encloſure would be of no prejudice to any of the tenants, &c. of the manor, it hath been the cuſtom to preſent that ſuch perſon, ſo obtaining the conſent and licenſe of the lord, might encloſe the ſaid parcel of the ſaid waſte, and a fine, or rent, hath been ſet on ſuch perſon by the homage; the plea then ſtated, that the homage had not preſented any ſuch perſon, &c. *Replication*, that the lord had a right to encloſe the ſaid parcel under the ſtatute of *Merton*, and did approve the ſame, there being left common ſufficient for all perſons having a right, &c. To this the defendants demurred ſeverally, and joinder by the plaintiff. Judgment was given for the plaintiff on the demurrers; and afterwards the cauſe went to trial on the ſeveral iſſues which had been taken. And the iſſues relating to the defendants preſcriptive right to dig gravel and ſand being found for them, the jury were diſcharged from giving any verdict on the other iſſues, on the ground that the lord could not encloſe under the ſtatute of *Merton* againſt ſuch a right, or any right of eſtovers (1). The maſter taxed the de-

(1) *Ante*, p. 569.

fendant's

fendant's costs on the *postea*, but did not allow them the costs of the demurrers. It was, on the part of the plaintiff, now moved, that the master might tax the plaintiff the costs occasioned by the demurrers, and that the amount of such taxed costs might be deducted out of the costs allowed to the defendants on the *postea*. And it was contended, that under the 4 *Ann.* c. 16. the plaintiff was entitled to the costs of the demurrer which had been adjudged for him, notwithstanding the defendants were entitled to judgment on the whole record: for that the 4th section of that statute allows to the party defending the liberty of pleading double; but the 5th section provides, that, if such matter shall on demurrer joined be adjudged insufficient, costs shall be allowed at the discretion of the Court. PER CUR. The question now is, Whether under the statute of *Anne*, the plaintiff has a right to the costs of the demurrers which were adjudged in his favour? Before this act of parliament, only one plea could be pleaded, when records were of course less expensive than they are at present. The meaning of the legislature in passing that act was, that though they would grant an indulgence to a defendant, by permitting him to plead several pleas, yet it should not be prejudicial to the plaintiff; and, therefore, the costs of double pleadings are by the statute left in the discretion of the Court. Then it is material to consider, whether, under this clause of the act, the *quantum* of the costs only is left to the discretion of the Court, or whether a discretion is vested in them whether they will or will not allow any costs at all. We are of opinion, that on this clause the plaintiff is entitled to costs, and that the *quantum* only is in the discretion of the Court. The form of entering the judgment for costs in all cases, states it to be by the discretion of the Court, but that is only as to the *quantum*. With regard to the latter part of this clause, if a verdict had been found for the plaintiff on the issues, *primâ facie* he would have been entitled to costs: and there is no instance of a judge at *nisi prius* certifying in favour of the party pleading double, when the issues on those pleadings are found against him; for it is but just that the party who has created that expence should pay it. Then it is said, that the plaintiff should not have argued the demurrer till after the issues had been tried, in order to avoid the expence of the demurrer; but that argument is not well founded, because an expence is immediately incurred by the pleadings. The plaintiff had a right to argue the demurrer, either before or after the trial; in fact it is better to argue it before the trial, because a demurrer may put an end to the whole. This falls very much within the reasoning in the case of *Dodd* and *Jodrell* (1), which was argued in the last term,

(1) *Infra.*

where the defendant in replevin was allowed the costs of the issues found for him out of the general costs of the verdict, though some issues were found for the plaintiff, which entitled him to judgment. There the Court reasoned on the plea itself, holding every thing afterwards to be consequent upon it. In the present case, the demurrer was in consequence of the bad plea pleaded by the defendants; and as the plaintiff had judgment on that plea, he is likewise entitled to the costs of it.—Rule absolute.

Davies *v.* James, Mic. Ter. 27 Geo. 3. B R. 1 *Ter. Rep.* 371.

Where a defendant removes proceedings by *recordari facias loquelam*, from a county court into one of the superior courts, and signs judgment of *non pros* in default of the plaintiff's appearing, he is entitled to costs.

And where by the writ each party has a day to appear in court, and the defendant may be damnified by the plaintiff's not appearing, he may appear and demand him; and if the plaintiff do not appear, the defendant is entitled to sign judgment of *non pros*, and to have his costs.

This was an action brought in the county-court of Monmouth, and removed by the defendant into this court by *recordari facias loquelam:* on which the plaintiff's attorney obtained an order for time to declare; and, within a few days afterwards, hearing from the plaintiff that he would not proceed, because the cause in the inferior court had been commenced to recover only three shillings, gave notice thereof to the defendant's attorney, who signed judgment of *non pros*.—The defendant had obtained a rule to shew cause, why the master should not tax his costs; and cause was shewn. Buller, J. The master thought, in this case, that he was not at liberty to tax the defendant his costs under the 13 *Car.* 2. st. 2. c. 2; and I agree with him in that; because, that act is confined to suits commenced in the superior courts. But a prior statute (1) makes this matter very clear, which says, that if a party be entitled to his judgment, he is entitled to costs. Then the question is, whether the defendant be entitled in this case to his judgment? That depends on the nature of a *recordari*. Now there is no distinction between an *habeas corpus* and a *recordari* as far as relates to this point; for an *habeas corpus* does remove the suit. Lord Chief B. *Gilbert*, in his Law of Replevin (2), says, on an *habeas corpus* the plaintiff must follow the body of the prisoner.—The general rule is, that where by the writ each party has a day in court, and the defendant may be damnified by not appearing, he may appear and demand the plaintiff, and this even

(1) 4 Jac. 1. c. 3. (2) 148.

though

though the writ be not returned; as upon a *capias*, *exigent*, or *diſtringas*. 38 *Ed.* 3. 20. 3 *H.* 7. 8. *pl.* 10. *Gilb. Law of Rep.* 131. Then what is a writ of *recordari?* It is a ſummons to both parties; for it requires the ſheriff to record the plaint, to have it in court on a certain day, and to prefix that day to both parties, that they may be there. *Fitz. N. B.* 70. By this writ, therefore, both the parties have a day; and the defendant, being bound to appear, may be damnified if he does not: then if the plaintiff do not appear, the defendant is entitled to judgment. It follows from hence that he is likewiſe entitled to his coſts; not, indeed, on the ſtatute of *Charles* the Second, but on that of 4 *Jac.* 1. c. 3.; whereby, if any perſon ſhall commence any action in any court, wherein the plaintiff or defendant might have coſts, in caſe judgment ſhould be given for him, and the plaintiff after appearance be non-ſuited, or a verdict paſs againſt him, then the defendant ſhall have his coſts. The words of the ſtatute "in any court" are not confined to *ſuperior courts*. PER CUR. Rule abſolute (1).

Greetham, widow, *v.* the Inhabitants of the Hundred of Theale, Tr. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1723.

Wherever a plaintiff would be entitled to coſts, the defendant is ſo reciprocally.—This was an action brought by the party grieved, againſt the inhabitants, on 9 *Geo.* 1. c. 22. ſ. 7. for ſatisfaction and amends for the damages ſuſtained by the maliciouſly ſetting on fire a barn and outhouſe belonging to the plaintiff: in which action, the plaintiff was non-ſuited; and on an application by the defendants to the maſter, "To tax the coſts of the nonſuit," he doubted, "Whether "the defendants were entitled to them." And on a motion that the maſter might tax them: THE COURT held, that wherever the plaintiff would be entitled to coſts, the defendant is ſo reciprocally: that here, the plaintiff, the party grieved, *would have been entitled*; and therefore, as it was mutual and reciprocal, he was liable.

ASTON, J. however, afterwards ſaid, in the caſe of WILKINSON *v.* ALLOT (2), that ſome of the judges thought, after the above caſe had been decided, that the Court had quite miſtaken and miſapprehended the ground of it: that he and WILMOT, J. thought ſo, upon talking it over afterwards, and were for ſetting the matter right, but the

(1) To a queſtion from the bar the next day, Whether it was to be underſtood that the deciſion had been made ſolely on the ground of the plaintiff's having appeared in this court by the order for time to declare. The Court (*Aſhhurſt* and *Buller*, Juſtices) anſwered in the negative.

(2) Mic. Ter. 16 Geo. 3. B. R. *Cowp.* 367. *Vide* that caſe in following page.

coſts were taxed: that the miſtake upon which the Court went, was, that the plaintiff being *the party grieved*, would have been entitled to coſts if he had recovered; and, therefore, having failed, ought to pay coſts to the defendant. But, in fact, the plaintiff would not have been entitled to coſts on the ſtat. 9 *Geo.* 1. c. 22. ſ. 7. upon which that action was brought, becauſe it is a ſtatute ſubſequent to the ſtatute of Glouceſter, which gives coſts only where damages were before recoverable. Now, before the ſtat. of 9 *Geo.* 1. c. 22. no demands were recoverable for what is here made the ſubject of an action againſt the hundred; therefore, the plaintiff could not have had coſts if he had ſucceeded, and, conſequently, the defendant was not entitled to any under the ſtat. 4 *Jac.* 1. c. 3. His Lordſhip added, that he would not have that caſe therefore conſidered as a precedent; becauſe, the Court afterwards found, that they had miſapprehended the ground upon which they determined it.

Jackſon v. The Inhabitants of Caleſworth, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 71.

But in this caſe, which was an action grounded on the 9 *Geo.* 1. c. 22. for ſetting fire to the plaintiff's houſe, wherein damages to the amount of 191*l.* had been recovered. A rule having been obtained, calling on the defendants to ſhew cauſe why the coſts of this action ſhould not be taxed: cauſe was ſhewn, and it was obſerved, that the authority of the caſe of *Greetham* v. *Theale* was greatly ſhaken by what fell from Mr. Juſtice *Aſton* as above (1). But WILLES, J. ſaid: This point on looking into the books, appears to have been determined. *Pilford*'s caſe, 10 *Co.* 115. b. is the only one which bears the other way, which Lord Ch. J. *Willes* ſeemed ſtrongly inclined to over-rule in the caſe in 2 *Wilſon*, 92 (2). It has been the conſtant uſage to give coſts in actions on the ſtatute of hue and cry. And wherever damages are given, coſts ought to follow of courſe. BULLER, J. Lord *Coke* in his 2 *Inſt.* 289. lays down a rule different from that in *Pilford*'s caſe; for he ſays, "This "clauſe (ſpeaking of the ſtatute of Glouceſter) doth ex-

(1) See p. 759. *ſupra.*

(2) In 2 *Wilſ.* 92. Mr. Juſtice *Buthurſt* ſaid, "that the ſtatute of hue and cry "did not create damages, but only gave the party robbed a diffe rent remedy from "that which he had before, for the party robbed before that ſtatute might have "had an action againſt the hundred for not keeping watch and ward."

But in the preſent caſe of *Jackſon v.* the Inhabitants of Caleſworth, the Court ſeemed inclined to think that no ſuch action againſt the hundred would have lain for not keeping watch and ward before the ſtatute; they not being a corporation. And Mr. Juſtice *Buller* in particular ſaid, he doubted whether ſuch an action againſt the hundred, as that mentioned by Mr. Juſtice *Buthurſt*, had ever been brought.

"tend

" tend to give coſts, where damages are given to any defend-
" ant or plaintiff by any ſtatute made after this parliament."
—Rule abſolute.

So where a *qui tam* informer on the ſtat. 21 *Hen.* 8. c. 13. for non-reſidence is non-ſuited, the defendant is entitled to coſts. In debt upon the ſtat. 21 *Hen.* 8. c. 13. for non-reſidence, the defendant pleaded the general iſſue, and at the trial the plaintiff was non-ſuited: the plaintiff afterwards obtained a rule to ſhew cauſe, why the maſter ſhould not be reſtrained from taxing the defendant his coſts; and in ſupport of the rule it was inſiſted, that as the plaintiff, if he had recovered, would not have been entitled to coſts, it was neither legal nor juſt, nor reciprocal, that in the event of his having failed, he ſhould pay coſts to the defendant. That by the ſtat. 24 *Hen.* 8. c. 8. a defendant can have no coſts on a nonſuit or a verdict, where the plaintiff ſues to the king's uſe, which was the caſe here; becauſe half the penalty belongs to the king. On the other ſide, the ſtat. 23 *Hen.* 8. c. 15. ſ. 1, and ſtat. 4 *Jac.* 1. c. 3. ſ. 2. were mentioned; but the ſtat. 18 *Eliz.* c. 5. ſ. 3. was relied chiefly on as having expreſsly provided, " That where *any informer*, on any penal ſtatute, " ſhall be non-ſuited, he ſhall pay to the party defendant his " coſts and charges, &c." Lord MANSFIELD, It is a certain principle, that the king himſelf neither pays nor receives coſts in any caſe; but this is not a ſuit proſecuted by the king, though he would have been entitled to a moiety of the penalty, if it had been recovered; but it is the ſuit of a common informer. The ſtat. 23 *Hen.* 8. c. 15. is out of the caſe; but the ſtat. 18 *Eliz.* c. 5. is deciſive: in theſe *qui tam* actions there is liberty given to the informer by the ſame clauſe of the ſtatute as provides for coſts, to compound for the offence with leave of the Court, which ſhews they are common informers. The plaintiff ought to pay coſts, and alſo the coſts of this motion. *Aſton*, J. The diſtinction taken in the books is this, whereſoever a ſtatute, ſubſequent to the ſtatute of Glouceſter, increaſes damages to double or treble value, where damages were before given, the plaintiff ſhall recover coſts, and theſe coſts ſhall alſo be doubled or trebled as the ſtatute may be; but where ſingle, double, or treble damages are newly given by ſuch ſubſequent ſtatute, *where no damages were formerly recoverable*, there the plaintiff ſhall recover thoſe damages only, and no coſts; becauſe, the ſtatute of Glouceſter does not operate to add coſts to what is given by ſuch ſubſequent ſtatute, 2 *Inſt.* 289. *Gilb. Hiſt. C. B.* 258, 259. *Aſhhurſt*, J. The object of this ſtatute was to prevent vexation in common informers; and, therefore, in that reſpect, there is no difference between a common

Wilkinſon, q t. v. Allot, Mic. Ter. 16 Geo. 3. B. R. *Cruſt.* 366.

mon informer *qui tam*, and one who is intitled to the whole penalty; for he may be just as vexatious when he prosecutes on the behalf of the king and himself jointly, as when he sues on his own separate account.—Rule discharged.

Ward v. Snell, Ea. Ter. 28 Geo. 3. C.B. 3 *Hen. Black.* 10.

So in debt for the penalty of the *habeas corpus* act, 31 *Car.* 2. c. 2. s. 5. against the defendant, who was keeper of Colchester gaol, for refusing the plaintiff (being the party grieved) a copy of the warrant of commitment. Plea *nil debet*.—Verdict for the penalty 100*l.* but no damages nor costs. On a rule to shew cause why the prothonotary should not tax the plaintiff his costs, and cause shewn, Lord LOUGHBOROUGH said, The statute of Gloucester is a remedial act, and ought to have a favourable interpretation. The penalty in the present case accrues to the party grieved before action brought, who having recovered a debt, is entitled to the costs attending such recovery. GOULD, J. Costs are in the nature of a satisfaction. This is not a popular action; it is like an action on a bond to recover a debt already due, a right of action vests in the party grieved as soon as the grievance is committed; but it is otherwise of a common informer, who has no interest till judgment. HEATH and WILSON, justices, of the same opinion.—Rule absolute.

Cresswell, v. Hoghton, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 355.

So in this case, which was an action upon the case against the defendant as sheriff of the county of Lancaster, for refusing to take bail under the stat. 23 *Hen.* 6. c. 9. wherein the plaintiff had obtained a verdict, with 40*s.* damages. A rule having been obtained, calling on the plaintiff to shew cause why the master should not be restrained from taxing the plaintiff his costs. Cause was shewn, viz. that this action was founded on the 23 *H.* 6. c. 9. which directs, "that the sheriffs, &c. shall let out of prison all manner of "persons by them arrested, or being in their custody, by "force of any writ, &c. in any action personal, &c. upon "reasonable sureties of sufficient persons, &c.;" and that all sheriffs, &c. acting contrary to the statute shall lose to the party in this behalf, indamaged or grieved his treble damages, and shall forfeit 50*l.* half to the king, and half to the informer. AND THE QUESTION was, Whether the plaintiff, the party grieved, having recovered damages, is entitled to his costs under the statute of Gloucester (1), which gives costs in all cases where the party is to recover damages? Lord KENYON, Ch. J. No answer has been given to the proposition laid down by the plaintiff's counsel, that the party, in such a case as the present, might have recovered damages before the

(1) 6 *Ed.* 1. c 1.

statute

ſtatute of Glouceſter, provided he took the proper means to compel the ſheriff to take bail, namely, by ſuing out a writ of mainpriſe. In the caſe of *Witham* v. *Hill*, reported in 2 *Wilſ.* 91. Lord Ch. J. WILLES ſaid, I agree that where a ſtatute ſubſequent to the ſtatute of Glouceſter gives an action in a caſe where no damages were ſuſtained before, the plaintiff is not entitled to coſts: but in all caſes where the party ſuſtains a damage, and a ſubſequent ſtatute gives the remedy, the party is entitled to coſts. Therefore I am of opinion, that *wherever the party has ſuſtained damage, and a new act gives another remedy, ſuch a party may recover coſts as well as damages.* In ſuch a caſe as the preſent, before the ſtat. *Hen.* 6. if the ſheriff did an injury to the party arreſted by not taking bail, the latter had a remedy againſt the ſheriff; for, in general, wherever an injury is done by one perſon to another, a right of action accrues to that other. And though a preliminary ſtep was to be taken by the party arreſted, to compel the ſheriff to take bail before the ſtatute of *Henry* the Sixth, as ſuing out a writ of mainpriſe, yet after having taken that ſtep the party might have maintained an action againſt the ſheriff, and recovered damages, &c. All that this ſtatute did was to clear the way, to take away the neceſſity of ſuing out a writ of mainpriſe, and to give treble damages to the party grieved; but as the party ſuſtained damages before, and might have maintained an action againſt the ſheriff, the coſts are given by the ſtatute of Glouceſter. Several caſes, however, have been mentioned by the defendant's counſel, to ſhew that the plaintiffs cannot recover coſts in thoſe actions, becauſe the actions were given by ſtatutes ſubſequent to the ſtatute of Glouceſter; but in thoſe the party had no right of action before. The caſe of *quare impedit* was conſidered as a queſtion of mere ſpiritual concern. So in the caſe of tithes; they could not be recovered in the temporal courts before the reign of *Edward* the Sixth. But thoſe caſes are diſtinguiſhable from the preſent; where, before the ſtatute of Glouceſter, damages might have been recovered; and then the coſts follow by that act. GROSE, J. agreed.—LAWRENCE, J. It is a general principle, that where an act of parliament impoſes a duty, and any perſon is prejudiced by the non-performance of it, the party injured may recover damages and his coſts. This has been the practice under many acts of parliament paſſed ſince the ſtatute of Glouceſter. Here the act of parliament impoſed a duty on the ſheriff to take bail; and for the non-performance of that by the ſheriff, the party grieved is entitled to recover damages and coſts. In the caſe of penalties, a diſtinction has been taken between thoſe caſes where the penalty is given to the party grieved, and thoſe where it is given to a common informer. That diſtinction was taken in *Ward* v. *Snell*; where the Court ſaid, that the inſtant the thing was done which occaſioned

casioned the penalty, it was a debt at common law: so here, if the sheriff did not do his duty by taking bail, an action might have been brought against him before the statute of Gloucester, and consequently the plaintiff is entitled to his costs under that act.—Rule discharged.

Tyte *v.* Glode, *et al.* Sheriff of Middlesex, Ea. Ter. 27 Geo. 3. B. R. 7 *Ter. Rep.* 267.

So in this case, which was an action on the stat. (1) 29 *Eliz.* c. 4. against the sheriff for treble damages, for taking more upon a levy of execution upon the plaintiff's goods than the fees allowed by that act. The declaration, after setting forth the necessary proceedings in the former suit, stated, that "nevertheless the defendants, not regarding their duty, nor "the statute in such case made and provided, received and "took of the plaintiff, for executing the said execution, "more or other consideration and recompence than in the "said act is limited and appointed in that behalf, viz. 15*s.* 6*d.* "more than in the said act is limited, whereby the plaintiff "is endamaged and aggrieved to the amount of the said "15*s.* 6*d.*; contrary to the form of the statute," &c. The plaintiff obtained a verdict, and had judgment for his treble damages under the statute, and the master taxed costs for him. On a motion, that the master might review his taxation, on the ground that no costs were due in this case under the stat. of Gloucester (2), and none were given by the act of *Elizabeth*, on which the action was framed; the Court were clearly of opinion, that there was no foundation for the motion; for that the rule was established in the foregoing cases, of *Witham* v. *Hill*, *Jackson* v. *The Inhabitants of Calsworth*, *Ward* v. *Snell*, and *Cresswell* v. *Hoghton*, that where by any act since the statute of Gloucester an action is given to the party grieved, he is entitled to costs if he succeed, though he had no remedy before such act. And therefore they refused the rule.

Barnard *v.* Moss, Hil. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 107.

In an action of debt on the stat. 2 & 3 *Ed.* 6. c. 13. to recover treble the value of tithes not set out: there was also a count for the single value. The defendant demurred to the declaration, but the parties afterwards agreed to submit to arbitration, and judgment was entered to stand as a security for costs. The arbitrator determined the single value of the tithes to be 6*l.* 17*s.* 6*d.* and awarded treble that sum to the plaintiff, viz. 19*l.* 2*s.* 6*d.* together with the costs of the reference, and that he might sue out execution. It was now moved, that the prothonotary might tax the costs of suit to the plaintiff, on the ground of the stat. 8 & 9 *W.* 3. c. 11. sect. 3. which enacts, "that in all actions of debt "upon the statute for not setting forth of tithes, wherein "the single value or damages found by the jury, shall not

(1) In 1 *Salk.* 331. it is said, that it appears by the parliament rolls to have passed in the 28 *Eliz.*

(2) 6 *Ed.* 1. c. 1.

"exceed

" exceed the ſum of 20 nobles (6*l.* 13*s.* 4*d.*), the plaintiff " obtaining judgment, or an award of execution, after plea " pleaded, or demurrer joined, ſhall likewiſe recover his coſts " of ſuit." The Court held, that the ſtatute was confined to the caſe of the ſingle value or damages being found by a jury, and therefore refuſed the rule, as far as it reſpected the counts for the penalty, but allowed the coſts to be taxed on the count for the ſingle value.

An award of " coſts ſuſtained in the action," does not include the coſts of the reference.—This cauſe being at iſſue, the parties ſubmitted to arbitration. The arbitrator awarded to the plaintiff 24*l.* damages, and the " coſts by him ſuſ- " tained in the ſaid action to be taxed by the proper officer." The prothonotary refuſed to allow the coſts of the reference, or any other, except thoſe of the action, as between party and party. AND THE COURT ſaid there was no precedent for the coſts of the reference to be included in an award, of coſts of the action; and they held, that theſe words were confined to the coſts of the action. Browne v. Marſden *et al.* Ea. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 223.

If the plaintiff enter a *noli proſequi*, the defendant is entitled to coſts under the 8 *Eliz.* c. 2. ſect. 2.—After this action was brought, and the declaration delivered, the plaintiff diſcovered that the defendant was an infant, and entered a *noli proſequi*; on which it was moved, that the defendant might be allowed his coſts under 8 *Eliz.* c. 2. ſect. 2. " which " gives the defendant coſts, if, after declaration, the plaintiff " ſhall ſuffer the ſuit to be diſcontinued, or otherwiſe ſhall " be nonſuit in the ſame." And the Court ſaid, that the caſe of a *noli proſequi* could not be diſtinguiſhed in reaſon from that of a diſcontinuance; for that in this, as well as in that, the party might afterwards commence another action for the ſame cauſe; and that the practice had been, to give coſts in ſuch caſes.—Rule abſolute. Cooper v. Tiffin, Mic. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 511.

If there be two defendants in an action of *aſſumpſit*, one of whom ſuffers judgment by default, and the other obtains a verdict, he who obtains the verdict is entitled to coſts.—In this action of *aſſumpſit* for goods ſold and delivered, one of the defendants ſuffered judgment to go by default, and the other gained a verdict; but the judge did not certify that there was reaſonable cauſe for making him a defendant, according to ſtat. 8 & 9 *W.* 3. c. 11. ſect. 1. The prothonotary having allowed coſts to him who obtained the verdict, a rule was granted to ſhew cauſe, why the taxation ſhould not be reviewed. *Per Cur.* There is a material difference between actions founded on torts, and thoſe on contracts of this kind, viz. torts are joint and ſeveral, ſo that one defendant may be acquitted, and the other found guilty; but for contracts being joint where there are two defendants in an action on a contract, one cannot have a verdict without a demon- Shrubb v. Barrett *et al.* Ea. Ter. 32 Geo. 3. C. B. 2 *Hen. Black.* 28.

demonſtration that there was no cauſe of a joint action againſt both. It is immaterial, therefore, that in the preſent caſe judgment went by default againſt one defendant, ſince the other obtained a verdict. 1 *Lev.* 63. 1 *Siderf.* 76. 1 *Keb.* 284. are authorities to this point in an action of covenant, and *Pract. Reg. C. P.* 102. in an action of *aſſumpſit.*

Rex *v.* Heydon, Head and Rope, Hil. Ter 2 Geo 3. B. R. 3 *Burr.* 1304.

Coſts for not going to trial, ſhall be paid to a defendant, by the courſe of the Court on informations for miſdemeanors, where the proſecutor does not countermand notice of trial in time.—In this caſe it was moved to diſcharge a rule for referring it to the maſter, "To tax coſts to be paid to the "defendants, for the proſecutor's not going on to trial." Theſe were three informations for bribery at an election to parliament. And the motion was made, firſt, on a point of law; ſecondly, upon the merits. And, firſt, It has been urged, that there were no coſts at all upon informations, before the ſtatute of 4 & 5 *W.* & *M.* c. 18. And by that act, ſect. 3. the Court have no authority to give coſts againſt the proſecutor, till he ſhall have neglected to proſecute, with effect, for the ſpace of a year: the words of it are—"In caſe the proſecutor "ſhall not, within one whole year next after iſſue joined, pro-"cure the ſame to be tried." But this was within the year. Secondly, That the merits were, that the adverſe party detained the books, which were the proſecutor's only evidence: which detention obliged the proſecutor to withdraw his record, and was the only reaſon of his not going on to trial. *Per Cur.* Firſt, by the conſtant courſe of the Court, the defendant is entitled to coſts, if the proſecutor gives notice of trial, and neither goes to trial, nor countermands it in time: and no inſtance can be produced to the contrary.—Secondly, Yet if the defendant had drawn the proſecutor in, "to give notice of trial," by giving him hopes of producing any books; that might be a reaſon for not giving the defendant any coſts. But no ſuch thing appears in this caſe. Therefore there is no reaſon to except this out of the general rule.

Rex *v.* Righton, Ea. Ter. 5 Geo. 3. B. R. 3 *Burr.* 1694.

Coſts are not payable for not going to trial on a traverſe according to notice, if they be not occaſioned by the party's own default.—This was a motion for the defendant, to ſhew cauſe why he ſhould not pay the proſecutor his coſts by him expended in this cauſe, *for the defendant*'s not going to trial, in purſuance of his notice given for that purpoſe.—It was an indictment for refuſing to take upon himſelf the office of borſholder; and he had obtained a rule for a ſpecial jury; every thing was ready for trial: but only five of the ſpecial jury appeared; and neither ſide prayed a tales; (though the defendant had a warrant for a tales in his pocket).—The Court were unanimouſly of opinion, that the defendant had not been guilty of ſuch a default as could render him liable to pay coſts for not going on to trial: the proſecutor might have come prepared with

with a warrant for a tales, if he had thought proper.—Rule discharged.

The king is only a truſtee for the party, in a forfeited recognizance.—This recognizance had been forfeited; a *ſcire facias* brought upon it; and a *levari facias* iſſued; and the ſheriff returned 20*l.* levied of the goods and chattels of *Bond*, and that *Eyres* had not any goods, &c. It was moved, to tax the proſecutor's coſts; and that they might be paid to the proſecutor out of the ſum levied. The Court gave a rule to ſhew cauſe: but the next day, being apprized how the matter ſtood, and that it was the king's money, they thought they could not make ſuch a rule, and ordered that it ſhould not be drawn up.—On the former motion being renewed, Lord MANSFIELD ſaid, Let the maſter tax the coſts: and let notice be given to the defendant and the bail, to ſhew cauſe why the coſts ſo taxed ſhould not be paid to the proſecutor; and the ſurplus of the money levied be returned to the defendant, or the bail upon whom it was levied.—This is the beſt, and eaſieſt method. The king has no intereſt in this money, he is only royal truſtee for the party.

Rex *v.* Eyres and Bond, manucaptors of Houncel. Tr. Ter. 7 Geo. 3. B. R.. 4 *Burr.* 2118.

On a defendant's acquittal on an information, he is not entitled, under the 4 & 5 *W.* & *M.* c. 18. ſect. 2. to coſts beyond the extent of the recognizance entered into by the proſecutor in 20*l.* under that act.—On an information being filed againſt the defendants, who were juſtices of the peace, for improperly granting an ale licence, *Carter*, the proſecutor's attorney, entered into a recognizance in 20*l.* to proſecute the information with effect, as required by 4 & 5 *W.* & *M.* c. 18. ſect. 2. At the trial at the laſt aſſizes for Surrey, the defendants were acquitted. And the defendants' coſts having been ſince taxed at 54*l.* a rule was obtained to ſhew cauſe why an attachment ſhould not iſſue againſt *Carter* for not paying thoſe coſts. This application was made for the purpoſe of taking the opinion of the Court on the conſtruction of the 4 & 5 *W.* & *M.*; the ſecond ſection of which enacts, " that no information ſhall be filed till the " proſecutor ſhall have entered into a recognizance in the " penalty of 20*l.*; that he will effectually proſecute ſuch in- " formation, and abide by, and obſerve ſuch orders as the " Court ſhall direct; and in caſe the proſecutor ſhall not, " within one year after iſſue joined, procure the ſame to be " tried, or if, upon ſuch trial, a verdict paſs for the defend- " ant, or the informer procure a *noli proſequi* to be entered, " then, in any of the ſaid caſes, the court of king's bench is " hereby authoriſed to award to the defendant his coſts; " and, in caſe the ſaid informer ſhall not within three months " next after the ſaid coſts taxed, and demand made thereof, " pay to the defendant the ſaid coſts, then the ſaid defendant " ſhall have the benefit of the ſaid recognizance to compel " him

The King *v.* Filewood *et al.* Mic. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 145.

" him thereto."—It was inſiſted in ſupport of the rule, that, though the ſtatute limited the recognizance to 20*l.* the Court were expreſsly authorized by the ſtatute to award the whole coſts. ASHHURST, J. delivered the opinion of the Court; and ſaid, that on looking into the act of parliament, and the caſes of the *King* v. *Howell*, *Caſ. Temp. Hardw.* 247. and the *King* v. *Morgan*, *Strange*, 1042. the coſts were limited to the ſum ſpecified in the act, namely, 20*l.*; and there being no authority to the contrary, they were not warranted in giving more than was mentioned in the recognizance. But he intimated, that perhaps in future it might be proper to adopt ſome new rule, ſuch as refuſing to grant any information unleſs the proſecutor will undertake to pay all the coſts in caſe he does not ſubſtantiate his charge; but that was a matter for future conſideration.—Rule diſcharged on paying 20*l.*

Rex v. Brooke. *et. al.* Hil. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 197.

But the Court being moved in this caſe, where an information had been granted againſt the defendants, to compel the proſecutors to give ſecurity for the coſts, in caſe the defendants ſhould be acquitted, over and above the recognizance in 20*l.* required by the 4 & 5 *W.* & *M.* c. 18. ſect. 2. according to what the Court had thrown out in the above caſe of the *King* v. *Filewood*. THE COURT refuſed the application; ſaying, that if any alteration were neceſſary, it had better be done by legiſlative authority, than by an order of the Court.—Rule diſcharged.

Coſts in Replevin.

Ingle v. Wordſworth, *et al.* in replevin, Hil. Ter. 2 Geo. 3. B. R. 3 *Burr.* 1284. 1 *Black. Rep* 355.

One of two defendants in replevin, cannot have his coſts upon acquittal.—One of the defendants having been acquitted by verdict (on a plea of "*non cepit*"), and there being no certificate of the judge "That there was a reaſonable cauſe for making him a defendant, it was moved, on his behalf, that the plaintiff in replevin might ſhew cauſe why the maſter ſhould not tax the defendant's coſts (purſuant to 8 & 9 *W.* 3. c. 11. ſect. 1. "For the better preventing frivolous and vexatious ſuits"), as if a verdict had been given againſt the plaintiff, and all the defendants acquitted. All the other defendants had avowed: and iſſue was taken upon a right of common, which was found for the plaintiff in replevin, viz. "That he had right of common."—The maſter had a doubt whether the action of replevin was within the ſtatute of 8 & 9 *W.* 3. c. 11. ſect. 1. which ſpecifically names only actions of treſpaſs, aſſault, falſe impriſonment, and *ejectione firmæ*.—Cauſe was ſhewn: and the Court took time to conſider of it. Afterwards Lord MANSFIELD delivered their opinion.—We have thought of this caſe. We had a ſtrong bias to have given

given the defendant his costs, if it had been possible; because it is agreeable to natural justice that he should receive them, if there was no reasonable cause for making him a defendant.—But the matter is too fully settled to be now gone into, upon reasons at large.—The statute speaks generally of actions of trespass; and does not particularly specify any actions of trespass that are not trespasses *quare vi et armis*. But this is a case of replevin; which cannot have that latitude of construction put upon it, which has been contended for, consistent with the settled cases.—It has been so settled and established, "That this act, and all acts that give costs, "are to be construed strictly."—The case of *Dibben* v. *Cooke* (1) is not so fully reported in Sir *John Strange* as it really passed. Lord *Hardwicke* gave the solemn judgment of the Court; and declared it to be then settled, "That all the statutes relating "to costs are, and ought to be, construed strictly and ac- "cording to the letter." And he declared, "That actions of "trespass upon the case could not be construed to be within "the act of parliament." And he gave reasons for it: and added, that upon enquiry into the practice of the common pleas, it appeared that the word trespass was there taken only to relate to trespasses *vi et armis*. And trespass upon the case is nearer to trespass *vi et armis* than replevin is; which differs, in many things, from a mere action of trespass.—There is another authority very strong; which is on the writ of error, in the exchequer-chamber, on 27 *Eliz.* c. 8. It is in 2 *Ro. Rep.* 434. (*Farnell*, plaintiff, in second deliverance), which determines a replevin not to be an action of trespass within that act; and that therefore a writ of error would not lie in the exchequer-chamber, upon a judgment in replevin in *B. R.* The argument in the case of *Dibben* v. *Cooke* was, "That actions of trespass upon the case had been holden "to be within the proviso of the statute of limitations; "though as much excluded there as they are here, by so "many other actions being specified in that (2) clause (even "actions on the case for words), and this omitted." But that proviso is to be construed liberally: this statute is to be taken strictly.—I consider this as a point so fully settled, as not to be got over upon any reasoning at large.—Rule discharged.

In this case there were several avowries on the record, and issues joined on all; and the jury having found for the plaintiff on all but one, on which a case was reserved, and upon which the defendant afterwards had judgment; a rule to shew cause why the master should not allow the defendant the full costs on all the issues was moved for; and it was

Stone *v.* Forsyth. Tr. Ter. 21 Geo. 3. B. R. 2 *Doug.* 708. [n. 2.]

(1) V. 2. Sir *J. S.* 1005, 1006.

(2) V. 1. J. 1. c. 16. sect. ult.

contended, that a defendant or avowant in replevin is an actor, and to many purposes considered in law as a plaintiff. That different avowries, therefore, ought to be looked upon as different counts in a declaration, and that when separate issues are joined on different counts, and any one of them is found for the plaintiff, he is allowed the costs of the whole record. That, by sect. 5. of 4 *Ann.* c. 16. if any special matter pleaded by virtue of that statute by any defendant, tenant, or plaintiff in replevin, shall be judged insufficient on demurrer, or found for the plaintiff or demandant on verdict, costs are given; but that it could not be supposed, that, in the general words "defendants or tenants," were included avowants or defendants in replevin; and if they were not included, they ought, upon general principles, to have their full costs in such a case, because, if any one of the avowries is found against the plaintiff, it shews that he had no cause of action. Cause being shewn, THE COURT were clear, that an avowant is a defendant within the meaning of the act, and said, it had always been so considered in the taxation of costs.—Indeed, if it were not so, there would be no authority under sect. 4. to plead different avowries.—See also *Coan* v. *Bowles*, *B. R. H.* 2 & 3 *W.* & *M.* where it was held, that an avowant is not a plaintiff within the meaning of 3 *Hen.* 7. c. 10. so as to be entitled to costs on the affirmance of a judgment in his favour upon a writ of error.—*Carth.* 122. 4 *Mod.* 7. 1 *Show.* 13. 165. 1 *Salk.* 95. 205.

Dodd v. Joddrell, Hil. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 235.

Where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant; the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause for pleading the matter on which those issues are joined.—This was an action of replevin. The defendant pleaded *non cepit*, and then made cognizance as bailiff of *J. Horne*. The plaintiff, after taking issue on *non cepit*, and traversing the defendant's being bailiff of *J. Horne*, pleaded two pleas in bar; the first, a licence to him from *J. Horne* to put his cattle in the place in question; the second, that the place in question was parcel of Postcome-Field, and set up a right of common thereupon. The replication first traversed the licence from *J. Horne* to the plaintiff; and, secondly, protesting against the right of common, traversed the place in question, being parcel of Postcome-Field. The first and last issues were found for the plaintiff; the second and third for the defendant. And the judge, before whom the cause was tried, did not certify that the plaintiff had a probable cause for pleading his pleas in bar; the master, in taxing the plaintiff his costs, having only deducted for the defendant the costs of the third issue; it was moved, that the master should be directed to allow the

defendant

defendant the costs of the verdict, or, at least, to deduct for him the costs of the second, as well as of the third issue. The difficulty arose from the penning of the statute, 4 *Ann*, c. 16. sect. 4 & 5. where the word "avowant" is omitted, though the plaintiff is mentioned. The fourth section gives leave to plead several matters in bar; and the fifth provides, that "if any such matter, upon a demurrer joined, "be judged insufficient, costs shall be given at the discretion "of the Court; or, if a verdict shall be found upon any issue "for the plaintiff or demandant, costs shall be given in like "manner, unless the judge who tried the issue shall certify "that the defendant, or tenant, or plaintiff in replevin, had "a probable cause to plead such matter which, upon the "said issue, shall be found against him." THE COURT were clearly of opinion that the defendant was entitled to deduct the costs of the second as well as of the third issue. And BULLER, J. added, The difficulty of the master seems to have arisen from the term "overpleading;" for he conceives, that although some of the issues are found for the defendant, yet, if the plaintiff did not unnecessarily plead the matter upon which those issues were taken, and was entitled to the general costs of the verdict, the costs of those issues ought not to be deducted. But I take it, that overpleading means pleading matters not true in point of fact, which is found against the party pleading it, and yet he is entitled to a verdict. It makes no difference, whether the plaintiff in replevin pleads new matter out of the cognizance, on which issue is joined, and it is found against him; or whether he takes issue on the cognizance itself, and that is found against him. The general rule is this: where several matters are pleaded by the plaintiff, some of which are found for him, and the others for the defendant, and the plaintiff is entitled to judgment, if the judge who tried the cause certify that there was a probable cause for pleading those pleas, the master is not to deduct the costs of those issues so found for the defendant: but, if there be no certificate, the defendant is entitled to have those costs deducted for him (1).

Where the plaintiff in replevin pleads several pleas in bar of an avowry, on which issues are joined, and one of them is found for him, which establishes his right of action, and the others for the defendant, and the judge does not certify under stat. 4 *Anne*, c. 16. the defendant is entitled to the costs, not only of the pleadings which form, but also of the trial of those issues which are found in his favour. In this action of replevin, the declaration contained two counts, the first for taking sheep at the parish of Mildenhall, in a

Brooke v. Willet, Hil. Ter. 35 Geo. 3 C. B. 2 *Hen. Black.* 433

(1) See *Dubberly* v. *Page*, in p. 756. *supra*.

place called Undley Common; the second, for taking them at the parish of Lakenheath, in a place called Undley Common. To the first count, *non cepit* was pleaded, on which issue was joined, and found for the defendant. To the second, avowry for damage feasant to the defendant's right of common for all commonable cattle, except sheep.—Pleas in bar: 1. A prescription for common for 20 sheep on the *locus in quo*, viz. Undley Common, on which issue was joined and found for the plaintiff. 2. Common by cause of vicinage, on which the issue was found for the defendant; and the judge did not certify that the plaintiff had probable cause for pleading such matter, under 4 *Ann.* c. 16. A rule being granted to shew cause, why the prothonotary should not tax the defendant the costs of those issues which were found for him, and why they should not be deducted from the costs of that issue which was found for the plaintiff, and also from the general costs of the cause to which the plaintiff was entitled, by having one issue found in his favour, by which it appeared that he had a cause of action. After cause shewn, and time taken to consider, THE COURT declared, that it appeared upon enquiry to be by no means the settled practice of the court of King's Bench to confine the statute 4 *Ann.* c. 16. to the costs of the pleadings, in all cases; and that both on the words and spirit of the statute, and on principles of justice, the defendant was entitled to have the costs allowed of the trial of the issue which was found for him, and not of the pleadings alone.—Rule absolute.

Leominster Canal Navigation v. Thomas Norris and Harold, Hil. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 500.

By a canal act, the company were authorized to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross; and the persons from whom the land was to be taken, were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums: an avowant, stating a distress under this act of parliament, has been held not entitled, on obtaining a verdict, to double costs under the stat. 11 *G.* 2. c. 19. sect. 22.—In replevin for taking the goods of the plaintiffs, the defendant, *Norris*, avowed, and the other defendant, *Harold*, acknowledged, the taking, &c. as bailiff to the defendant, *Norris*, and to *E. Norris*. And they stated, that the said *T.* and *E. Norris*, before the passing of a certain act after-mentioned, were seised in fee of two acres of land, with the appurtenances; and were also seised in fee according to the custom of the manor of Orleton, of two other acres of land, with the appurtenances, in Orleton. That by an act, 31 *G.* 3. for making and maintaining a navigable canal through Leominster, &c. the company of proprietors were authorized to make a canal navigable for boats to Kingston, through several parishes therein mentioned; and were empowered to enter on the lands of any person to make a survey, &c. and to set out

out ſuch parts as they ſhould think neceſſary for making the canal, &c. they making ſatisfaction in the manner therein mentioned for all damages to be ſuſtained by the owners and perſons intereſted in ſuch lands, as ſhould be taken, uſed, or prejudiced, in or by the execution of the act. That certain perſons were thereby appointed commiſſioners to determine all queſtions that ſhould ariſe between the company and the perſons intereſted in any lands that ſhould be effected or prejudiced by the execution of the act; and alſo to determine, from time to time, what ſum of money ſhould be paid by the company, either by annual rent, or by a ſum of money in groſs, for the abſolute purchaſe of the houſes, lands, &c. which ſhould be ſet out and aſcertained, or intended to be taken or made uſe of, for making the ſaid canal; and alſo, to determine what other diſtinct ſum of money ſhould be paid by the company as a recompence for any damages which ſhould be ſuſtained by ſuch perſon intereſted, &c. by reaſon of making, repairing, or maintaining, the ſaid canal, &c. in caſe ſuch price or value of damages and recompence, reſpectively, could not be ſettled and agreed for by and between the ſaid company, and the perſons intereſted, &c. That it was by the ſaid act enacted, that ſuch annual rents, or ſums, as ſhould be ſo agreed upon, or ſettled and aſcertained. ſhould be charged on the rates therein granted to the company, and ſhould be paid by them as the ſame ſhould become due; and in caſe ſuch annual rents, or ſums, ſhould not be paid within twenty-one days after they ſhould become due, ſuch perſons were thereby empowered to ſeize and diſtrain any boats, or other effects, of the company which ſhould be found on the canal, or on the wharfs, warehouſes, or other works thereto belonging, and to detain the ſame until payment, &c. The defendants then ſtated that the company, in the execution of the powers given to them by the act, entered into divers lands of the ſaid *T.* and *E. Norris* (ſpecifying them), and ſet out and aſcertained the firſt of them, containing four acres, and divers parts of the ſaid other lands (ſpecifying them) for the making, improving, and completing of the ſaid canal, &c. and took and made uſe of the ſame for the purpoſes aforeſaid. That the annual rent, or ſum, to be paid to the ſaid *T.* and *E. Norris* by the ſaid company, for the ſaid lands, was, in due manner, ſettled and determined by, and between them and the company, according to the meaning of the act, &c. and, upon that adjuſtment ſo made, it was, on the 28th of November, 1791, agreed by and between them and the company, that the company ſhould pay to them for the ſame, until the ſaid company ſhould be poſſeſſed of the ſame by purchaſe, the annual rent or ſum of 2*l.* 10*s.* for every acre, &c. And then they ſhewed, that three years of the ſaid annual rents and payments, amount-

ing to 58*l.* 2*s.* 6*d.* were due on the 2d of February, 1796, for the ſaid lands, the ſame lands not having been purchaſed by the company of the ſaid *T.* and *E. Norris;* and the ſaid rents being unpaid for twenty-one days afterwards, the defendants took the ſaid goods of the plaintiffs as a diſtreſs, &c. —There were ſeven other avowries, varying, in ſome reſpects, from the firſt; but, in all of them, it was alleged that the money was due from the company to *T.* and *E. Norris*, as annual rents.—To the firſt avowry the plaintiffs pleaded in bar; 1ſt, That the defendants, of their own wrong, took the ſaid goods, &c. traverſing, that the company entered into the ſaid lands of the ſaid *E.* and *T. Norris*, and took and made uſe of the ſame for the purpoſes in the ſaid avowry, and cognizance mentioned, &c.; and, 2dly, That the defendants, of their own wrong, took the ſaid goods, &c. traverſing, that the annual rent, or ſum to be paid to the ſaid *E.* and *T. Norris* by the company for the ſaid lands ſet out and aſcertained, and taken by the company, was ſettled and adjuſted by and between the company and the ſaid *T.* and *E. Norris*; and, upon that determination and adjuſtment, it was agreed between the ſaid company and the ſaid *T.* and *E. Norris* in manner above alleged, &c. Nearly ſimilar pleas in bar were pleaded to the other avowries, and iſſue was taken upon each of them.—On the trial at the aſſizes a verdict was given for the defendants; and, in the laſt term. the plaintiffs obtained a rule, calling on the defendants to ſhew cauſe why judgment ſhould not be entered for them, notwithſtanding the verdict for the defendants, on account of the inſufficiency of the avowries. The objection was, that the diſtreſs could not be ſupported as a diſtreſs at common law, becauſe the goods were diſtrained off the premiſes; nor as a diſtreſs under this act of parliament, becauſe the act only gave power to diſtrain for an annual rent, or ſum of money in groſs, for the abſolute purchaſe of the lands, &c.; whereas it appeared here, that this was not an annual rent, or a ſum for the abſolute purchaſe, but merely an annual ſum, until the company ſhould purchaſe the lands.—The Court being of opinion that the act of parliament gave a power of diſtreſs in ſuch a caſe as the preſent, diſcharged the rule.—The maſter having ſince allowed the defendants double coſts, it was moved that he might review his taxation, on the ground, that the defendants were not entitled to double coſts under the ſtat. 11 *Geo.* 2. c. 19. ſect. 22 (1). And the caſe of *Lloyd* v. *Win-*

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(1) After reciting that great difficulties ariſe in making avowries or cognizance upon diſtreſſes for rent, quit-rents, reliefs, heriots, and other ſervices, it is enacted by this ſection, that "it ſhall be lawful for all defendants in replevin to avow or make "cognizance generally, that the plaintiff in replevin, or other tenant, of the land "and

ton (1) was mentioned, where it was holden, that that act did not extend to a seizure for heriot custom. In support of the rule it was contended, that the defendants were not entitled to double costs under the stat. 11 *Geo.* 2. *which applies only to distresses at common law:* whereas this is a *distress under a particular act of parliament*, that allows a distress off the premises. —The Court, after observing that the case of *Lloyd* v. *Winton* was not the case of a distress, and therefore not within the stat. 11 *Geo.* 2. said they would consider of their opinion in this case. And afterwards Lord Kenyon, Ch. J. said, We have considered this case, and are of opinion, that it is not a case within the stat. 11 *Geo.* 2. c. 19.; and, consequently, that the defendants are not entitled to double costs. *Per Cur.*—Rule absolute.

The like point was again decided in the court of C. B. It was replevin of a boat taken belonging to the company. Avowries: 1st, That by the 31 *Geo.* 3. c. 69. the company was authorized to enter into the lands of any person, and set out such parts as they should think necessary for the canal; making a recompence for all damage done by a sum in gross, or by an annual rent, to be charged upon the rates: that a power was given to distrain the boats of the company, upon the canal, in case such rent should be in arrear twenty-one days; that the company entered into and damaged the avowant's lands; that the recompence was adjusted by an annual rent; and because that was above twenty-one days in arrear, he distrained, &c. 2d, That after the passing of 31 *Geo.* 3. c. 69. a sum was due from the company to the avowant for rent on account of land set out and damaged, and afterwards adjusted according to the provisions of the said act. These facts having been traversed, and found for the avowant, and judgment entered, a rule was granted to shew cause why the prothonotary should not be directed to review his taxation, he having allowed double costs. Eyre, Ch. J. We need only look at the Leominster canal act to be satisfied that this is not a distress for rent within the meaning of 11 *Geo.* 2. the distress intended to be protected by that act, is a distress for a certain rent directly reserved by a landlord on his grant, or demise of land, theretofore made. In that case, the landlord may avow generally, and is entitled to

Leominster Canal Company v. Cowell and another, Hil. Ter. 38 Geo. 3. C. B. 1 *Pull. et Bosan.* 213.

" and tenements whereon such distress was made, enjoyed the same under a grant or " demise, at such a certain rent, during the time wherein the rent distrained for in- " curred, which rent was then, and still remains, due," &c.; and if the plaintiff in such action shall become nonsuit, discontinue his action, or have judgment against him, the defendant, in such replevin, shall recover double costs of suit.

(1) 2 *Wilf.* 28; and *Sayer on Costs*, 107.

double costs. But this is a distress for rent by the canal act charged on the rates; it is a mere rent-charge, with a power of distress given; and not at all like the case of rent reserved by tenure. A rent-charge is not within the 11 *Geo.* 2. *Per Cur.*—Rule absolute.

Costs to Officers acting in the Execution of their Office.

Grindley *v.* Holloway, Hil. Ter. 20 Geo. 3. B. R. 1 *Doug.* 307.

To entitle a constable, &c. to double costs under 7 *Jac.* 1. c. 5. after a verdict for him, it must be certified, by the judge who tried the cause, that he was acting in the execution of his office.—This was an action of trespass, in which, on the plea of not guilty, a verdict was found for the defendant. In the last term, a rule was granted to shew cause, why it should not be entered on the roll, that the defendant was a constable, and that the action was brought for what he had done in the execution of his office. By the statute of 7 *Jac.* 1. c. 5. (1), it is enacted, That if any action shall be brought against a justice of peace, constable, &c. for any thing done by virtue or reason of his office, he may plead the general issue, and give the special matter in evidence; and, if the verdict shall pass with the defendant in such action, or the plaintiff become nonsuit, or suffer a discontinuance, in every such case, the justices or justice, or such other judge before whom the said matter shall be tried, shall allow to the defendant his double costs. There was no indorsement on the *postea*, nor certificate, in this case; but, in an affidavit of the defendant, it was sworn, that the act for which he was sued, was done in the execution of his office. On the other hand, an affidavit was read, by which it appeared, that the defendant was not acting in the execution of his office, and the rule was discharged.

Rann *v.* Pickins, Mic. Ter. 23 Geo. 3. 1 *Doug.* 308. [n. 82.]

But, where there is a special verdict, and it appears by the facts there found, that the act for which the action was brought was done by the defendant by virtue or reason of his office, as a justice of peace, &c. the master must tax double costs, though there has been no certificate, nor allowance by the judge who tried the cause. And Lord *Mansfield* and *Buller*, Justices, said, upon that occasion, that in common cases, where it does not appear, upon the record, in what capacity the defendant was acting, an allowance by the judge is necessary, but not when it does appear on the record, that he was acting by virtue of his office; that the case of a discontinuance,

(1) Made perpetual, 21 *Jac.* 1. c. 12.

provided

provided for by the ſtatute, ſhews, that the right to double coſts was not meant to be confined entirely to ſuch allowance of a judge at *Niſi Prius*. The maſter being aſked, ſaid, he had no doubt but that he ought to tax double coſts.

To entitle a defendant (an officer) to double coſts under the ſtatute of 7 *Jac.* 1. c. 5. there muſt be a certificate of the judge who tried the cauſe (which may be granted either at the trial or afterwards), that the defendant was ſuch an officer, and that the action was brought againſt him for ſomething done by him in the execution of that office.—This was an action of treſpaſs againſt the defendant, for taking an anchor as a diſtreſs for non-payment of the poor-rate, in which the plaintiff was nonſuited, becauſe the magiſtrates who granted the warrant of diſtreſs to the defendant as one of the churchwardens, were not made defendants. It was moved on the part of the defendant, for a rule to ſhew cauſe, why a ſuggeſtion ſhould not be entered on the record, that the defendant was a churchwarden, and that the action was brought againſt him for what he had done in the execution of that office, in order to entitle him to double coſts. In ſhewing cauſe againſt that rule, an anonymous caſe in 2 *Ventr.* 45, the caſe of *Grindley* v. *Hollyway*, *Dougl.* 307, and the words of the ſtat. 7 *Jac.* 1. c. 5. (1), were relied on, to ſhew that this was not the proper mode of obtaining the relief prayed for by the defendant, and that he could not be entitled to double coſts without a certificate from the judge who tried the cauſe. *The Court* were of that opinion, recommending an application to the judge for a certificate; adding, that they thought the judge was bound to grant it, and that it was not neceſſary that it ſhould be granted at the trial, as was holden in *Swinnerton* v. *Jervis* (2), on the conſtruction of the ſtat. 8 & 9 *W.* 3. c. 11. ſ. 4. reſpecting a certificate that a treſpaſs was wilful.—Rule diſcharged.

Harper v. Carr, Mic. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 448.

A juſtice of peace, who has proſecuted a gaoler to conviction for ſuffering a priſoner to eſcape, committed by him on a charge of felony, is not entitled to the coſts of the conviction under the 5th *W.* & *M.* c. 11. ſ. 3.—Cauſe was ſhewn againſt a rule, which had been obtained to diſcharge the defendant out of cuſtody as to an attachment for non-payment of coſts, the term of impriſonment for his offence being expired. The circumſtances were, that the proſecutor, Mr.

The King v. Sharpneſs, Tr. Ter. 27 Geo. 3. B. R. 2 *Ter. Rep.* 47.

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(1) The firſt ſection of that ſtatute (which is extended by ſtat. 21 *Jac.* 1. c. 12. to churchwardens and overſeers) enacts, that if a verdict ſhall paſs with the defendant, or the plaintiff become nonſuit, or ſuffer any diſcontinuance, "in every ſuch caſe the juſtice or juſtices, or ſuch other judge *before whom the ſaid matter ſhall be tried*, ſhall, by force of that act, allow to the defendant or defendants, his or their double coſts," &c.

(2) See *ante* vol. 1. p. 229.

Pembroke,

Pembroke, being a juſtice of the peace, had indicted the defendant, who was the keeper of the gaol at St. *Albans*, for ſuffering a priſoner to eſcape, who had been committed by him (the proſecutor) for felony; upon which indictment the defendant had been convicted. He contended, that the proſecutor was entitled to his coſts under 5 *W.* & *M.* c. 11. ſ. 3. as being a public officer, proſecuting for the benefit of the public. PER CUR. ASHHURST, J. On looking into this act of parliament, it appears to me that the defendant ought not to be charged with coſts. This is not one of thoſe inſtances mentioned in the third ſection of the act, which only extends to thoſe officers who proſecute, or preſent *ex officio*, or where the proſecution is carried on by the party grieved. If a juſtice of the peace were to preſent a road, and that preſentment were afterwards turned into an indictment, there the juſtice would be entitled to coſts; or if a juſtice were to indict a conſtable, or other inferior officer, for diſobeying his order, in ſuch caſe alſo he would be entitled to his coſts. But this is not a proſecution carried on by the proſecutor as a magiſtrate, for any other perſon might have indicted the defendant: the offence in this caſe was ſuch as concerned the general juſtice of the realm.—BULLER, J. The caſe originally came before the proſecutor in the character of a magiſtrate, on the complaint of ſome other perſon; and if the juſtice choſe to take the proſecution out of private hands, and to conduct it himſelf, he cannot be ſaid to proſecute as a magiſtrate, but like any other individual. The Court has always conſtrued this act of parliament as ſtrictly as poſſible. There was one caſe, indeed, on this ſtatute, the law of which I doubt, where it was held that a perſon who was injured, and was really the proſecutrix, was not entitled to coſts, becauſe her name did not appear on the back of the indictment, though it was well known ſhe was the real proſecutrix (1); but I believe that caſe has been ſince over-ruled. Another caſe afterwards came before this Court, where the queſtion was, whether the proſecutor were entitled to the coſts of a trial at bar; and it was determined that he was not, becauſe the ſtatute only extended to ſmall offences (2). Theſe caſes ſhew, that the Court has always put a ſtrict conſtruction on this act of parliament.—Rule abſolute.

The King *v.* Kettleworth, Mic. Ter. 32 Geo. 3. B.R. 5 *Ter. Rep.* 33. *Nolan*, 153.

A juſtice of the peace who indicts a road for being out of repair (the indictment being afterwards removed here by *certiorari*), is entitled to coſts under ſtat. 5 & 6 *W.* & *M.*

(1) *Rex* v. *Geter*, *M.* 16 *Geo.* 3. the proſecutrix was Lady *Cowper*, who indicted the defendant for a public nuiſance.

(2) This appears from ſome MS. notes of Sir *Simon Harcourt*, when he was maſter of the Crown Office; and which was the ſame book that Mr. Juſtice *Buller* referred to.

C. 11.

c. 11. ſ. 3. if the defendant be convicted.—The defendant having been convicted on an indictment (removed here by *certiorari*) for not repairing a road *ratione tenuræ*, a ſide-bar rule was obtained to give Doctor *Cooper*, a juſtice of the peace, his coſts under the 5 & 6 *W.* & *M.* c. 11. ſ. 3. which enacts, that "if the defendant, proſecuting ſuch writ of *certiorari*, be convicted of the offence for which he was indicted, the Court ſhall give reaſonable coſts to the proſecutor, if he be the party grieved, or a juſtice of the peace, &c. or any other civil officer, who ſhall proſecute upon the account of any fact committed or done that concerned him, or them, as officer or officers to proſecute or preſent." And the only queſtion was, whether Doctor *Cooper* were the proſecutor of this indictment, ſo as to be entitled to the coſts. From the affidavits of one *Cloſe*, and the attorney for the proſecution, it appeared, that Doctor *Cooper*, being indiſpoſed at the time when the indictment was preferred, deſired *Cloſe*, who had been his clerk for many years, to prefer it; that the attorney was employed and paid by Doctor *Cooper* only; that previous to the indictment, *Cloſe*, by Doctor *Cooper*'s directions, required the defendant to put the road into proper repair; and that *Cloſe* acted throughout merely as Doctor *Cooper*'s clerk. The affidavits on the other ſide ſtated, that *Cloſe*'s name only was on the back of the indictment; that the defendant ſerved *Cloſe* (who was alſo a ſhop-keeper) with notice of trial, &c. as the proſecutor; and that he knew nothing of Doctor *Cooper*'s acting as the proſecutor.—Cauſe was ſhewn againſt a rule to diſcharge the ſide-bar rule, upon the ground, that under the above circumſtances Doctor *Cooper* was entitled to the coſts, as being the proſecutor and a public officer. Lord KENYON, Ch. J. This is a remedial law; not indeed to be extended beyond, but as little to be reſtrained within, the fair import of it. The words of the act are, "that coſts ſhall be given to the proſecutor, if he be the party grieved, or be a juſtice of the peace, &c. who ſhall proſecute upon the account of any fact committed or done, that concerned him or them, as an officer or officers to proſecute or preſent, &c." It is true, that this act might have been done by any individual as well as by a magiſtrate, but ſtill he did it in the regular diſcharge of his duty. The inclination of my opinion is, that as this was a proſecution on a code of laws, ſubject to the adminiſtration of juſtices of the peace, and carried on for the benefit of the public, he ought to have his coſts. If the verdict had been for the defendant, and it had appeared that the proſecution was vexatious, the attorney might have been compelled to diſcloſe his real client.—BULLER, J. Magiſtrates are to ſee that the public roads are kept in repair; it is their duty to preſent or indict them; and there is no difference, on the ſubject of coſts, between

between a presentment and an indictment. Grose, J. By the laws respecting highways, not only great powers are given to justices of the peace, but in several of the acts they are bound to see that the roads are kept in proper repair. And though in this instance the magistrate did not present, yet he prosecuted the indictment, which is the same thing as to this purpose.—Rule discharged.

The King *v.* W. Williamson, Mic. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 32.

The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped, is a party grieved within the meaning of 5 *W.* & *M.* c. 11. s. 3.—This was an indictment for stopping up an ancient and common footway, which the defendant removed by *certiorari*. At the trial, a verdict was found for the crown; and now the question was, Whether the prosecutor, who appeared to have used this way for some years before it was stopped up by the defendant, but had since been obliged to take a more circuitous route, were entitled to costs under the statute 5 *W.* & *M.* c. 11. s. 3. which enacts, that if the defendant, prosecuting the writ of *certiorari*, be convicted of the offence for which he was indicted, this Court shall give reasonable costs to the prosecutor, if he be the party grieved or injured? &c. And the Court thought that the prosecutor must be considered as the party grieved, and as such entitled to costs; they, therefore, made the rule absolute against the defendant for the costs.

Remedy for Costs.

5 *Burr.* 2686.

An attachment for non-payment of costs taxed and liquidated, may be moved for on the last day of term.

Rex *v.* Smollet, and Rex *v.* Hamilton, Ea. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1313.

A Clerk in court's bill included in an attorney's, and taxed together with it, was ordered, after the attorney's death, to be paid by his client to the clerk in court, and the remainder to the attorney's executrix.—In this case it was moved, in behalf of Mr. *Barlow*, clerk in court for Admiral *Knowles*, the prosecutor in these causes, to whom the executrix of his late attorney Mr. *Chapone* (lately deceased) had delivered a bill, which included Mr. *Barlow*'s bill in these causes, which bill of Mr. *Barlow*'s had already been taxed, as well as Mr. *Chapone*'s own bill; that Mr. *Knowles* might be at liberty to pay to Mr. *Barlow* his bill as clerk in court; and that on payment of the remainder of Mr. *Chapone*'s bill to the executrix of *Chapone*, she should deliver up to him all his papers and writings remaining in her hands; and Lord Mansfield said, it was so plain, and so obviously just and reasonable, that it did not want any precedent to support it.

Emerson one, &c. *v.* Lashley, Mic. Ter. 34 Geo. 3. C. B. 2 *Hen Black.* 248.

No action will lie in the court of C. B. to recover costs ordered to be paid by a rule of an inferior court, in the course of

of a ſuit there, notwithſtanding the defendant may not be liable to an attachment of the inferior court, by being reſident out of its juriſdiction. But ſuch an action having been brought, the Court ordered the coſts awarded to the plaintiff in the inferior court, to be deducted by the prothonotary from thoſe allowed to the defendant in the action.—This was an action of *aſſumpſit*, and the declaration ſtated, " that before and at the time of making the promiſe and undertaking of the defendant therein-after next mentioned, a certain action and attachment thereunto made, had been, and was, depending in the court of our lord the king, holden before the mayor and aldermen of the city of London, in the chamber of the Guildhall of the ſame city, according to the cuſtom of the ſaid city from time immemorial there uſed and approved of (that is to ſay), a certain action and attachment, wherein the ſaid defendant was plaintiff, and one *Benjamin Boſtock* was defendant, and *Thomas Daniel*, the elder, and *Thomas Daniel*, the younger, were garniſhees, and in which ſaid action and attachment, the ſaid plaintiff, before the making of ſuch promiſe and undertaking, had been retained and employed as the attorney of, and for the ſaid defendant, in the ſaid court, to wit, at London, &c.; that while the ſaid action was ſo depending in the ſaid court, and before the making of the promiſe and undertaking of the ſaid defendant thereafter next mentioned, to wit, on the 19th day of February, in the 30th year of our ſaid lord the king, a certain rule or order was made by the ſaid Court of the ſaid lord the king before the mayor and aldermen aforeſaid, in the chamber of the Guildhall aforeſaid, whereby it was ordered, that the ſaid *Emerſon*, the plaintiff's attorney in the ſaid action and attachment, ſhould, at the next ſitting of the court, ſhew cauſe why he, the ſaid *Emerſon*, had refuſed to proceed in the ſaid action and attachment, for the ſaid now defendant, and to anſwer the matters contained in a certain affidavit of the ſaid defendant, and one *William Norfolk Johnſon*, as by ſaid rule or order (reference being thereunto had), will more fully appear: and ſuch proceedings were thereupon had, that afterwards and before the making of ſaid promiſe and undertaking of ſaid defendant thereafter next mentioned, to wit on the 14th day of May, in the thirtieth year aforeſaid, at London, &c. a certain other rule or order was made by ſaid Court of our ſaid lord the king, before the mayor and aldermen aforeſaid, in the chamber of the Guildhall aforeſaid, upon reading the ſaid firſt-mentioned rule, and upon hearing counſel for ſaid plaintiff and ſaid defendant reſpectively, and reading the affidavits of ſaid defendant, and *William Norfolk Johnſon*, and the affidavits of ſaid plaintiff, and of *John Smith* and *Samuel Hawkins*, whereby it was ordered, that the ſaid firſt-mentioned rule ſhould be

be discharged with costs (1), to be taxed by the proper officer, as by said rule or order so made as last aforesaid (reference being thereunto had) will more fully appear; and the said *Emerson* averred, that afterwards, to wit, on the 7th day of June, in the 30th year aforesaid, at London, &c. the costs of and attending the said last-mentioned rule or order, were taxed and allowed by one *Thomas Whittle*, the proper officer in that behalf, at a large sum of money, to wit, the sum of 9*l.* 14*s.* 5*d.* of lawful money of Great Britain; of all which said several premises, the said defendant afterwards, to wit, on same day and year last aforesaid, at London, &c. had notice; and by means thereof, and according to the form and effect of said last-mentioned rule or order, the said defendant then and there became liable to pay to the plaintiff the said sum of 9*l.* 14*s.* 5*d.* when the said defendant should be thereunto afterwards requested; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on same day and year last aforesaid, at London, &c. promised to pay, &c." There were also the common counts. The defendant at first demurred generally to the first count, and pleaded the general issue to the others; but the demurrer was afterwards withdrawn, and *non assumpsit* pleaded to the whole declaration. The cause, therefore, went to trial, and a verdict was found for the plaintiff on the first count, SUBJECT TO THE OPINION OF THE COURT, on the question, Whether the action could be maintained? N. B. It appeared at the trial, that the defendant at the time of entering the action and attachment in the mayor's court, and also at the time when the present action was brought, was resident out of the jurisdiction of that court.—Lord Chief Justice EYRE. If there were nothing else in this case, but the mere circumstance of its being an action brought for the first time, the Court would think again and again, before they would give it any encouragement. In general there is another remedy (however that remedy may fail in an inferior court, whose jurisdiction is local), and the consequence of our determining that an action would lie for such costs as these, would be, that instead of applications to the Court for their superior interference, numberless actions would be brought, of which we have enough already. And upon general principles of law, it seems pretty clear, that no action can lie for such costs. In actions brought in superior courts, the costs become a duty only by being united with the debt in the judgment: there is that sort of credit given to the judgments of a

(1) The words of the latter rule were, "It is ordered that the said rule (*i. e.* "the first rule) be discharged with costs, to be taxed by the proper officer of this "court."

court

court of competent jurisdiction, that they create debts and duties, upon which actions of debt are founded. General policy and convenience require, that faith should be given to those judgments, and that duties should arise; but as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the Court, that enforces these kinds of orders; and the power of the Court will always be regulated by the discretion of the Court, in causes which come before them. I was very much struck with an observation at the bar, that if we suffer an action to be brought for costs thus ordered to be paid in an inferior court, we must take that order to be final: we give credit, indeed, to judgments of inferior courts, because there is a regular course, if those judgments are improper, by which they may be corrected; but the case is very different with respect to these interlocutory orders, from which there is no appeal or writ of error. It would be impossible to take one of these interlocutory proceedings as final, and if we were to enquire whether the inferior court had done right, what a new field would be open for investigation! If a superior court were to take into consideration a cause, with which they had nothing to do, and to give judgment whether the inferior court had done right in making an interlocutory order, it would be impossible for any such court to go on with its ordinary business. The case that comes the nearest to the support of this action, is that of *The King* v. *Chamberlayne* (1), where the court of King's Bench decided, that the costs upon a recognizance to prosecute were in the nature of the debt, which an administrator might claim. But the expressions in that case, must be understood according to the subject-matter; properly speaking, those costs were not a debt to any one, for if they were a debt, there was no occasion for a recognizance to enforce the payment of them; the Court, indeed, held, that the original right devolved from the original party to the administrator, but if it were not a debt to the original party, it was not a debt to his representative: the recognizance, indeed, was merely a security, without which the costs could not have been recovered at all. That case, therefore, rather makes against the argument to which it is applied. Upon the whole, therefore, though there will be a particular inconvenience arising in this case, from the circumstance of the defendant being out of the jurisdiction of the inferior court, it is better to oblige the other party to wait, till he can be brought within that jurisdiction, than to produce the

(1) *Supra*, p. 553.

mischievous

miſchievous conſequences, which would enſue from our determining that this action could be maintained. GOULD, J. I agree with my lord, according to the rule of law laid down by *Littleton* and Lord *Coke*, that it is better to ſubmit to a particular inconvenience, than introduce a general miſchief. It is apparent, what an ill uſe might be made of our eſtabliſhing a precedent of this kind. Did any man ever hear of an action in a ſuperior court to recover coſts, where there had been an interlocutory reference to a prothonotary or maſter? It has been always holden, that an attachment was the proper remedy on the *allocatur*. HEATH, J. I am of the ſame opinion. The queſtion ariſes upon an action for coſts, given by an interlocutory order, which are not coſts given by the ſtatute of Glouceſter. It is a motion in an inferior court, by a party againſt his own attorney; the Court acting upon a power it has over its own miniſters, declares the complaint groundleſs, and inflicts a penalty. As, therefore, theſe coſts are a penalty, and not given by the ſtatute of Glouceſter, I am of opinion that the action will not lie. ROOKE, J. Of the ſame opinion.—Judgment for the defendant.

On a ſubſequent day, a rule was granted to ſhew cauſe, why the coſts awarded to the plaintiff in the mayor's court, ſhould not be deducted from the coſts to be allowed to the defendant in the preſent action, and why the prothonotary ſhould not make his *allocatur* after the deduction.—After cauſe ſhewn, *The Court*, without heſitation, ſaid, it was highly reaſonable to allow the deduction, and therefore made the rule abſolute.

White one, &c. v. Milner, Mic. Ter. 34 Geo. 3. C. B. 2 *Hen.* 2 *Black.* 357.

An attorney is not liable to pay the coſts of taxing his bill, under the ſtat. 2 *Geo.* 2. c. 23. ſ. 23. where the deduction of one-ſixth is occaſioned, not by the particular *items* being taxed, but by a whole branch of it being diſallowed.—A rule was granted to ſhew cauſe, why the plaintiff, who was an attorney, ſhould not pay the coſts of the taxation of his bill by the prothonotary, according to ſtat. 2 *Geo.* 2. c. 23. ſ. 23. under the following circumſtances: The bill had been referred to the prothonotary by a judge's order, and on the taxation, more than one-ſixth part was taken off. But the deduction was cauſed, not from any over charges of particular *items*, but from the whole of the expences of defending two actions for one *Brandon*, being diſallowed; which it was ſtated that the defendant had undertaken to pay the plaintiff, but which the prothonotary, on reading the affidavits on both ſides, was of opinion, that he had not undertaken to do. THE COURT held, that the ſtat. of *Geo.* 2. was applicable only where an attorney made exorbitant charges on his client, in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it. That in the preſent caſe, the plaintiff's charges for defending *Brandon* were

were not objectionable, provided he could have proved that the defendant was liable to pay them, and the other *items* of the bill were not reduced one sixth.—Rule discharged.

In what Cases the Courts require Security for Costs.

On a motion in *B. R.* for the plaintiff in a *qui tam* action, to give security for costs upon an affidavit of the lowness of his circumstances. Lord MANSFIELD said, that the Court would not do it in the case of a foreigner being a plaintiff, nor in matters of property, except in ejectment, where the lessor of the plaintiff is an infant; but the question was put an end to by the production of an affidavit, stating the plaintiff to be a person of property. Golding *q. t.* *v.* Barlow, Ea. Ter. 14 Geo 3. B. R. *Cowp.* 24.

The court of *C. B.* however, have since determined that they will not require the plaintiff, in a *qui tam* action under the stat. 22 *Geo.* c. 47. & 27 *Geo.* 3. c. 1. to give security for costs, though it appear by affidavit that he is insolvent. In such a case, the proper mode for the defendant to pursue, is to move the Court, that the issue money should be paid into the hands of the prothonotary; and the Court said, that to require a security for costs would be directly contradicting the acts of parliament which gave the penalties to whoever would sue for them without imposing any such condition; and the same practice prevails in *B. R.* vide 3 *Ter. Rep.* 137. Field, *q. t.* *v.* Carron, Ea. Ter. 32 Geo. 3. C. B. 2 *Hen.* 2 *Black* 27.

The court of *B. R.* stayed the proceedings in this action, till the lessor of the plaintiff, who lived in Ireland, should give security for the costs; although it was an ejectment brought under the direction of the court of Chancery, where the bill was retained till after trial of the ejectment; and security had already been given there for 40*l.* Denn, *ex dimiss.* Lucas *v.* Fulford, Tr. Ter. 1 Geo. 3. B. R. 2 *Burr*, 1177. 1 *Black.* 288.

But a rule for the lessor of the plaintiff to give security for costs, in an ejectment depending, was refused in this case.—The lessor of the plaintiff had brought an ejectment in the court of Exchequer in the year 1784, to recover the possession of the same premises, for which the present action was brought, but had abandoned his suit when it came on to be tried. A rule had been obtained, calling on the lessor of the plaintiff to shew cause, why the proceedings in this action should not be staid till he gave security for the costs, in case he was non-suited, or a verdict was given against him. And this rule was founded on an affidavit, which stated that, in the former ejectment, the court of Exchequer had obliged the lessor of the plaintiff to give security for the costs of that action. PER CUR. There are only three instances in which this court *B. R.* will interfere on behalf of a defendant, to oblige the plaintiff to Doe, on the demise of Selby, *v.* Alston, Bart. Mic. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 491.

give ſecurity for coſts. The firſt is, when an infant ſues, the Court will oblige the *prochein amy*, or guardian, or attorney, to give ſecurity for the coſts; 2dly, when the plaintiff reſides abroad, in which caſe the Court will ſtay the proceedings till ſecurity is given for the coſts; and 3dly, where there has been a former ejectment (1); but there the rule is to ſtay the proceedings in the ſecond ejectment till the coſts of the former are paid, and not till ſecurity is given for the coſts of the ſecond. So that even the form of the preſent application is wrong. But it is not ſtated that the coſts of the ejectment in the court of exchequer have not been paid.—Rule diſcharged.

Boſwell *v.* Iriſh, Tr. Ter. 7 Geo. 3. B. R. 4 *Burr.* 2105.

Formerly the court of *B. R.* did not require ſecurity for coſts of a foreign plaintiff, nor of one gone abroad.—It was moved, on behalf of the defendant, that the plaintiff, being gone to reſide abroad, and having left no effects in England, might give ſecurity for the coſts, in caſe of a verdict or judgment for the defendant. But the Court ſaid, it had been denied over and over.—ASTON, J. ſaid, that he had taken ſo many notes of the refuſal of ſuch motions, that he had ceaſed to take any more, as being a point fully ſettled. And YATES, J. alſo mentioned a very ſtrong caſe where it was refuſed, though it appeared that *Peter Mingotti*, the plaintiff, lived totally in Italy, and never meant to come to England. He ſaid, it was clogging the courſe of juſtice.

Nuncomar *v.* Burdett, Mic. Ter. 15 Geo. 3. B. R. *Cowp.* 158.

So alſo in this caſe; it being moved to ſtay proceedings till ſecurity ſhould be given to the defendant for his coſts, in caſe of the plaintiff's failing of ſucceſs, as the plaintiff's reſidence was in the Eaſt-Indies, at Calcutta, in Bengal.—ASTON, J. ſaid, it is every day refuſed: I have many notes of its being ſo.

Pray *et al.* *v.* Edie, Ea. Ter. 26 Geo. 3. B. R. 1 *Ter. Rep.* 267.

But it is now the practice of the *B. R.* if the plaintiff reſide abroad, to ſtay proceedings till he give ſecurity for the coſts.—A rule was obtained, to ſhew cauſe why the proceedings ſhould not be ſtayed, *till the plaintiff, who reſided at Georgia, in North America, gave ſecurity for the coſts*, in caſe a verdict was given againſt him. For the plaintiff it was contended, that ſuch a rule had never been granted but under very particular circumſtances: and 2 *Burr.* 1026. 4 *Burr.* 2105. & *Cowp.* 158. were cited. SED *per*—BULLER, J. There have been ſeveral late caſes to the contrary; and for this reaſon, that if a verdict be given againſt the plaintiff, he is not within the reach of our law ſo as to have proceſs ſerved upon him for the coſts. *Per Cur.*—Rule abſolute.

Fitzgerald *v.* Whitmore, Tr. Ter. 26 Geo. 3. B. R. 1 *Ter. Rep.* 362

So in this caſe, on ſhewing cauſe againſt a rule why the proceedings ſhould not be ſtayed till the plaintiff, who was an Iriſhman, and reſided at Waterford, in Ireland,

(1) See *Wiſton* v. *Withers*, in p 752. *ſupra*.

gave security for the costs, in case a verdict was given against him, or he was non-suited. THE COURT were of opinion, that the same reason which induced the Court to lay down the rule with respect to foreigners, namely, because the process of our courts would not reach them in case an execution issued for the costs, held equally with respect to Irishmen.—Rule absolute.

But the court of *B. R.* will not stay the proceedings till the plaintiff, a foreigner, give security for the costs, unless the defendant have put in bail.—Therefore the Court made the rule absolute in this case only, on the defendant's undertaking to put in bail. De la Preute v. the Duc de Biron, Ea. Ter. 32 Geo. 3 B. R. 4 *Ter. Rep.* 697.

And, if a foreigner sue two defendants, and only one of them puts in bail, that one may, in *B. R.* require the plaintiff to give security for the costs, without putting in bail for the other defendant. Carr v. Shaw and Price, Mic. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 496.

And a rule calling on the plaintiff, who had left the kingdom, to give security for the costs, may be made after the parties are at issue, and the plaintiff has given notice of trial for the sittings after term. Barker v. Hargreaves, Hil. Ter. 36 Geo. 3 B. R. 6 *Ter. Rep.* 597.

Formerly the court of *C. B.* would not require the plaintiff to give security for costs, either on account of his being a foreigner, or insolvent, if he resided in England, though the affidavit stated, "that he was a foreigner, had left his country to avoid being arrested for debt, and was in England insolvent:" and they said in this case, that neither the plaintiff's being a foreigner, nor his insolvency in this country, were sufficient reasons to require such a security. Parquot v Elling, Hil. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 105.

However, the practice of the court of *C. B.* is now conformable with that of the court of *B. R.* in this respect.—In this case a motion was made, that the plaintiff should give security for costs, on an affidavit which stated simply, "that "his place of residence was at Bourdeaux, in France," without any other circumstances. After cause shewn, THE COURT, upon consideration, made the rule absolute, and laid it down as a settled point to guide the practice in future, that when a plaintiff resides in a foreign country, and so out of the reach of the process of the Court, he may be called upon to give security for costs, though no other circumstance be stated in the affidavit (1). Ganesford v. Levy, Mic. Ter. 33 Geo. 3 C. B. 2 *Hen. Black.* 115.

But the practice of the court of *C. B.* at one time was different in this respect; for in this case the Court refused to require the plaintiff to give security for the costs, merely on account of his residence abroad, unless there were special circumstances to induce the Court to require it. Portier v. Carter, Hil. Ter. 29 Geo. 3 C. B. 1 *Hen. Black.* 106.

But a foreign seaman having brought an action for his wages, against a foreigner, the court of *C. B.* refused to compel Henschen v. Garves, Mic. Ter. 35 Geo. 3. C. B. 2 *Hen. Black* 383.

(1) In two cases in the preceding June term, viz. *Meish.* v. *Airey*, and *Kelly* v. *Lemere*, there were similar decisions.

pel him to give ſecurity for coſts, on account of his being on a voyage on board an Engliſh ſhip.—The plaintiff, who was a foreign ſeaman, having brought an action for his wages againſt the defendant, who was a foreign owner of a Swediſh veſſel, and holden him to bail, a rule was granted to ſhew cauſe why the proceedings ſhould not be ſtaid till the plaintiff gave ſecurity for coſts, on an affidavit which ſtated, "That "the plaintiff was a foreigner, and did not reſide in this "kingdom, but was in a veſſel on a voyage up the Baltic "ſea. And farther, that the plaintiff had not any goods or "chattles, lands or tenements, within this kingdom."—The Lord Ch. J. and HEATH J. held, that it would be highly impolitic in the preſent ſtate of public affairs, when men were wanted in the navy, to throw difficulties in the way of a foreign ſailor recovering his wages in our courts, who was ſerving on board an Engliſh ſhip, and who, if he were compelled to give ſecurity, would probably not be able to recover them at all, and therefore, that the ſecurity ought not to be required. But ROOKE J. was of opinion, that as the plaintiff was a foreigner, not domiciled in England, and out of the juriſdiction of the Court, the circumſtance of his being on board an Engliſh ſhip, was not a ſufficient reaſon to exempt him from giving the ſecurity.—Rule diſcharged.

Jacobs v. Stevenſon, Mic. Ter. 38 Geo. 3. C. B. 1 *Pul. & Bof.* 96.

Nor will the court of C. B. ſtay proceedings till ſecurity is given for the coſts, in an action by a foreign ſeaman ſerving on board an Engliſh ſhip.—The plaintiff was a foreign ſailor, ſerving on board an Engliſh ſhip, and declared in trover for a cheſt. It was moved for a rule to ſhew cauſe, why the proceedings ſhould not be ſtayed till the plaintiff ſhould give ſecurity for the coſts of the action. SED PER CUR.—*This motion cannot be ſupported in the caſe of any foreigner if he be reſident in this country.* Now the Court may aſſimilate the caſe of foreigners ſerving on board Engliſh ſhips, to that of foreigners reſident in this country. Perhaps the preſent plaintiff is ſerving on board an Engliſh ſhip bound to the port of London. He may, indeed, be a foreigner, but he is juſt as amenable to the juriſdiction of the Court as any Engliſh ſailor in the ſame ſituation.

Michel v. Pateſki, Hil Ter. 36 Geo 3 B. R. 2 *Hen Black.* 593.

And, after a defendant has agreed to take ſhort notice of trial, the Court of C. B. will not compel the plaintiff, a foreigner, and reſident abroad, to give ſecurity for coſts; for if the defendant agree to take ſhort notice of trial, he waives his opportunity of making ſuch an application, which muſt neceſſarily delay the plaintiff.

In what Caſes Coſts are not allowed.

Waldron v. Norris, Tr. Ter. 11 Geo. 3. C. B. 2 *Black.* 769.

Coſts cannot be given on refuſal of a rule to ſhew cauſe.—The defendant had given notice of motion in this cauſe, which the plaintiff (to prevent delay) oppoſed in the firſt inſtance without

without waiting for any rule to ſhew cauſe. And, upon hearing the matter, it appearing to be frivolous and ill-founded, the counſel who moved it took nothing by his motion.—The plaintiff then applied for the coſts of his attendance upon this notice. And it ſeemed to GOULD, J. that he ought to have them; elſe, it would be in the power of any litigious party, to plague the other with frivolous motions, and put him to perpetual expence. But DE GREY Ch. J. and BLACKSTONE, J. held, that, as the defendant's counſel took nothing by his motion, he could not take a rule to pay coſts; though, when a rule *niſi* is diſcharged by a ſubſequent rule, coſts may be added in that rule. It was in the plaintiff's election to appear or not, in the firſt inſtance: and if, for the ſake of expedition, he makes his option, to appear immediately, and oppoſe the granting of any rule at all, he purchaſes that expedition at the expence of his coſts. NARES, J. having been of counſel in the cauſe, gave no opinion. And ſo no rule for payment of coſts was made.

The ſtatute for judgment, as in caſe of a nonſuit, does not extend to a writ of right, ſo as to give coſts to the tenant. Ea. Ter. 16 *Geo.* 3. *C. B.* 2 *Black.* 1093. Newman v. Goodman.

Coſts are not allowed in C. B. where a defendant pleads a tender of half a guinea, which is found againſt him, if the judge certifies, upon the 43 *Eliz.* that the damages are under 40*s.*—Caſe upon aſſumpſit: the defendant pleaded a tender of half-a-guinea, which the plaintiff took out of court, and proceeded for more. There was a verdict for the plaintiff, damages 1*l.* 1*s.*; and the judge certified under the ſtat. 43 *Eliz.* c. 6. that the damages to be recovered in this action did not amount to 40*s.* but to 1*l.* 1*s.* and no more. It was now moved, that the prothonotary might tax the plaintiff full coſts *de incremento*, on the ground that the judge ought not, in this caſe, to have certified, becauſe the defendant has pleaded a tender, which being found falſe, he had, by his own wrong pleading, increaſed the coſts.—Ch. Juſtice: I believe, that in ſome caſes ſuch a rule has obtained, becauſe the defendant, by his own fault, has rebutted his right to coſts, by bringing another matter in queſtion. CLIVE, J. In an action for words, "that the defendant ſtole a hen," the defendant juſtified there was a verdict for the plaintiff, and damages leſs than 40*s.* The court of King's Bench refuſed to allow more coſts than damages. Ch. Juſtice: This action is clearly frivolous, and the plea of tender does not alter the caſe.—So the rule for full coſts was denied. Bartlett v. Robins, Ea. Ter. 5 Geo. 3. C. B. 2 *Wilſ.* 258.

If the plaintiff in treſpaſs *vi et armis* for beating the plaintiff's dog, recover leſs than 40*s.* the judge may certify under the 43 *Eliz.* c. 6. to prevent his recovering more coſts than damages.—This was an action of treſpaſs *vi et armis* for beating the plaintiff's dog, whereby the dog was hurt, and the plaintiff loſt the uſe of him. The defendant pleaded the Dand v. Sexton, Hil. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 37.

general iſſue. On the trial, the plaintiff recovered 1*s.* damages; and Lord KENYON, Ch. J. certified under 43 *Eliz.* c. 6. that the damages were under 40*s.* It was moved for a rule to ſhew cauſe why the certificate ſhould not be ſet aſide, on the ground, that the ſtatute only applied to thoſe actions which could be brought in the county court; and that, of courſe, it did not extend to an action *vi et armis*.—Lord KENYON, Ch. J. It ſeems to me that this caſe comes within the ſtatute, which extends to all perſonal actions, not being for any title of lands, nor for any battery. And, on the maxim *exceptio probat regulam*, it includes all other actions *vi et armis*. It is true, indeed, that an action *vi et armis* cannot be brought in a county court: but there are other inferior courts which, by charter, have a power of trying actions *vi et armis*. However, as ſome of the judges have entertained doubts upon the queſtion, take a rule to ſhew cauſe. Afterwards the Court were extremely clear, on the authorities of *Walker* v. *Robinſon* (1), *White* v. *Smith* (2), and *Bartlet* v. *Robins* (3), that the ſtatute (4) extended to the preſent caſes.—And they diſcharged the rule.

Roe v. Davis, Hil. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 593.

If the plaintiff, in an action for meſne profits recover leſs than 40*s.* and the judge do not certify that the title came in queſtion, the plaintiff is entitled to no more coſts than damages.—After a verdict for the plaintiff with 1*s.* damages in an action for meſne profits, the maſter only allowed him 1*s.* coſts. It was now moved, that the maſter might be directed to review his taxation, and to allow the plaintiff his full coſts, on the ground, that this caſe did not come within the ſtat. 22 & 23 *Car.* 2. c. 9. for that the title could never come in queſtion in this action, and conſequently there could be no certificate. PER CUR. This action is founded wholly and entirely upon title. The judge might have certified in this caſe, "that the freehold or title was chiefly in queſtion," under the ſtatute of *Charles* the Second; but not having done ſo, the plaintiff is entitled to no more coſts than damages.—Rule diſcharged.

The King v. Miles, Tr. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 367.

The 8 & 9 *W.* 3. c. 11. giving coſts in all ſuits of *ſcire facias*, does not extend to a *ſcire facias* to repeal a patent proſecuted in the name of the king.—In *ſcire facias*, at the ſuit of the crown, to repeal a patent granted to the defendent for making and vending a particular ſort of lamp, a verdict was given for the crown. Whereupon a rule had been obtained, for referring it to the coroner and attorney of the king, to tax the coſts to be paid by the defendant to the proſecutor: which rule was now moved to be ſet aſide, on the ground, that there was

(1) *Wilſ.* 93. 2 *Str.* 1232. (2) Cited in 1 *Wilſ.* 94.
(3) 2 *Wilſ.* 258 and p. 789. *ſupra.*
(4) It has been holden, that a certificate upon this ſtatute may be granted after the trial of the cauſe. *Holland* v. *Gore*, Tr. 32 *Geo.* 2. *C. B. Sayer on Coſts*, 18.

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no ſtatute which gives coſts in this caſe, and on the general rule that no coſts are payable where the crown is a party, unleſs by force of ſome particular ſtatute. On ſhewing cauſe, the ſtat. 8 and 9 *W.* 3. c. 11. was adverted to, which gives coſts in all ſuits upon any writ or writs of *ſcire facias*; but it was admitted, that that ſtatute refers merely to civil ſuits, as it mentions plaintiffs and defendants, and award of execution. AND THE COURT ſaid, that this caſe fell within the general rule, that no coſts are either paid or received where the crown is the proſecutor, unleſs in ſome particular caſes, ſuch as informations in the nature of *quo warranto* by the ſpecial proviſion of the legiſlature (1)—Rule abſolute.

Coſts of ſuit as to a perſon admitted in formâ pauperis.

Blood v. Lee, Mic. Ter. 10 Geo. 3. C. B. 3 *Wilſ.* 24.

This was an action upon the caſe upon *aſſumpſit*, commenced in the palace court for about the ſum of 9*l.* which the defendant removed into this court by *habeas corpus*. The cauſe being at iſſue, and the plaintiff not having proceeded to trial in due time after iſſue joined, the defendant gave him notice of motion for judgment, as in caſe of a nonſuit. Before the motion came on, the plaintiff (being a poor man) applied to be admitted, and was admitted, to proceed in his ſuit in *formâ pauperis*. Afterwards, upon ſhewing cauſe why there ſhould not be judgment, as in caſe of nonſuit, the rule was made abſolute, becauſe the plaintiff, or his attorney, would not undertake to pay the coſts of that application to the court; whereupon judgment, as in the caſe of a nonſuit, was entered; and the plaintiff being now taken in execution upon that judgment, it was moved that he might be diſcharged out of cuſtody, on the ground, that a pauper was not liable to coſts in this caſe: whereupon the Court made a rule to ſhew cauſe.—At another day, before the defendant came to ſhew cauſe, WILMOT, Ch. J. cited, from his own manuſcript notes, the following caſes relating to paupers and coſts: *Winter* v. *Slow*, *Mic.* 4. *Geo.* 2. *B. R.* (2) trover by a pauper. At the trial, the plaintiff proved a demand and refuſal at the time of ſerving the writ, which being after the commencement of the action, he became non-ſuited; and having brought a ſecond action for the ſame thing, it was moved, that he might pay the coſts of the nonſuit in the former action, before he proceeded in the ſecond action: but the Court refuſed to grant the motion, becauſe they thought the plaintiff had not been vexatious.—In *Taylor* v. *Lowe* (3), *Trin.* 7. &

(1) 9 *Ann.* c. 20. ſect. 5.
(2) *Stra.* 878. *Barnard. B. R.* 375.
(3) *Stra.* 903.

8 *Geo.* 2. *B. R.* the plaintiff being a pauper, and having given five or six notices of trial, and thereby vexed the defendant, it was moved that he might pay costs of former notices, or be restrained from proceeding to trial; but while the admission to sue in *formâ pauperis* stood, they would make no rule about costs, but made a rule to shew cause why he should not be dispaupered, which was made absolute upon an affidavit of service thereof. In *Oats* v. *Holiday*, *Trin.* 22 & 23 *Geo.* 2. *B. R.* it was at first doubted, whether a plaintiff could be admitted in *formâ pauperis* after the commencement of the suit; but at length it was resolved that he might be so admitted at any time of the suit; and the Court resolved, that a person so admitted in *formâ pauperis pendente lite* shall not pay costs from the beginning. This seems to be a case in favour of this motion to discharge the plaintiff out of custody.—*Sed adjournatur.*

Rice v. Brown, Ea. Ter. 37 Geo 3. C. B. 1 *Pull. & Bosan*, 39.

A pauper, as such, can never pay costs, though, it seems, that he may receive them for the defaults of his opponents. —The plaintiff, in this case, sued as a pauper: and the cause standing in the paper for trial on the first sitting in Easter term, was, on that day, made a remanet, until the second sitting in the same term, by an order of *nisi prius* at the instance of the defendant, he undertaking to pay the costs of the day, and also of that application. The order was made a rule of this Court, and the costs allowed by the prothonotary; but the defendant refused to pay them: in consequence of which, an attachment was moved for. When this was first mentioned, the Court seemed to entertain strong doubts whether a pauper could be allowed costs: and it was urged, that in *Walker* v. *Packer*, *Cooke's Cases of Practice in C. P.* 47. the Court ordered costs to be taxed against a pauper for not proceeding to trial, and declared that a pauper should pay costs for all defaults, as an executor or administrator should for their own defaults (1). *Per Cur.*—The case that has been cited respecting the payment of costs by a pauper, is not law. The mode of proceeding by the Court is this: where a pauper misbehaves himself, he is dispaupered in consequence (2), and so becomes liable to costs. In this case, however, the attachment must issue, it being a voluntary undertaking to pay the costs, which had been made a rule of court.

(1) See also 1 *Str.* 420.

(2) 2 *Str.* 1122. 2 *Salk.* 506. 3 *Wils.* 24. and the cases cited therein. In *Butler* v. *Ingoys & Ux.* 2 *Str.* 891. a pauper having been nonsuited in a first action, and having recovered in a second, the Court of *B. R.* refused to deduct out of the recoveries in the second action the costs of the first.

COVENANT, *ſee title* ACTION *(Debt), and (Covenant), alſo title* LEASES.

County Court.

A defendant is not liable to be ſued in the county court for a debt under 40 *s.* if it does not ariſe within the county, though he be reſident therein.—In an action of *aſſumpſit:* the cauſe of action aroſe at Newmarket, but the *venue* was laid in Middleſex, and the verdict being for 8 *s.* 6 *d.* only, and there being no certificate according to the 23 *Geo.* 2. c. 33. a rule was obtained to ſhew cauſe why a ſuggeſtion ſhould not be entered on the roll, that the defendant was reſident in Middleſex, and liable to be ſummoned to the county court. On ſhewing cauſe, it was urged, that the county court has no juriſdiction where the cauſe of action does not ariſe within the county; and a plaint levied in that court muſt ſtate the cauſe of action to have ariſen within its juriſdiction, otherwiſe it is error. And *Welſh* v. *Troyte*, 2 *H. Bl.* 29. and *Tubb* v. *Woodward*, 6 *T. R.* 175. (both in vol. I. p. 311, 312), were cited, where the court of C. B. and B. R. refuſed to ſtay proceedings, though the cauſes of action were under 40 *s.* upon the ground, that as the defendant did not reſide in the county in which the cauſes of action accrued, he could not be ſued in the county court.—*Per Cur.* This is a ſtruggle in the teeth of a ſolemn determination in both courts, and of the principle which governs every inferior court in this country. The rule muſt therefore be diſcharged; but as the action is a very ſhabby one, let it be without coſts.

Smith v. O'Kelly, Tr. Ter. 37 Geo. 3. C. B. 1 *Pul. & Baſ.* 75.

If there is a plea of tender as to part, and *non aſſumpſit* as to the reſidue, and the plea of tender being found for the defendant, the balance proved on the *non aſſumpſit* is under 40 *s.* yet, if that added to the ſum tendered exceed 40 *s.* the defendant, though ſubject to the juriſdiction of the county-court of Middleſex, is not entitled to double coſts under 23 *Geo.* 2. c. 33. ſect. 19.—This was an action of *aſſumpſit* on a plea of tender as to 2 *l.* 18 *s.* 4 *d.* part of the demand; and *non aſſumpſit* as to the reſt.—On the trial there was a verdict for the defendant on the tender, and for the plaintiff on the *non aſſumpſit*, but with damages under 40 *s.* viz. 7 *s.* 6 *d.* The defendant, upon an affidavit, ſtating that he reſided in the county of Middleſex, obtained a rule to ſhew cauſe why he ſhould not be at liberty to ſuggeſt, on the roll, that the damages were under 40 *s.* in order to entitle himſelf to the benefit of the ſtatute of 23 *Geo.* 2. c. 33. ſect. 19.—Lord MANSFIELD, The plaintiff could not know that the defendant would plead a tender. The tender was not an extinguiſhment of the debt; and the queſtion is, what appears to have been due at the time of the action brought, for if that exceed 40 *s.* the inferior court has no juriſdiction.—Rule diſch.

Heaward v. Hopkins, Mic. Ter. 21 Geo. 3. B. R. 2 *Doug.* 448.

The

M'Collam v. Car, Ea. Ter. 38 Geo. 3. C. B. 1 *Pul. & Bof.* 223.

The juriſdiction of the court of conſcience does not extend to contracts made on the high ſeas; nor will the Court allow a ſuggeſtion for double coſts under 23 *Geo.* 2. c. 33. where the original debt being above 40 *s.* has, by a balance of accounts, been reduced below that ſum.—*Aſſumpſit* for ſeaman's wages. The declaration contained two counts, one on a ſpecial contract, and another for work and labour generally. At the trial the plaintiff attempted to prove that he had been preſſed out of the ſhip with the colluſion of the defendant, but failed to eſtabliſh that fact. The defendant had paid him a certain ſum as wages up to the period of his quitting the ſhip, but having made a ſmall miſtake in calculating the time, the plaintiff obtained a verdict for 1 *l.* 2 *s.* on the laſt count. It was now moved for leave to enter a ſuggeſtion on the roll, under 23 *Geo.* 3. c. 33. that the defendant was reſident in Middleſex, and liable to be ſummoned to the county-court.—EYRE, Ch. J. Does the court of conſcience try contracts made on the high ſeas, by conſidering them as if made in the pariſh of Mary-le-Bow, in the ward of Cheap? Theſe actions, though tranſitory as to the ſuperior courts, are not ſo as to the court of conſcience: clearly, therefore, the cauſe of action in this caſe did not ariſe within the juriſdiction of that court. Beſides, the action ariſes on a contract, part of which has been ſatisfied by money on account. Is there any caſe where the ultimate balance of an account only being under 40 *s.* the Court has allowed a ſuggeſtion? I ſhould pauſe upon ſuch a caſe, ſince the moſt intricate point in accounts between merchant and merchant might, by this means, come to be decided before a county-court. It ſeems to me, that the original demand ought to be under 40 *s.*—Rule refuſed.

Croſs v. Kaye, Ea. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 663.

The 25 *Geo.* 3. c. 80. which gives a penalty againſt attornies proſecuting or defending any ſuit in any court, holding pleas, where the debt or damage ſhall amount to 40 *s.* or more, does not extend to the ſheriff's court, though an attorney proſecute a ſuit there by virtue of a writ of juſtices for more than 40 *s.*—In an action on this ſtatute the plaintiff obtained a verdict for five penalties upon five different counts. Three of the counts were for commencing and proſecuting actions in the court of common pleas at Lancaſter, without having obtained the certificate required by the act. The two other counts were for proſecuting and carrying on the proceedings in certain actions in the county court of the ſheriff of the county of Lancaſter, by virtue of his majeſty's writs of juſtices, where the damages were laid at 9 *l.* In all the counts the defendant was charged with having done the ſeveral acts as an attorney.—Afterwards, a motion was made in arreſt of judgment, on two grounds: 1ſt, That the act only related to proſecuting actions, &c. in courts which have ordinary juriſdiction of cauſes of 40 *s.* and upwards; 2dly, That

That it is only averred that the defendant acted as an attorney, without ſtating that he was an attorney admitted, enrolled, or regiſtered, &c. as deſcribed in the ſtatute. PER CUR. The firſt objection muſt prevail. The act of parliament on which this action was brought, was not meant to extend to thoſe courts that only hold pleas where the cauſe of action is under 40*s.* By looking into any of the treatiſes on the county court, it will be ſeen, that that court is conſidered in the nature of a court baron. The writ of juſticies, giving power to this Court to hold pleas above 40*s.* in ſome inſtances, does not alter the nature of the court; this is not a court *proprio vigore*, holding pleas of above 40*s.* and therefore is not within the meaning of this act of parliament. But there is no foundation for the ſecond objection; it is ſufficient for this purpoſe, that the defendant acted as an attorney.—Judgment arreſted.

County Rate.

The ſeſſions have no power to vary the proportions, in which the county rate has uſually been aſſeſſed on the ſeveral pariſhes.—The court of quarter ſeſſions for the county of Middleſex, under the ſtat. 12 *Geo.* 2. c. 29. aſſeſſed the pariſh of St. *Paul*, Covent-garden, at the ſum of 69*l.* 5*s.* 7½*d.* as their proportion towards the general county rate. Upon the appeal of the pariſh to the next general ſeſſions, alleging, that their aſſeſſment was unequal and unjuſt, the ſeſſions confirmed the rate, conceiving that they were not authoriſed to vary the proportions, as it had invariably continued in the ſame form ever ſince the year 1739. The objection to the inequality was, that the value of the lands aſſeſſed in this pariſh of St. *Paul* to the poor rates, did not amount to 32,000*l.* and, therefore, the rate of 69*l.* 5*s.* 7½*d.* was unequal and unjuſt, becauſe the lands in the pariſh of St. Mary-le-bone was aſſeſſed 7*l.* 5*s.* 10*d.* only, although the value of the lands charged with the poor rates in that pariſh, amounted to 140,000*l.* Note, that in the year 1739, that is to ſay, in the 12th year of the late king, the county rate act 12 *Geo.* 2. c. 29. paſſed; and by that ſtatute, *the juſtices are reſtrained in making of county rates to ſuch proportions, as any of the rates theretofore made, had been uſually aſſeſſed*; and the firſt county rate after that ſtatute, was made according to the proportions obſerved at the time of paſſing the ſaid act, and had never been varied from that to the preſent time. Lord *Mansfield*. There is great hardſhip in this caſe; but the point is ſettled by the authority in *Parker* 74, and we can give no relief. The diviſions of the land-tax were ſettled in 1694. By the increaſe of the metropolis, it happened, that a great quantity of land in Weſtminſter has ſince been built upon: but the act having laid the tax upon the diviſion, the diviſion is no further

Rex v. the Inhabitants of St. Paul, Covent-garden, Hil. Ter. 22 Geo 3. B.R. *Cald.* 153.

further liable than before. In this caſe to be ſure, the ſubject is different; but the reaſon is the ſame in both. By this act, county rates are to be collected in the ſame manner, as rates have been uſually collected in the ſeveral diſtricts; upon pariſhes *co nomine*; and not upon individuals. We have no authority to alter this proportion; notwithſtanding change of circumſtances, and though convinced that the equity of the caſe is with the appellants. The juſtices diſcretionary power, is applicable to the time when, and not the mode how. —The other judges concurred.

The King *v.* the Inhabitants of Eſſex, Ea. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 591. *Nolan.* 56.

If a fine be impoſed on a county, which the juſtices at the ſeſſions think illegal, they may order the treaſurer to defray the expence of litigating the queſtion out of the county ſtock.—A fine having been impoſed by Lord *Loughborough*, when going the home circuit in the year 1789, upon the county of Eſſex for neglecting to repair the county gaol, and that fine having been eſtreated in the Exchequer, the legality of it was there litigated by the direction of the county magiſtrates, who, in order to defray the expences of ſuch litigation, made the following order at the quarter-ſeſſions: It "is ordered by this Court, that the further ſum of 150*l.* be "advanced by the treaſurer of this county to *W. Bullock*, "eſq. clerk of the peace for the ſaid county, on account of "the expences of defending the inhabitants of the ſaid county, "from the fine impoſed on them by Lord *Loughborough*, "ſubject to the diſcuſſion of any right that the county have "to diſpute the payment of ſuch money." This order having been removed by *certiorari* into this court, and a rule having been obtained to ſhew cauſe why it ſhould not be quaſhed. On ſhewing cauſe, the ſtat. 12 *Geo.* 2. c. 29. ſ. 6. was relied on, which directs the county treaſurer to pay the county ſtock to ſuch perſons, "as the juſtices, at their reſpective "general or quarter-ſeſſions, or the greater part of them, "&c. ſhall, by their orders, from time to time direct and appoint, for the uſes and purpoſes of the recited acts, and "for any other uſes and purpoſes to which the public ſtock "of any county, &c. is, or ſhall be applicable by law." Lord KENYON, Ch. J. If the conteſt in this caſe had been, whether the juſtices of the county could arbitrarily impoſe taxes on the county, the only anſwer that could have been given, would have been in the negative. But the queſtion here is, where by any expreſs law, or by precedent and long uſage, that which has been done was not lawfully done: and if it be warranted by precedent and long uſage, and by many analogous caſes in the law, the order may be ſupported, though there be no preciſe act of parliament to direct it. Long before the ſtatute alluded to, various duties were impoſed upon counties, one of which was the repair of bridges, and that was before any county rate was directed to be made by any act of parliament. And whether theſe duties aroſe by

by the common law, or were impoſed by any ſtatute, it was at the ſame time implied, that thoſe who imputed any neglect to a county, might do ſo without any foundation; in which caſe, the county muſt neceſſarily have had the power of defending themſelves. Trials of this kind have been frequently had, and even diſputes between two counties, which could not have been conducted without great expence; that expence has always been borne by the county, and taken out of the county ſtock; and yet there is no act of parliament to enable the county to do ſo, but it is founded on long uſage, and the neceſſity of the thing. I am not driven, nor will I ever reſort to, the maxim, *communis error facit jus*; but uniform and unbroken uſage *facit jus*. This is that which makes the common law: it is not to be found in the ſtatute-book, but in the text-books, which treat on it as the common law of the land. There is another claſs of caſes analogous to the preſent, the coſts of defending appeals againſt orders of removals. The ſtat. 43 *Eliz.* c. 2. ſ. 1. gave power to the pariſh officers to raiſe a pariſh ſtock; and when a ſubſequent ſtatute, 13 & 14 *Car.* 2. raiſed the queſtions of ſettlements, it became neceſſary to have recourſe to ſome fund for defraying the expences of litigating them; and thoſe expences have always been paid by the pariſh officers out of the pariſh ſtock. The propoſition, therefore, on which I rely, is this; that wherever a duty is impoſed on a county, and where coſts incidentally and neceſſarily ariſe in queſtioning the propriety of acts done to enforce that duty, the magiſtrates, who have the ſuperintendence over the county purſe, have neceſſarily a right to defray ſuch expences out of the county ſtock. Ashhurst, J. Where magiſtrates have acted *bonâ fide* for the intereſt of the county, over which they preſide, in oppoſing the levying of a fine, which (as they think) has been improperly impoſed, they ought not in reaſon to be burthened individually with the expences attending it. In this caſe, the act of parliament has directed a county ſtock to be raiſed, to be applied to certain purpoſes therein mentioned, and to others "*to which the public ſtock* "*of any county is applicable by law*," reaſon and analogous caſes warrant us in ſaying, that the expences of litigating the legality of the fine impoſed upon the county, ought to be defrayed out of the county ſtock. The caſe of bridges bears ſo ſtrong an analogy to the preſent, that on principle it is not to be diſtinguiſhed from it; and that, it is to be remembered, was a caſe well eſtabliſhed before the ſtatute 12 *Geo.* 2. Then, if at that time all the expences incurred in litigating queſtions between two counties ſhould be borne by the reſpective counties, and paid out of their county ſtocks, let us ſee how the queſtion ſtands ſince that act. That ſtatute, after reciting two former acts reſpecting the repair of county bridges and highways, and other ſtatutes reſpecting

gaols

gaols and other different objects, for each of which a ſepa-rate rate was to be raiſed, directs one general rate to be made for the purpoſes of thoſe acts, and for other purpoſes to which by law it is applicable. Now, if before that act the county were liable to pay the expences of litigating queſtions reſpecting the repairs of bridges and highways, it muſt ſtill continue liable, notwithſtanding the words of the act are confined merely to repairs: and if this be the true conſtruction of the ſtatute with regard to bridges and highways, we cannot put a narrower conſtruction on it as to county gaols. In my opinion, the true conſtruction of this act is, that the neceſſary expences of every thing relating to the ſubjects therein mentioned, muſt be borne by the county, and paid out of the common ſtock. If it were otherwiſe, the active magiſtrates of a county would be put in a perilous ſituation, in a variety of caſes that might happen. For inſtance; the juſtices of the peace have, under one of the acts (1), power to purchaſe land adjoining to county bridges: now if the words of the ſtatute be taken ſtrictly, they would be confined to the ſum contracted for with the ſeller; but the purchaſe cannot be completed without ſome other contingent expences, taking an abſtract of the title, drawing the conveyance, &c. which muſt, therefore, neceſſarily be included in the act. To go a ſtep further; objections may be made to the title after the contract is entered into, and a ſuit may be inſtituted againſt the magiſtrates, who contracted, to compel them to carry the agreement into execution; it would be abſurd to ſay that thoſe who have contracted on behalf of the county ſhould not be defended at the expence of the county againſt ſuch a ſuit. It ſeems, therefore, that the neceſſary expences attending all thoſe ſubjects mentioned in the act, muſt be paid out of the county ſtock; and that is ſufficient for the determination of this caſe. But, even upon more general grounds, when a county is attacked, they ſhould have the power of defending themſelves, if unjuſtly attacked; and whether or not there be juſt grounds on which they may defend themſelves, it muſt, according to reaſon, the words of the ſtatute, and by neceſſary implication, be determined by the juſtices acting at the ſeſſions, in whoſe hands the diſtribution of the county rate is veſted. GROSE, J. of the ſame opinion.—Order of ſeſſions affirmed.

The King *v.* the Inhabitants of the Weſt Riding of Yorkſhire, Mic. Ter. 38 Geo. 3 B R. 7 *Ter. Rep.* 377.

But the juſtices of the peace at the quarter-ſeſſions have no authority to order the coſts of a proſecution for a miſdemeanor, carried on under the direction of the magiſtrates, to be allowed out of the county rates.—An order made at the quarter-ſeſſions for the Weſt Riding of Yorkſhire, being re-

(1) 14 *Geo.* 2. c. 33. ſ. 1.

turned

turned to this Court by *certiorari*. "It appeared that three juſtices of the peace for the ſaid riding had directed a proſecution for a miſdemeanor to be carried on at the expence of the ſaid riding, to be defrayed by and out of the county rates, and that the attorney's charges on that proſecution, amounting to 76*l.* 19*s.* 9*d.* had been ordered by the court of quarter ſeſſions, to be paid by the county treaſurer out of the rates in his hands." THE COURT aſked, whether it could be ſupported on any legal grounds, and the counſel candidly admitting that it could not, this not being included under the proviſions of any of the acts of parliament, giving the juſtices authority to allow charges, &c. *The Court* thereupon directed, that the order of ſeſſions ſhould be quaſhed.

A county rate may be levied, and a high conſtable appointed, *de novo*, for a town erected into a county of itſelf by charter many years before, although no ſuch officer had been appointed, or ſuch rate levied before, the corporation having defrayed the expences out of their own funds. James *v.* Green *et al.* Ea. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 228.

Alſo a building given by the corporation for the purpoſe of a houſe of correction about ſeventy years ago, and maintained by them to the preſent time, is not a houſe of correction within the exception of the 17 *Geo.* 2. c. 5. ſ. 31. liable to be maintained by the corporation; but the public may be called upon to ſupport it by a county rate.

This caſe was as follows:—The quarter-ſeſſions for the town and county of the town of Nottingham, appointed a high conſtable for the enſuing year, for the ſpecial purpoſe of collecting and raiſing from the churchwardens and overſeers of the poor of each pariſh, within the town, the rates and aſſeſſments to be levied in the nature of a county rate. The ſame ſeſſions appointed a treaſurer to receive ſuch ſums as the high conſtable ſhould collect, by virtue of ſuch rates, which ſhould be deemed to be a public ſtock, ſubject to the legal order of the ſeſſions; at the ſame time the juſtices ordered 50*l.* to be aſſeſſed upon the town and county of the town, in a certain proportion upon the three ſeveral pariſhes whereof it conſiſted, in the nature of a county rate, "for the relief of priſoners in the gaol; for the relief of priſoners in the King's Bench and Marſhalſea priſons; repairing and furniſhing the houſe of correction, with the keeper's ſalary, the treaſurer's ſalary; the charges concerning vagrants, ſoldiers' carriages, convicting and tranſporting felons, and other charges to which the ſame was by law applicable within the ſaid town." The town of Nottingham was formerly part of the county of Nottingham, and a corporation by preſcription from time immemorial, and has had a gaol in the town, under the cuſtody of, and always repaired by, the corporation. *Henry* 6, by a charter in the 27th year of his reign, after reciting and confirming various charters by former kings, incorporated the:

the town by the name of the mayor and burgeſſes of the town of Nottingham, and made it a county of itſelf; and in that and former charters, "there were grants of fines, forfeitures, and certain eſtates for the purpoſe of defraying future as well as preſent burthens ariſing within the town. But no power is expreſsly given by any of the charters to appoint a high conſtable or treaſurer; nor was a high conſtable or treaſurer ever appointed before the preſent, or any county or other rate in the nature of a county rate made, within the town, until the preſent. Neither have the inhabitants of the town ever contributed to the rate for the county at large." The overſeers have uſually paid the conſtable for apprehending vagrants, without any rate being made; and alſo for the ſupport of the families of militia men; "and all the other charges in the rate (except as above ſtated) have been paid by the corporation of Nottingham out of their own funds." The houſe of hoſpitallers, in Nottingham, was granted by *Edw.* 6. to the corporation, for the purpoſe, as is expreſſed in the charter, of better enabling them to repair and ſuſtain the bridges up the Trent; the corporation, about ſeventy years ago, converted the houſe into a houſe of correction, to which purpoſe it has been ever ſince applied, and the different keepers of it have always been appointed by the mayor.—In this caſe, two queſtions aroſe; viz. 1. Whether the juſtices had power to levy any county rate at all for ſuch purpoſes? 2dly, Whether the preſent rate in the form of it was good? As to the firſt point it was contended, that it appeared from the charters and from the uſage, that the corporation had, in former times, accepted grants of eſtates for the purpoſe of defraying future, as well as preſent burthens, and that it was ſtrong evidence to ſhew, that ſuch was the intention of thoſe grants in the opinion of the grantees themſelves, that until lately they had always defrayed all county charges out of their own funds; and that, therefore, they were concluded now from controverting their liability. As to the ſecond point, if they were ſtill at liberty to raiſe country rates for the firſt time, it was contended, that if any one of the purpoſes for which the rate was expreſſed to be levied were bad, the whole rate was bad; and it was inſiſted, that here the juſtices had exceeded their juriſdiction, by making an order to raiſe county rates for purpoſes to which they are not by law applicable. For the rate purported on the face of it to be made, 1ſt. For the relief of priſoners in the gaol; whereas, the corporation have always relieved the priſoners out of their own funds; and the grants of fines and forfeitures to them under their charters, were probably for this very purpoſe. That they had always had the cuſtody of the gaol, and conſequently, were bound to maintain the priſoners; and could not relieve themſelves from that burthen, without expreſs

preſs authority. That, in the next place, the rate purported to be made for the repairing and furniſhing the houſe of correction, and alſo for paying the keeper's ſalary; and as to this it was obſerved, that the ſtat. 7 *Jac.* 1. c. 4. ſ. 2. requires a houſe of correction to be provided in every county; and the 4th ſection enacts, that the quarter-ſeſſions ſhall appoint, at their pleaſure, a governor of the ſame, that the 17 *Geo.* 2. c. 5. ſ. 31. which places ſuch houſes under the management of the juſtices at the quarter-ſeſſions, and requires them to be fitted up and furniſhed, expreſsly excepts ſuch houſes of correction as have been erected or maintained by any particular founders; it was, therefore, contended, that in this caſe the corporation were the founders and maintainers of this houſe of correction, and had always appointed the keeper, which ſhewed that it was expreſsly within the exception of the ſtat. 17 *Geo.* 2.—By Lord KENYON, Ch. J. and the COURT (ſtopping the other ſide), It appears from the caſe, that Nottingham was ſeparated from the county at large, and made a county of itſelf by the charter of *Henry* 6; and though it had no ſuch officer as a high conſtable before, yet I conceive, that by the common law, but certainly by the ſtatute of Wincheſter, all officers of this nature are incident to the creation of ſuch a diſtrict, having ſeparate juriſdiction; and it is no new thing, if we may have recourſe to analogous caſes, at this day to appoint officers in places where none were in fact appointed before, if by law ſuch an appointment may be made. In the caſe of vills, the Court have, in modern times, frequently granted writs of *mandamus*, to appoint overſeers of the poor for the firſt time, as ſoon as the exigencies of the place required it. So here, when certain public expences were to be defrayed, it was fit that proper officers ſhould be appointed, and rates collected for that purpoſe; many of theſe charges have ariſen in latter times: and though the corporation, in whom the government of the place reſides, might have thought proper, while ſuch charges were ſmall, to pay them out of their own funds, yet as they became more heavy, that could not preclude them from recurring to legal methods of raiſing ſupplies for that purpoſe from the public; ſome perſon or other muſt be liable to theſe burthens, and I ſee no evidence that would ſuſtain a proſecution againſt the corporation for not diſcharging ſuch demands. The circumſtance of their having hitherto taken this burthen on themſelves, will not of itſelf diſcharge other perſons on whom the law has impoſed that liability. As to the preſent houſe of correction, it ſeems, the corporation gave their houſe of hoſpitallers for that purpoſe ſome years ago; other perſons have given buildings for the like purpoſe: but it never can be argued from thence, that ſuch perſons are therefore chargeable with all ſubſequent repairs

and burthens incident thereto. The exception in the ſtatute of the 17 *Geo.* 2. does not apply to caſes of this kind, but was inſerted with reference to ſuch perſons as were bound by tenure, grant, or preſcription, to keep up eſtabliſhments of this nature; the circumſtance relied on here, of the mayor's having appointed the keeper, can only be attributed to the curteſy and deference paid by the reſt of the juſtices, who are aldermen, to him as their head. I ſee no objection to any of the purpoſes for which this rate is expreſſed to be made.

Curates.

Martyn *v.* Hind, Ea. Ter. 16 Geo. 3. B.R. *Cowp.* 440.

There is a diſtinction between curates licenſed, and curates not licenſed; if not licenſed they are removeable at the pleaſure of the incumbent: but if licenſed, they are only removeable *ſub modo*, for inſtance, by the conſent of the biſhop; or where the rector does the duty himſelf.—Per Lord *Manſfield.*

Martyn *v.* Hind, Ea. Ter. 16 Geo. 3. B.R. 3 *Doug.* 141.

It has been decided, that if a rector give a perſon a title to the biſhop, by which he appoints him curate of his church, and undertakes to continue him and pay him a ſalary, till he ſhall be otherwiſe provided of ſome eccleſiaſtical preferment, or for fault by him committed, lawfully removed, he cannot remove him, without cauſe, while he continues rector of that pariſh, and during that time the curate may recover the ſalary in an action upon the title (1). But if the rector is *bona fide* preferred to another living, the obligation ceaſes.—This was a caſe reſerved for the opinion of the Court. The declaration ſtated, that the defendant, on the 13th of February, 1769, by an inſtrument in writing, undertook and promiſed *to retain and continue the plaintiff to officiate as curate in the pariſh church of St. Ann, Weſtminſter, until otherwiſe provided of ſome eccleſiaſtical benefice*, unleſs, by fault by him committed, he ſhould be lawfully removed; and to pay him fifty guineas a-year during that time; that the plaintiff had not been provided of any other eccleſiaſtical preferment, nor lawfully removed, and that the defendant had not, from the ſaid 13th of February, 1769, retained and continued him curate of the ſaid church, and permitted him to officiate therein, and had not paid the fifty guineas a year, &c.—*Plea*—*Non aſſumſit.*—The inſtrument on which the action was brought, was called a title, and was in theſe words, "To the right reverend father in

(1) *Vide* vol. i. p. 290. for this point.

"God,

" God, *Richard*, lord biſhop of London. Theſe are to cer-
" tify your lordſhip, that I, *Richard Hind*, rector of St.
" Ann, Weſtminſter, in the county of Middleſex, and your
" lordſhip's dioceſe of London, do hereby nominate and ap-
" point, the reverend *Thomas Martyn*, to perform the office
" of a curate, in my church of St. Ann, aforeſaid, and do
" promiſe to allow him the yearly ſum of fifty guineas, for
" his maintenance in the ſame, and to continue him to offi-
" ciate in my ſaid church, until he ſhall be otherwiſe pro-
" vided with ſome eccleſiaſtical preferment, unleſs by fault
" by him committed, he ſhall be lawfully removed from the
" ſame; and I hereby ſolemnly declare, that I do not frau-
" dulently give this certificate, to entitle the ſaid *Thomas*
" *Martyn* to receive holy orders, but with a real intention to
" employ him in my ſaid church, according to what is be-
" fore expreſſed. Witneſs my hand, this 13th day of Fe-
" bruary, 1769, *R. Hind.*"—The caſe then ſtated, that on the 6th of July, 1778, the church of St. Ann had become vacant, on the defendant's having taken other preferment (viz. the living of Rochdale), and that he had paid the plaintiff his ſalary, as curate, up to that time. The queſtion upon the caſe reſerved was, Whether the plaintiff could recover the arrears of his ſalary of fifty guineas, from the time of the defendant's quitting the rectory of St. Ann? For the plaintiff, it was contended, that the undertaking by *Hind*, did not determine by his ceaſing to be rector of St. Ann, that it was a permanent agreement to provide for the plaintiff till he ſhould obtain ſome other church preferment. But the defendant inſiſted, that every ſentence in the inſtrument confined the undertaking to the time of *Hind*'s continuance in the rectory of St. Ann. That it could not bind his ſucceſſor, and certainly did not bind him to continue all his lifetime rector of that pariſh. Lord MANSFIELD, There does not ſeem to me to be any colour whatever for the preſent demand. The queſtion is, what *Hind* has undertaken to do. He could not turn the plaintiff out at pleaſure, but there is no pretence to ſay that he has undertaken for himſelf, or his executors, to maintain him for life, or to continue all his own lifetime rector of St. Ann. The queſtion here is not, whether this is a good title or not; although it ſhould ſeem that it is good. They commonly run in this form, and the curate takes the riſque of the rector's quitting the living. A man may give a more permanent title, but the words of this inſtrument clearly confine the undertaking to the time of *Hind*'s continuing rector of St. Ann. " I nominate, &c." " to the office of a curate of my pariſh of St. Ann," &c.—*Poſtea* to the defendant.

Custom.

Fitch v. Rawling, Fitch, and Chatteris, Hil Ter. 35 Geo. 3. C. B. 2 *Hen. Black* 393.

A cuſtom for "all the inhabitants of a pariſh to play at "all kinds of lawful games, ſports, and paſtimes, in the "cloſe of *A.* at all ſeaſonable times of the year, at their free "will and pleaſure, is good." But a ſimilar cuſtom, "for "all perſons for the time being, being in the ſaid pariſh," is bad.—This was an action of treſpaſs for breaking and entering the plaintiff's cloſe, and playing there, with divers other perſons to the plaintiff unknown, at a certain game called cricket, and other games, ſports, and paſtimes, and in ſo doing, &c. &c.—Pleas, 1ſt. Not guilty by all the defendants. 2d. by *Chatteris*, "That there now is, and from "time whereof, &c. hath been a certain ancient and "laudable cuſtom uſed and approved of in the ſaid pariſh, "that is to ſay, that all the inhabitants for the time being, "of the pariſh aforeſaid, have, during all the time afore-"ſaid, uſed and been accuſtomed to have, and of right "ought to have had, and ſtill of right ought to have, the "liberty and privilege of exerciſing and playing at all "kinds of lawful games, ſports, and paſtimes, in and "upon the ſaid cloſe, in which, &c. every year, at all "ſeaſonable times of the year, at their free will and plea-"ſure;" he then averred, that at the ſeveral times when, &c. he was an inhabitant of the ſaid pariſh, and at thoſe times, being ſeaſonable times, he entered the *locus in quo*, and played at cricket, &c. &c. The 3d plea, by *Rawling* and *Fitch*, ſtated the cuſtom to be for "all perſons for the time "being, being in the ſaid pariſh, to have the liberty and privi-"lege of exerciſing and playing at all kinds of lawful games, "ſports, and paſtimes, in and upon the *locus in quo*, at all ſea-"ſonable times, &c. &c." and juſtified under that cuſtom.—The replication to each plea traverſed the cuſtoms alleged, and on the traverſes iſſues were joined, and a verdict found for the defendants. Afterwards it was moved in arreſt of judgment (1), and cauſe was ſhewn againſt that rule. BULLER, J. It is ſaid, that the plea of the defendant, *Chatteris*, does not anſwer the complaint laid in the declaration, which is, that all the defendants together, with divers other perſons unknown to the plaintiff, played at cricket in the plaintiff's cloſe,

(1) When the rule was moved for, Mr. J. *Buller* obſerved, that as there was a verdict for the defendants on the whole record, it was uſeleſs to move in arreſt of judgment, for as it appeared that they had not committed the treſpaſſes complained of, it was immaterial what became of the ſpecial iſſues. The *poſtea*, therefore, was amended by entering a verdict for the plaintiff on the general iſſue, and for the defendants on the others.

But

but that the plea alleges the cuſtom to be for the inhabitants of the pariſh to play at cricket there, and that *Chatteris* as an inhabitant ſo played (that is, it has been ſaid), that he played there with other perſons who were not inhabitants, and who were therefore treſpaſſers, and that he himſelf, by aiding them in their treſpaſs, was guilty of an abuſe of a licence in law, and therefore a treſpaſſer *ab initio*. But this objection, ſuppoſing it to be a good one, does not ariſe on the face of the plea; and if the plaintiff would have availed himſelf of it, he ought to have ſet it out by way of replication. It cannot prevail on a motion in arreſt of judgment, for admitting it to have more weight than I think it has, after verdict it is cured by the ſtatutes of *Jeofails*.—Another objection made, is, that the cuſtoms, whether good or bad, are repugnant to each other, and therefore that the Court cannot give judgment on either of the ſpecial pleas, though found for the defendants. But it would be very ſtrange, if one defendant ſhould plead a good plea, and it were found for him, that he ſhould not have judgment, according to the juſtice and truth of the caſe, though the other defendant ſhould plead a bad plea. But why are theſe cuſtoms inconſiſtent with each other? It might happen, that there might be at firſt a limited cuſtom, and afterwards a more extenſive one; and I do not ſee why the ſecond ſhould root up the firſt, or why they might not both exiſt together, ſuppoſing the ſecond to be a good one.—But the real queſtion is, Whether the cuſtoms, as ſtated, are good? It is objected to the firſt cuſtom, that it is not alleged to be for the neceſſary recreation of the inhabitants, nor that the defendant *Chatteris* went into the cloſe in queſtion for his recreation. But in the caſe of *Abbot* v. *Weakly*, in 1 *Levinz*, 176, the Court ſay that it is neceſſary for the inhabitants to have their recreation. If ſo, it is a matter of law; and though there may be precedents which ſtate ſuch cuſtoms to be for either the health or recreation of the inhabitants, yet, when the Court lay it down that recreation is neceſſary, it is not neceſſary to be averred in pleading. As to the objection, that it is not ſtated that the defendant *Chatteris* went into the *locus in quo* for his recreation, the words of the plea are, that "he entered into the "ſaid cloſe, in which, &c. for the purpoſe of exerciſing and "playing at divers lawful games, ſports, and paſtimes, and "at thoſe ſeveral times reſpectively there played at the ſaid "game of cricket, and the ſaid other games, ſports, and paſ-"times, &c." Now, what are ſports and paſtimes, but recreations? With reſpect to the caſe in *Bro. Abr. Cuſtom pl.* 46, there the cuſtom was holden to be bad, not becauſe it was for the fiſhermen of Kent to dry their nets on the plaintiff's land (which the caſe in *Cro. Car.* 419. ſhews to be good); but either becauſe the digging in the ſoil, in order

to pitch ſtakes to hang the nets upon, was unneceſſary, or it tended to the deſtruction of the inheritance. But that is not the caſe here. There is no authority therefore to oppoſe the caſe in *Levinz*; and, upon the whole, I think that this cuſtom is reaſonable, and the plea good.—But I hold the other cuſtom to be as clearly bad as the firſt is good. How that which may be claimed by all the inhabitants of England, can be the ſubject of a cuſtom, I cannot conceive. Cuſtoms muſt, in their nature, be confined to individuals of a particular deſcription, and what is common to all mankind, can never be claimed as a cuſtom. And I perfectly agree, that no action could be maintained for interruption of it, any more than in the inſtance of a highway, over which the king's ſubjects have a right to paſs and repaſs, and for the obſtruction of which no action can be maintained without ſpecial damage. There muſt be, therefore, judgment for the defendant *Chatteris* on the firſt ſpecial plea, and for the plaintiff againſt the other two defendants.—*Heath*, J. agreed. The lord might have granted ſuch a privilege, as is claimed by the firſt cuſtom, before the time of memory. As to the ſecond, it is clearly bad, being for all mankind; and on that *Fitzgibbon*, 51. is in point.—*Rooke*, J. alſo agreed.

Selby *v.* Robinſon. Mic. Ter. 29 Geo. 3. B. R. 2 *Ter. Rep.* 758.

A cuſtom for poor and indigent houſeholders to cut and carry away rotten boughs and branches in a chaſe cannot be ſupported.—In treſpaſs the defendant juſtified under the following cuſtom: That *all and every* the poor, neceſſitous, and indigent houſeholder, and houſeholders, reſiding and abiding within the ſaid townſhip of Whaddon, in the pariſh of Whaddon, and county aforeſaid, from time immemorial, have uſed and been accuſtomed, at his and their free will and pleaſure, ſtanding upon the ground within the ſaid chaſe, as well with their hands as with woodhooks, to break off, gather, pick up, take, and carry away from and out of Whaddon Chaſe aforeſaid, as well the rotten wood of and belonging to the boughs and branches of the trees, ſtanding and growing in the ſaid chaſe, as the rotten wood broken and fallen off from the boughs and branches of the ſaid trees there ſtanding and growing, and found upon the ground within the ſaid chaſe, for neceſſary fuel to be uſed, burned, and conſumed, in his and their reſpective dwelling-houſes in the townſhip of Whaddon aforeſaid. This cuſtom was traverſed by the replication, and found for the defendant. A rule was obtained to ſhew cauſe why the verdict on the iſſue taken on the above cuſtom ſhould not be ſet aſide, and a verdict entered for the plaintiff, with nominal damages, on the ground that the cuſtom, on which the juſtification was founded, was bad in point of law; on the authority of *Gateward's* caſe. 6 *Co.* 59. *b.*—The Court thought the queſtion too clear for diſcuſſion, and ſaid it was impoſſible to ſupport the cuſtom as now

now ſet out. It might, perhaps, have been otherwiſe, if the defendant could have ſtated on the record that he was ſeiſed of a certain ancient tenement, and ſo preſcribed in a *que* eſtate; becauſe that would be limiting the benefit claimed to the houſes to which the preſcription would apply. But there is no limitation at all in this caſe; and it is impoſſible to aſcertain who is entitled to this right under the cuſtom as ſtated on this record; for the deſcription of poor houſeholders is too vague and uncertain.—Rule abſolute (1).

In replevin for taking and detaining thirty-five ſheep of the plaintiff's, the defendant made cognizance, as bailiff of *J. W. S.* Eſq. and ſet forth a cuſtom within the manor of Wintertown, that the jury of the court leet, from time to time, for and during all the time aforeſaid, have been uſed and accuſtomed, at the ſame court leet, by and with the conſent of the greater part of the commoners, having right of common on the waſtes of the ſaid manor, to make reaſonable by-laws and ordinances for the better preſervation and regulation of the commons within the ſaid manor, and the graſs and herbage growing in the ſame; and to impoſe reaſonable penalties on any farmer or tenant of the ſame manor that ſhould infringe or break ſuch by-law, as they from time to time thought proper. And to diſtrain, &c. And that at a court leet, holden at Winterbourn on the 16th of October, 1764, &c. the jury at the leet made a by-law; and thereby did then and there order, that no perſon or perſons ſhould depaſture any ſheep, horſes, cattle, or any other beaſt whatſoever, on Winterbourn Down, otherwiſe Winterbourn Common, or any other common belonging to the tything of Winterbourn within the ſaid manor, from St. Thomas's-day to Lady-day, yearly in every year, from thenceforth for ever thereafter, on pain of forfeiting 20 *s.* for every ſheep, beaſt, or any other cattle, of what nature or kind ſoever, which ſhould be depaſtured thereon contrary to the ſaid by-law, and all former by-laws. The breach of the by-law was then ſet forth: there was a demurrer and joinder in demurrer: and upon the argument ſeveral objections were taken.—Lord Chief Juſtice de Grey, The principal objection which ſticks with us, is, that the by-law ſtates, that no perſon or perſons ſhall depaſture any ſheep, &c. on pain of forfeiting 20 *s.* for every ſheep which ſhould be depaſtured, &c. contrary to the ſaid by-law and all former by-laws; how can the Court judge whether the offence ſet forth be contrary to all former by-laws, when thoſe by laws are not ſet forth? For thoſe other laws may (perhaps) modify and

Gerriſh v. Rodman, *alias* Rodborne, Hil. Ter. 11 Geo. 3. C. B. 3 *Wiſ.* 255. 164-171.

(1) *Vide Grimſtead* v. *Marlowe*, *ante* vol. i p. 218. that a cuſtom to take a profit in *alieno ſolo* is bad: ſuch a right can only be claimed by preſcription.

qualify the offence, or excuſe from the penalty, for any thing we know to the contrary.—*Gould*, J. The by-laws may be good, but not being ſet forth and diſcloſed, the Court can give no judgment about them.—*Blackſtone*, J. The by-law itſelf is uncertain, for the penalty is given for an offence againſt all former by-laws, and therefore they muſt be ſet forth for the Court to judge of them.—Lord Chief Juſtice, Suppoſe the plaintiff had offended againſt this by-law, yet no penalty is incurred, unleſs he had offended againſt all former by-laws.—The cauſe was ordered by the Court to ſtand over for further argument, with liberty for the defendant to conſider, whether he would not move for leave to amend his cognizances: but the caſe never came again before the Court.—*Adjournatur.*

Griffin *v.* Blandford, Ea. Ter. 14 Geo. 3. B.R. *Cowp.* 62.

In replevin the defendant avowed the taking, under an ancient cuſtom, that time out of mind the lord of the manor, upon the death and alienation of every tenant, was entitled to the ſecond beſt beaſt; if but one, then to that beaſt; and, if no beaſt, then to a compenſation in lieu of it.—On the trial the cuſtom was proved to be as above, with an exception of *meſne ſeigniories*, burgage tenures, and alienations to the uſe of the alienees and their heirs. There was a verdict for the plaintiff; and on a motion for a new trial, on the ground that the cuſtom ſet forth was different from that proved, THE COURT ſaid, that in point of form the cuſtom was not ſet out as proved, becauſe there was nothing in the plea that went to ſhew that burgage tenures and *meſne ſeigniories* were excluded, therefore they awarded a new trial, with liberty to the defendant to amend his plea.

Cuſtoms and Excise.

Offences againſt the Cuſtoms.

Timſon *et al.* *v.* Nodin, Hil. Ter. 15 Geo. 3. C. B. 2 *Bl. Rep.* 963.

The practice of making prime and poſt entries at the cuſtom-houſe is legal and valid: for it is a practice for the benefit of trade; becauſe, if a full entry was to be made at firſt by gueſs without gauging, which cannot be performed on board, and more than the juſt duty was paid, it would be attended (according to the courſe of the cuſtom-houſe) with great circuity, delay, and expence, to get the overplus returned; whereas, by entering a leſs quantity than the truth, and afterwards aſcertaining the true quantity before it goes out of the cuſtody of the officers, the trader is eaſed, and the

revenue

revenue ſufficiently ſecured. And this practice is in effect authorized by the legiſlature; for in the book of fees, eſtabliſhed A. D. 1662, by the houſe of commons, and ſigned by the ſpeaker (ſee *Com. Journ.* the 17th of May, 1662), under the authority of ſect. 24. of the rules and orders annexed to the ſtatute 12 *Car.* 2. c. 4. notice is taken of prime and poſt entries, which ſhews it to have been an ancient legal uſage.

Rex v. Franklyn, Hil. Ter. 23 Geo. 3. B. R. *Cald.* 244.

The taking an active part in company with armed perſons, in defiance of the laws of cuſtoms and exciſe, is a capital felony within the ſtat. 19 *Geo.* 2. c. 34. (1).—A rule was obtained to ſhew cauſe why a writ of *habeas corpus* ſhould not iſſue, directed to the keeper of the caſtle of the city of Norwich, to bring up the defendant, who had been committed under ſtat. 19. *Geo.* 2. for the puniſhment of perſons going armed or diſguiſed in defiance of the laws of cuſtoms and exciſe, for the purpoſe of being bailed. The commitment charged that he had, with others armed, aided and aſſiſted in reſcuing uncuſtomed goods, &c. and aſſaulted, &c. and wounded and maimed, &c. an officer of exciſe in the execution of his duty. This application was made upon the ground, that the commitment did not charge any offence againſt the ſtatute: that it ſtated only that the priſoner did certain acts with others armed; but did not allege that he perſonally was armed, as the act required: and this fact was ſupported by the affidavit of the priſoner. To this it was anſwered, that even if the Court ſhould think that the ſtatute could only affect perſons who were themſelves armed, and conſequently that the preſent commitment was defective, this application muſt prove nugatory; as before the writ of *habeas corpus* could be returned, a proper warrant of detainer ſhould be lodged againſt the priſoner.—Lord *Mansfield*, To be ſure that may be done: but the priſoner does not deny that he was there with armed perſons; and, if he was active, it is not neceſſary under this act, that ſuch individual ſhould be armed. His Lordſhip added, that there was no ground for this application; for the Court never grants the motion upon the merits as diſcloſed by the priſoner's affidavit. *Willes*, *Aſhhurſt* and *Buller* concurred.—Rule diſcharged.

(1) Which enacts, "That if any perſons, to the number of three, or more, armed with fire-arms, or other offenſive weapons, ſhall, &c. be aſſembled in order to be aiding and aſſiſting, &c. in reſcuing or taking away prohibited or uncuſtomed goods, after ſeizure, from any officer or officers of the cuſtoms or exciſe, &c. or in caſe any perſons, to the number of three, or more, ſo armed as aforeſaid, ſhall, &c. be ſo aiding or aſſiſting, &c. or ſhall forcibly hinder, obſtruct, aſſault, oppoſe or reſiſt any of the officers of the cuſtoms or exciſe, or other his majeſty's revenue, in the ſeizing or ſecuring any ſuch goods, &c then every perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of felony, and ſhall ſuffer death as in caſes of felony, without benefit of clergy." c 34. ſect. 1.

If

Wilson v. Saunders, Ea. Ter. 38 Geo. 3. C. B. 1 *Pul. & Bos.* 267.

If goods prohibited from being sold in this country by 11 & 12 *W.* 3. c. 10. are taken out of a warehouse, and put on board a vessel as if for exportation, but in fact with a view to be re-landed, they are liable to be seized, though no actual attempt to re-land them has been made.—This was trespass for seizing goods under the following circumstances. The plaintiff purchased at the India sale a quantity of Bandanno handkerchiefs (which are prohibited to be used in this country by 11 & 12 *W.* 3. c. 10.), and sent them down with the usual forms, under the care of a custom-house officer, to the custom-house at Alborough, where they were put on board the Experiment cutter by the custom-house officers, the plaintiff having entered them for Hamburgh, and the cutter having cleared out for that port, though she had only a license to fish between Flamborough-head and the Isle of Wight, under 24 *Geo.* 3. c. 47. The plaintiff had given security for the goods "being exported and not re-landed," according to the directions of 11 & 12 *W.* 3. c. 10. sect. 2. The defendant, who was captain of the Argus revenue cutter, seized the vessel and goods after the former had proceeded some way down the river, but while she was within the limits of the port of Alborough, and a tide-waiter of that port being on board at the time. A verdict was found for the plaintiff, with liberty to the defendant to move to set it aside in the ensuing term. Which motion being made, and cause shewn—Eyre, Ch. J. The question for the consideration of the jury was, Whether, when a person goes through the necessary ceremonies which belong to a fair exportation, and puts his goods on board a vessel colourably bound for Hamburgh, but, in fact, a cutter licensed to fish between Flamborough-head and the Isle of Wight, together with all the circumstance which belong to this case, tending to prove that they were not meant to be exported, he can be considered as having taken them out of the warehouse in order to export them? If it could be demonstrated that he had no intention to export them, and that he meant to put them on board a vessel in order to be carried one, two, or three leagues only from the shore, proof of that intention would defeat the allegation that they were taken out of the warehouse for the purpose of exportation. The circumstance of actual relanding need not be shewn, for the case would be vitiated by the original intention with which the goods were taken out of the warehouse. I think that the circumstances of the case afford a presumption on this one point, which ought to be submitted to a jury. There may have been reasons of necessity sufficient to justify the plaintiff in having acted in the manner which he has done; and he will have an opportunity of insisting upon them at a new trial. I am anxious that the principle

principle of these laws should be a little understood, and that an idea should not be entertained, that if all the forms and ceremonies prescribed by the act are complied with, the substance may be evaded with impunity. *Per. Cur.*—Rule absolute.—On the second trial, *Ashhurst*, J. left it to the jury to determine whether the goods were put on board the cutter with the intention of being exported, a verdict was found for the defendant. In consequence of which, a rule *nisi* for a new trial was obtained on two grounds: 1st. That the goods at the time of the seizure were in *custodiâ legis*, having been sent down to Alborough under the care of a custom-house officer, having been put on board the vessel at Alborough by custom-house officers, and an officer having been on board at the time when they were seized: 2dly, That the goods were in a course of exportation, no act towards re-landing them having been done. But the Court, after cause shewn, were clearly of opinion, that the goods were not in the custody of the law, for that the owner, after giving security in London according to the statute, was at liberty to export them as he thought fit; that the practice of sending down an officer with the goods was not required by the 11 & 12 *W.* 3. but had been adopted from 6 *Geo.* 3. c. 40. sect. 6. which relates to the exportation of East-India goods to Africa; and that the officer who was on board at the time of the seizure was placed there for the general protection of the revenue, not to watch these particular goods. As to the second point, that there was no distinction between an intention to export the goods, and their being in a course of exportation: and that if it could be demonstrated that all intention to export them was abandoned, the bond of security might be put in suit, though all the forms necessary to exportation had been complied with.—Rule discharged.

There is no right to seize contraband goods in the river before the goods are landed, or offered to sale; for there is no right to seize unless the goods be landed, or offered to sale; the mere bringing the ship into port gives no right to seize; and this opinion of the Court was grounded on the stat. 18. *Car.* 2. c. 7.

Smyth *v.* Reynolds, Ea. Ter. 5 Geo. 3. C. B. 2 *Wilf.* 257.

Officers.

Trespass will lie against custom-house officers for entering a house and searching for smuggled goods, if none be found (1).

Bruce *v.* Rawlins, *et al.* Ea. Ter. 10 Geo. 3. C. B. 3 *Wilf.* 61.

(1) But they are now protected under the stat. 23 *Geo.* 3. c. 70. if there be probable cause.

Trespass

Treſpaſs for breaking and entering the plaintiff's houſe at A. in Eſſex, and opening and ſearching ſeveral boxes and drawers therein; the defendants ſuffered judgment to go againſt them by default. Upon executing the writ of inquiry of damages, it was proved, that the defendants were cuſtom-houſe officers; that on the 4th of July, in the day-time, they entered the plaintiff's dwelling-houſe with a writ of aſſiſtance, without any conſtable, in order to ſearch for uncuſtomed goods; the plaintiff's wife and daughter being only at home, were frightened and much ſurprized, delivered to the defendants (at their requeſt) the keys of ſeveral boxes and drawers, which the defendants ſearched, but found no uncuſtomed goods. They ſtaid in the houſe about an hour, broke no locks, bolts or doors, and did very little or no damage; and departed, curſing and ſaying, Damn it, there are no goods! Whereupon the jury found 100*l.* damages.—It was moved to ſet aſide the inquiſition for exceſſive damages. Cauſe was ſhewn.—*Wilmot*, Ch J. This is an inqueſt of office to inform the conſcience of the Court, who, if they pleaſe, may themſelves aſſeſs the damages; but I am of opinion we ought not to interpoſe in this caſe. This is an unlawful entry into a man's houſe (which is his caſtle), an invaſion upon his wife and family at peace and quietneſs therein, frightened and ſurpriſed by theſe defendants; who, under pretence of information received, and colour of legal authority, demand the keys of, and ſearch all the boxes and drawers in the houſe. This is one of thoſe caſes wherein the Court will not interpoſe.—*Gould*, J. The entering the plaintiff's houſe under colour of legal authority, aggravates the treſpaſs committed by the defendants; and though they had a writ of aſſiſtance, yet as they had no conſtable with them, they would have been treſpaſſers, notwithſtanding they ſhould have found uncuſtomed goods in the plaintiff's houſe. See ſtat. 12 *Car* 2. cap. 19. ſect. 1 & 4. and ſtat. 13 & 14 *Car.* 2. cap. 11. A cauſe was tried before me at Pool (which is a town and county of itſelf), againſt a cuſtom-houſe officer and a conſtable, for entering the plaintiff's houſe to ſearch for run-goods; and though they found ſuch goods in the houſe, yet becauſe the conſtable was not a conſtable of the town of Pool, but of the county of Dorſet, they were treſpaſſers; and the jury gave the plaintiff 100*l.* damages.—*Yates*, J. The caſe muſt be very groſs, and the damages enormous, for the Court to interpoſe: here the defendants have acted under colour of legal authority, and we have no line or meaſure to go by. I think the damages are not exceſſive, and have no deſire to ſet the inquiſition aſide.—Rule diſcharged.

Redſhaw *v.* Brook, *et al.* Ea. Ter. 9 Geo. 3. C. B. 2 *Wilſ.* 405.

So in this caſe, which was treſpaſs againſt the defendants (cuſtom-

(cuſtom-houſe officers) for breaking and entering the plaintiff's houſe, and ſearching every place therein for prohibited and uncuſtomed goods, but none found: upon not guilty pleaded this cauſe was tried before Lord C. J. *Wilmot*, when the jury gave a verdict for the plaintiff, and 200*l.* damages. It was moved for a new trial, alleging, that the damages were exceſſive, for that it appeared upon the trial that the defendants had not done damage to the plaintiff to the value of 10*s.*; whereupon the Lord Chief Juſtice reported the evidence; and added, Although I myſelf may think 200*l.* too large damages, yet how can we draw the line to fix the meaſure of damages in this caſe; I cannot ſay the jury have done wrong; and perhaps, if I had been one of the jury, ſome of them might have convinced me that 200*l.* damages are little enough: I am not diſſatisfied with the verdict.—*Clive*, J. As my Lord C. J. is not diſſatisfied, how can we ſay that theſe damages are too large?—A rule to ſhew cauſe why there ſhould not be a new trial refuſed *per totam curiam.*

In ſearches by exciſemen where the preſence of a peace-officer is required, an officer by reputation, attending the rotation juſtices, is not ſufficient.—In treſpaſs for breaking into the plaintiff's houſe, and entering and ſearching the ſame: on not guilty, there was a verdict for the plaintiff with 30*l.* damages, ſubject to the following caſe: The plaintiff was a tallow-chandler and maker of ſoap; the defendants were exciſe officers; and on Sunday, the 26th of May, 1776, entered and ſearched the houſe and workſhop of the plaintiff at four in the morning, and ſtaid there half an hour. They had with them one *John Farrel*, who about two years before had been headborough of St. Paul's, Shadwell, when a board was fixed over his door with his name, and the word headborough upon it, which ſtill continued, though he was no longer headborough, but he ſtill attended the rotation office of juſtices, as an apprehender of felons. The defendants, by miſtake, applied to him at his own houſe, to attend them in making the ſearch, which he accordingly did. The ſtatutes 8 *Ann.* c. 9. ſect 10. and 10 *Ann.* c. 19. ſect 12. require the preſence of a "conſtable, or other lawful officer "of the peace," when exciſe officers attempt to make a ſearch in the night time.—*De Grey*, Ch. J. The treſpaſs is clearly enough ſtated: one who illegally aſſumes the name of an officer, is not a legal officer.—*Gould*, J. It is of great conſequence to the public for the Court to ſee theſe powers, lodged in the officers of the revenue, ſtrictly purſued.—*Blackſtone*, J. It was incumbent on the defendants to be ſure that they had a regular peace-officer: *Farrel* was certainly not ſo at the time of the ſearch; and I incline to think he never was properly qualified for this ſearch, being formerly an officer

Hill v. Barnes, *et al.* Ea. Ter. 17 Geo. 3. C. B. 2 *Black.* 1135.

officer of Deptford, and not of Chriſtchurch. The ſpirit of all the revenue laws is, *that the accompanying officer muſt be an officer* of the place, *that the ſubject may not be unreaſonably terrified at his houſe being entered in the night by mere ſtrangers.* This was particularly the caſe in the revenue of hearth-money, and has been purſued in all the laws of the cuſtoms and exciſe which ſucceeded it. It is not enough to be an officer of the county, but he muſt be of the place. If a conſtable from Deptford will authorize a ſearch in Chriſtchurch, the next time they might fetch a tythingman from Hounſlow. —*Nares*, J. of the ſame opinion.—*Poſtea* to the plaintiff.

Oldfield v. Licet, Ea. Ter. 15 Geo. 3. C. B. 2 *Black.* 1001.

In treſpaſs, on a caſe reſerved, the queſtion made by the counſel was, Whether an action of treſpaſs would lie againſt a cuſtom-houſe officer for miſbehaviour in the houſe where he had made a ſeizure of goods, notwithſtanding ſome of thoſe goods were condemned on a trial in the exchequer, and the judge had certified that there was probable cauſe for ſeizing the whole.—For the plaintiff was cited the *Six Carpenters'* caſe, 8 *Rep.* 146. and for the defendant, *Vanderbergh* and *Blake*, *Hardr.* 194. and the ſtatute of the 19 *Geo.* 2. c. 34. ſect. 16. But the Court, on conſidering the circumſtances ſtated in the caſe, which was very long and minute, did not think there was any ſuch miſbehaviour in the defendant as would amount to an act of treſpaſs (independent of the protection which he claimed under the condemnation and certificate), ſuppoſing, as it was, his original entry to be lawful, and therefore they gave no opinion on the principal point in queſtion.

Boſtock v. Saunders, *et al.* Tr. Ter. 13 Geo. 3. C. B 3 *Wiſ.* 434. 2 *Black.* 912.

This was treſpaſs for breaking and entering the plaintiff's houſe. On not guilty and iſſue thereon, the cauſe was tried before the lord chief juſtice at the ſittings after Hilary term, and a verdict for the plaintiff with 100*l.* damages, ſubject to the opinion of the Court on the following caſe. The plaintiff proved his declaration. The defendants in their defence produced and proved a warrant under the hands and ſeals of Meſſrs. *Lucas* and *Stonehewer*, two commiſſioners of exciſe, reciting, "that the defendant *Saunders* (an officer of exciſe) "had made oath before them, that he had cauſe to ſuſpect "and did ſuſpect, that tea was fraudulently hid and con- "cealed in the plaintiff's houſe, to defraud the king of his "duties, ſetting forth in and by his ſaid oath the ground of "his ſuſpicion, and the ſame appearing to us to be reaſon- "able ground of ſuſpicion;——they therefore judge it rea- "ſonable, and do authorize and impower the ſaid defendant "*Saunders*, to enter the plaintiff's houſe, &c. and to ſeize all "tea and other exciſeable goods, which he ſhall there find "fradulently concealed: and all conſtables and other offi- "cers are authorized and required to be aiding and aſſiſting "therein." Dated the 27th of October, 1772.—On which

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was indorſed this return; "Honourable Sirs, I have ſearched "the houſe of *H. Boſtock*, but without ſucceſs." But the defendants did not produce or prove the information ſtated in the warrant to have been made on oath before the commiſſioners.—It was proved that the defendant *Saunders* was an officer of exciſe, and that the other defendants, who acted as his aſſiſtants, were two of them officers of exciſe, and one an officer of the cuſtoms.—The queſtion was, WHETHER upon the circumſtances the plaintiff was entitled to recover? And this aroſe upon the ſtat. 10 *Geo.* 1. c. 10. ſect. 12 & 13.—Lord Ch. J. *De Grey* (after argument), This is a queſtion of conſtruction upon an act of parliament, the 10 *Geo.* 1. c. 10. ſect. 13 which enacts, that if any officer ſhall have cauſe to ſuſpect that any coffee, tea, &c. is fraudulently concealed, &c. then, upon oath made by ſuch officer before two of the commiſſioners, ſetting forth the ground of his ſuſpicion, they may, by warrant, authorize the officer to enter, &c. ſeize, and carry away, all the coffee, tea, &c. which he ſhall find concealed, &c.; and if any perſon ſhall hinder the officers from entering, or ſeizing, or carrying away ſuch coffee, tea, &c. the offender ſhall forfeit 100*l.*—*Saunders*, the officer, upon his oath obtains a warrant, ſearches the plaintiff's houſe, finds nothing; he both acquires and executes the warrant. It is contended he is juſtifiable, as acting under the command of the commiſſioners, and that it is ſufficient for him to ſhew their warrant, authorizing him to enter the plaintiff's houſe, &c. in like manuer as a bailiff of the ſheriff is juſtifiable in the execution of his warrants. But the caſe of a ſheriff's bailiff is very different from this: the bailiff is bound to execute the ſheriff's warrant; the officer of exciſe is the party promoting, and acting for his own benefit, under an authority which he has obtained by his own oath, and he is not bound to obey like a ſheriff's officer. *Saunders* ſwears to his ſuſpicion, he is miſtaken, and his ſuſpicion is groundleſs; he finds no teas concealed; the whole matter riſes and ends in himſelf.—The queſtion is, Whether the exciſe-officer is juſtified in all events, or whether he acts at his peril? I am of opinion, he acts at his peril, and is a mere volunteer.—In caſes of warrants granted to ſearch for ſtolen goods, the informer makes oath that a felony has been committed and of the reaſons he has for ſuſpicion that the goods are concealed in ſuch a place; the execution of theſe warrants depends upon the event; the ſearch is lawful if the goods are there, unlawful if not there; and although the juſtice of peace and the officer may juſtify in treſpaſs, yet the informer cannot. 2 *H. H. Pl. Coron.* 150. It is ſaid, the warrant to ſearch the plaintiff's houſe was granted upon a judgment formed by lawful magiſtrates [the commiſſioners]; I think the commiſſioners were bound to grant the warrant upon the oath of *Saunders*, and could

could not form any judgment upon the matter, the commiſſioners have no power to ſummon the ſuſpected party, or any witneſſes, they cannot examine on both ſides, ſo it was impoſſible for them to judge; if the commiſſioners had ſuch power, it would be nugatory, for the goods would be removed before ſuch examination could be had.—I think the ſtat. 10 *Geo.* 1. c. 10. ſect. 13. is compulſive upon the commiſſioners to grant the warrant to the officer to enter and ſearch, upon his oath of ſuſpicion that teas, &c. are fraudulently concealed; ſo it points out the very perſon liable, if any injury be done, and no goods found; and it is reaſonable and juſt that the informer, who obtains and executes the warrant, ſhould be anſwerable in this caſe; and, in my opinion, the production of the warrant of itſelf is not a ſufficient juſtification. Whether, upon the trial, the information would have been admiſſible evidence for the defendant, is not now for the Court to determine; but, as it was then called for by the plaintiff, I think it ought to have been produced; but as no evidence was given at the trial of any probable cauſe or ground of ſuſpicion that tea was fraudulently concealed by the plaintiff, the jury found a verdict for him, and gave the whole damages in the declaration: and I am of opinion he muſt have judgment.—*Gould*, J. It is not neceſſary to determine, whether an action will or will not lie againſt the commiſſioners, but thus much I will ſay, that if a warrant, like the preſent, ſhould be granted by them, upon a frivolous, vain, and groundleſs ſuſpicion, an action might well lie againſt them: but I do not give any opinion as to this.—The officer, by his own act, having obtained the warrant, I think it is not neceſſary now to determine, whether he was then bound to execute the ſame. The ſtatute ſays, if the officer ſhall have cauſe to ſuſpect, &c. then, upon his oath, ſetting forth the ground of his ſuſpicion, the commiſſioners may grant a warrant, authorizing him to enter, ſearch, &c. no evidence was given of the ground of the defendant's ſuſpicion, he ought to have ſhewn to the Court and jury the cauſe of his ſuſpicion; ſuppoſe the defendant had been obliged to have pleaded ſpecially, I think he could not have juſtified under the warrant alone, but muſt have pleaded the facts upon which he grounded his ſuſpicion; and if, upon the facts pleaded, a probable cauſe had been ſhewn, he might (perhaps) have been juſtified in the opinion of the jury, although no goods were found; I am alſo of opinion, that judgment muſt be given for the plaintiff.—*Blackſtone*, J. Upon the firſt argument of this caſe I was, and ſtill am, of opinion, that judgment muſt be given for the plaintiff. I think this is not ſuch a warrant as actually commands and requires execution, but I look upon it as a permiſſion to the officer to act at his peril. I ſhould rather think the commiſſioners would be liable to an action,

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if there was not good ground of ſuſpicion laid before them before they granted the warrant; but I give no opinion as to this. After the officer has acquired the warrant, I think it remains ſtill in his option, whether he will execute it or not. —*Nares*, J. agreed.—By the 12th ſect. of the ſtat. 10 *Geo.* 1. c. 10. power is given to the officers, in the day time, to enter all warehouſes, &c. uſed for keeping coffee, tea, &c. and to take accounts thereof, &c. this ſection only has reſpect to druggiſts, grocers, &c. &c. &c. or other perſons ſelling or dealing in coffee, tea, &c. by wholeſale or retail; but the legiſlature ſeeing that coffee, tea, &c. might be fraudulently concealed in private houſes, made further proviſion by ſect. 13. for the ſecurity of the ſubject with reſpect to the officer's power of entering into private houſes to ſearch, &c. the officer himſelf who makes information that goods are concealed, muſt be the perſon authorized, by warrant, from the commiſſioners to enter, ſearch, &c. who have a diſcretionary power to grant ſuch warrant. In the preſent caſe, the officer informs on oath, acquires a warrant, enters and ſearches the plaintiff's houſe, but finds nothing, and an action of treſpaſs is brought. What ought the officer to have ſhewn beſides the warrant? He ought to have proved upon the trial, that he is an officer, that he made information, on oath, of the cauſe and ground of his ſuſpicion, and what that cauſe and ground of ſuſpicion was, that the jury might judge whether there was any probable cauſe or ground of ſuſpicion, that tea was fraudulently concealed in the plaintiff's houſe; but he proved nothing of this; *et de non apparentibus et non exiſtentibus eadem eſt ratio*; it would therefore be very ſtrange indeed for the Court to ſay he is juſtified under the warrant alone: if a commiſſion of bankruptcy be ſued out againſt a perſon not liable to be a bankrupt, and he be declared a bankrupt thereupon, and his goods be ſeized to the uſe of the aſſignees, treſpaſs lies againſt the aſſignees, who cannot juſtify under the Lord Chancellor's commiſſion alone, but muſt ſhew every requiſite neceſſary to prove that the party was liable to be a bankrupt.—Judgment for the plaintiff.

In another caſe, where an action of treſpaſs was brought againſt an officer of exciſe for entering under a warrant of two commiſſioners, founded on the 10 *Geo.* 1. c. 10. into the plaintiff's houſe to ſearch for concealed goods. THE COURT held, that the defendants were not treſpaſſers, even though they found nothing in the plaintiff's houſe, the act itſelf being legal; but that the only remedy was by an action on the caſe for obtaining or executing the warrant from bad motives.

Boot *v.* Cooper, *et al* Ea. Ter. 25 Geo. 3. B. R. cited 1 *Ter. Rep.* 535.

But a condemnation of goods in the Exchequer is ſo concluſive, and ſo alters their property, that treſpaſs will not lie againſt

Scott *v.* Sheerman, *et al.* Hil. Ter. 15 Geo. 3. C. B. 2 *Black.* 977.

againſt the officer who ſeized them to try the point of forfeiture again. 1ſt. Becauſe of the implicit credit which the law gives to any judgment in a court of record, having competent juriſdiction of the ſubject-matter; and the juriſdiction in this caſe of the court of Exchequer, is not only competent, but ſole and excluſive. And though it be ſaid, that no notice is given to the owner in perſon, and that, therefore, he is not bound by the condemnation, not being a party to the ſuit; yet the ſeizure itſelf is notice to the owner, who is preſumed to know whatever becomes of his own goods. He proves that they were ſeized by a revenue officer. He knows that they are carried to the king's warehouſe. He knows, or may know, that, by the courſe of law, the validity of that ſeizure will come on to be examined in the court of Exchequer, and can be examined no where elſe. He has notice by the two proclamations according to the courſe of that court. He has notice by the writ of appraiſement, which muſt be publicly executed on the ſpot where the goods were detained. And if he neglect this opportunity of putting in his claim, and trying the point of forfeiture, it is his own laches, and he ſhall for ever be concluded by it, not only with reſpect to the goods themſelves, but every other collateral remedy for taking them. For it would be nugatory, to debar him from recovering *directly* the identical goods that are condemned, if he is allowed to recover *obliquely* damages equivalent to their value.—2dly. Becauſe, the property of the goods being changed, and irrevocably veſted in the crown by the judgment of condemnation (as is clear beyond any diſpute, and conceded on the part of the plaintiff), it follows, as a neceſſary conſequence, that neither treſpaſs nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retroſpect and relation backwards to the time of the ſeizure. The goods ſeized are, therefore, to be conſidered by this retroſpect and relation backwards to have been, at the time of the ſeizure, the goods and chattels of his majeſty, and not of the party, and neither treſpaſs nor trover will lie for taking of goods, unleſs, at the time of the taking, the property be in the plaintiff. *Gild. Exch.* c. 13. p. 186. *Keil*, 68. b. 8 *Ed.* 4. 4. 1 *Hal. P. C.* 416. 2 *Hal. P. C.* 64. *Fitz. Abr. Forfeiture*, 35. *Staundf. P. C.* 183. and *Prerog.* 46. *Dyer*, 283. *b.* 2 *Hal. P. C.* 301. *Vanderbergh* and *Blake. Tr.* 13 *Car.* 2. In the *Exchequer*, *Hardr.* 194. it was held that the ſeizure and proclamation are ſufficient notice to the owner; and that neither trover, nor action for malicious information, nor other action which may blow off the judgment by a ſidewind, will lie after a condemnation in the *Exchequer*. Alſo, *Ekins* and *Smith*, *M.* 31 *Car.* 2. In the *Exchequer*, *Raym.* 336. and cited *per Cur.* *Carth.*

Carth. 327. As *Martin* and *Wilsford. T.* 6 *W.* & *M.* In the *Exchequer*, *Carth.* 323. are to the same points (1).

But a condemnation of goods by the commissioners of excise, is not conclusive evidence to a jury in an action of trespass.—This was an action of trespass against certain officers of excise for seizing a quantity of soap, supposed to be irregularly lodged and concealed. It appeared in evidence, that the soap was seized under a warrant, grounded on an oath of suspicion, on the 25th of February, 1777; that on February the 26th, an information was ordered by the commissioners against the plaintiff. That on the 28th, he brought his action, and gave notice of trial on the 25th of April, for the sittings after that term, being the 14th of May. On the 10th of May, and not sooner, notice was given to the plaintiff of the information, with a summons to attend the hearing on the 13th; which drove the plaintiff into a consent to postpone the trial of his cause. And on the 16th, the commissioners convicted the plaintiff in 100*l.* (which they mitigated to 40*s.*) besides the forfeiture of the soap. At the trial it was insisted, on the 10th of June, 1777, that this *condemnation was conclusive evidence to the jury*; and, 2d. If it was not so, yet that the *onus probandi* that the soap had paid the duty, lay upon the plaintiff. The judge permitted the condemnation to be read in evidence as a fact, but left it under all its circumstances to the jury to consider what weight it ought to have; informing them, that this, being a condemnation at the board of Excise, and not in the Exchequer, was not evidence conclusive. And that in an action, the *onus probandi* of the soap's not having paid the duty, lay upon the officers who seized it. Upon which the jury found a verdict for the plaintiff, damages 132*l.* 9*s.*—A new trial was moved for upon this supposed misdirection of the judge. Per Cur. It was determined very lately in *Scot* and *Shearman*, in this Court, and has been uniformly so held for above a century, that a condemnation of goods in the Exchequer is conclusive evidence against all the world. But the reasons and authorities relied on in that and all the other cases, extend only to that court, being the king's supreme court of revenue, and not to the inferior jurisdictions of the boards of Excise and Customs. The only shadow of argument, that can be alleged for making their condemnations final and conclusive, is drawn from stat. 23 Geo. 2. c. 21. s. 33. which enacts, that upon seizure of goods where no claimant appears, then upon giving the notices therein directed, the condemnation "shall be final to "all intents and purposes whatsoever," but it goes on and adds, "as if the owner had been summoned to attend the

Henshaw *v.* Pleasance, *et al.* Mic. Ter. 18 Geo. 3 C.B. 2 *Black.* 1174.

(1) See also *Viner's* Abr. Tit. Ev. 95.

"commiſſioners." This does not, therefore, apply to the preſent caſe, as here the legal owner appeared. Nor in any caſe would it be any otherwiſe final, than other condemnations by the board, where the owner is ſummoned or appears; which never were ſuppoſed to be final evidence to a jury at common law.—2dly. The other point was expreſsly determined in the caſe of *Salomon* and *Gordon*, by the whole Court; and we ſee no reaſons to alter the opinion then given, unleſs there be any thing in the laws of exciſe relating to ſoap, different from thoſe relating to glaſs. But the ſtatute of 10 Geo. 1. c. 10. ſ. 21. which has been mentioned, as not being then under conſideration, relates only to coffee, tea, and cocoa-nuts; and to informations thereon for forfeiture; and not to actions at common law. And the ſect. 35. of ſtatute 23 *Geo.* 2. c. 21, which relates to ſoap and candles, and lays the *onus probandi* on the claimer, and not the officer, is exactly ſimilar to thoſe general clauſes which were conſidered in the caſe of *Salomon* and *Gordon*, and relates plainly to informations, and not to actions (1).—Rule diſcharged.

Salomon *v.* Gordon and Berrie, Ea. Ter. 32 Geo. 3. C.B. 2 *Black.* 813.

The caſe of *Salomon* v. *Gordon*, cited in the laſt caſe, was treſpaſs for taking four boxes of plate-glaſs. It appeared in evidence on the trial, that the goods were ſeized in the open ſtreets of London, from the plaintiff's porter, who was carrying them from a warehouſe where they had lain three months, to the plaintiff's houſe; in the paſſage to which, they did not go near the water-ſide. That the defendants were cuſtom-houſe officers, and ſeized the goods, under a ſuſpicion of their not having paid the duties, about nine o'clock in the evening. The defendants admitted theſe facts; but inſiſted, that under the ſtatutes 6 *Geo.* 1. c. 21, ſect. 41. and 12 *Geo.* 1. c. 28. ſ. 8. the *onus probandi*, that theſe goods had paid duty, lay upon the plaintiffs: in default of which, the ſeizure was juſtifiable. The judge was of a different opinion, and thought the defendant, in an action of treſpaſs, muſt ſhew the goods were forfeited; and the plaintiff recovered a verdict. Afterwards a new trial was moved for, on the ground that the proviſions, in thoſe ſtatutes, extended to all caſes; as well actions, as proſecutions.—Per Cur. The judge's direction was right; they relate to proſecutions only. It has been found neceſſary for the revenue, to lay traders under ſpecial reſtraints, to prevent colluſion and fraud. Before the ſtat. 6 *Geo.* 1. if an officer went into a trader's houſe, and an action of treſpaſs was brought againſt him; then, on proof of the treſpaſs committed, unleſs the defendant could prove, that the goods therein were forfeitable, he had a verdict againſt him. This ſtopped the collection

(1) But this is altered by the ſtat. 23 *Geo.* 3. c. 7. and the *onus probandi* now lies upon the claimant in actions as well as informations.

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of the public revenue. To remedy this, the ſtat. 6 *Geo.* 1. was made; and the preamble to ſect. 39. ſtates the miſchief. And the purport of the act is, that, where an officer acts *bonâ fide* he ſhall be protected. Violent preſumption ſhall excuſe him, though he miſtakes, in theſe three caſes. 1. Where goods are on board a boat, &c. without any officer. 2. Where they are coming from the water-ſide. 3. On credible information. In theſe caſes, the owner may apply to the commiſſioners; who, if the circumſtances are proper, will reſtore the goods. If no application be made, but the officer is driven to a proſecution for condemnation; the *onus probandi*, that the goods are not forfeitable, lies on the claimer in ſuch proſecution. Such proſecution in ſect. 41, relates to the proſecution for condemnation, in ſect. 40. The proof is to lie on the claimer, and not the proſecutor. Not the leaſt idea of a plaintiff in a civil action throughout the whole. Next comes the ſtat. 12 *Geo.* 1. which, in all the preceding clauſes, relates only to proſecutions for condemnation. In ſect. 8. it refers to 6 *Geo.* 1. in all the unaltered parts; but carries it, in this point, farther than it went before. The ſtat. 6 *Geo.* 1. ſect. 41. had ſaid, that, "if upon ſuch proſecution (*i. e.* proſecution upon a "ſeizure), where no application hath been made to the com-"miſſioners, and not otherwiſe, the property ſhall be claimed, "and the non-payment of the duties ſhall come in queſtion; "the proof ſhall be incumbent on the claimer, and not on "the ſeizor or proſecutor." The ſtat. 12 *Geo.* 1. c. 28. ſect. 8. enacts, that "in all caſes, where foreign goods ſhall be "ſeized for non-payment, &c. and any diſpute ſhall ariſe, "whether the duties have been paid; the proof ſhall lie on "the owner or claimer of ſuch goods, and not on the offi-"cer who ſhall ſeize; any thing, in ſtat. 6 *Geo.* 1. c. 21, "to the contrary notwithſtanding." This extends to all caſes, whether application hath been made to the commiſſioners or no; but to all caſes, in *pari materia*, all caſes of proſecutions to condemn.—There is no occaſion to protect the officer, or lay the trader under difficulties, where there is no violent ground of ſuſpicion. If an information had been brought in the Exchequer, the officer might have applied to remove, or ſtop, the civil action againſt him, by a kind of equitable injunction, and have inſtituted an action there, in the ſame plight as the removed action ſtood. But nothing of this ſort has been done. Here is a ſeizure of goods in the ſtreet, not upon information, nor coming from the water-ſide. Treſpaſs is brought for this wrong; and now the plaintiff is called upon to ſhew he has paid the duties. If this were allowable, a cuſtom-houſe officer might enter into any man's houſe (within the year allowed in ſuch caſes), and ſeize any foreign goods, books, ſilks, laces, or any thing liable to the cuſtoms; and put the owner upon proof

that the duties have been paid. We therefore think the direction of *Blackſtone*, Juſtice, perfectly right.—Rule diſcharged.

Barker *v.* Chalk and Griffith, Tr. Ter. 15 Geo. 3. C. B. 3 *Black.* 1918.

An officer of the cuſtoms ſued in trover for ſeizing a ſmuggling veſſel, and held to ſpecial bail, ſhall not be diſcharged on a common appearance, unleſs the true foundation of the ſeizure be ſhewn, and that the defendants are doing all they can to get the veſſel condemned.—It was moved to enter a common appearance for the defendants, one being the maſter of a cuſtom-houſe cutter, and the other a mariner on board, and held to bail for 500*l.* in an action of trover at the ſuit of Barker, for taking his ſhip and goods; it appearing that the ſame were now in the poſſeſſion of the outport officers of the cuſtoms at Margate, being delivered to the ſurveyor by the defendants, as a ſeizure for ſmuggling; that great quantities of prohibited goods had been found aboard the veſſel; on which account the commiſſioners of the cuſtoms had ordered her to the cuſtom-houſe, at London, to be there further examined. And the caſe of *Garcia* and *Hankins*, *P.* 8 *Geo.* 3. in the King's Bench, *Modena* and *Shell*, *ibid.* and *Bennet* and *Licet*, *H.* 12 *Geo.* 3. in the King's Bench, were cited, in all which it appearing, that the ſhips and cargo were depoſited in the king's warehouſe, in order to proceed to condemnation thereof in the court of Exchequer, the Court made rules ſimilar to that which was now prayed, and made the plaintiffs pay the coſts, BUT THE WHOLE COURT were of opinion, 1ſt, That the defendants had not given a clear and full account of the foundation on which the ſeizure was made; 2dly. That it did not appear that they had uſed due diligence in proceeding towards a condemnation in the court of Exchequer; in both of which points this caſe was to be diſtinguiſhed from thoſe in the King's Bench. And, therefore, as there did not ſufficient matter appear to take away the plaintiff's common law-right of holding the defendants in trover to ſpecial bail, they diſcharged the rule.

Wood *v.* Cheſſal, Hil. Ter. 19 Geo. 3. C B. 2 *Black.* 1254.

Upon not guilty in treſpaſs, exciſe officers executing a body warrant iſſued by the commiſſioners, may give the ſpecial matter in evidence.—On the trial of an action for treſpaſs againſt an officer of exciſe for entering the plaintiff's houſe, in order to execute a body-warrant of the commiſſioners of exciſe for the apprehending of one *John Crumpler*, on the general iſſue of not guilty; the entry being proved, the defendant offered to give in evidence the conviction of the ſaid *Crumpler* before the commiſſioners, on the 26th of March, 1776, and that a body-warrant iſſued to apprehend him on the 21ſt of Auguſt, 1777, in execution of which the treſpaſs was committed. But the judge rejected this evidence, being then of opinion, that this matter ought to have been ſpecially pleaded, and could not be given in evidence

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on the general iſſue; as the act of treſpaſs was not committed by the defendant in immediate execution of the ſtatutes relating to the exciſe (as if he had entered at his own riſque to ſearch for unentered goods) but mediately; being in execution of the warrant of the commiſſioners, who themſelves were the immediate actors in the execution of the laws of exciſe (1). A verdict was therefore given for the plaintiff, with leave to move for a new trial, or rather to ſet the verdict aſide, it being agreed that it ſhould be entered for the defendant, if the Court ſhould be of opinion, that the evidence was admiſſable. PER CUR. The exciſe laws take their origin from two ſtatutes of the 12 *Car.* 2. the one c. 23. which granted an exciſe on certain commodities for the king's life; the other c. 24. which in lieu of the military tenures granted to the crown an hereditary exciſe on certain other commodities. To theſe two ſtatutes all ſubſequent exciſe laws have reference. And in both of them (ſect. 31. of the firſt, and ſect. 45. of the ſecond) the commiſſioners are impowered to iſſue warrants for levying of forfeitures on the goods of perſons convicted of any offence, and for want of ſufficient diſtreſs to impriſon the party till ſatisfaction. This is the ground of what is called the body-warrant. And by ſect. 35. of the former, and ſect. 49. of the latter, the general iſſue may be pleaded, and thoſe acts given in evidence, "if "any perſon ſhall at any time be ſued or proſecuted for any "thing by him done or executed in purſuance of thoſe acts." —After this, many other exciſe laws were made for different commodities; and, in particular, 10 & 11 *W.* 3. c. 21. on which *Crumpler*'s proſecution was founded. In ſect. 21. of which it is enacted, that "perſons ſued or proſecuted for "any thing done or executed in purſuance of this or any "other act relating to the exciſe, may plead the general iſſue, "and give the acts in evidence."—There is alſo a general clauſe (ſect. 13.) in the tea-act, 18 *Geo.* 2. c. 26. which allows the commiſſioners or juſtices to act in offences againſt the exciſe laws, as well where the offender is found within their reſpective juriſdictions, as where the offence is committed within the ſame: viz. to hear and determine, iſſue warrants of diſtreſs, and for want of diſtreſs to commit the party. And then in ſect. 15. follows the like clauſe as in the 10 & 11 *W.* 3. for pleading the general iſſue, and giving the acts in evidence.—The clauſe, ſect. 13. of 18 *Geo.* 2. was afterwards extended by ſect. 26 of 5 *Geo.* 3 c. 43. to all ſubſequent offences againſt the laws of exciſe created ſince 18 *Geo.* 3. And in the laſt ſect. of the ſtatute 5 *Geo.* 3. there is a ſimilar clauſe, for perſons ſued for any thing done

(1) See 23 *Geo.* 3. c. 70. under which officers of exciſe are allowed to plead the general iſſue, and give the ſpecial matter in evidence.

or executed in purſuance of any act relating to the cuſtoms, exciſe, or ſalt duty, to plead the general iſſue and give the acts, and the ſpecial matter in evidence.—Anxiouſly as theſe laws have provided for the defence of all perſons concerned in executing the laws of exciſe, we cannot conceive that they meant to exclude the officer, by whoſe hand they are executed, unleſs where he acts upon his own judgment, and not by the warrant of his ſuperiors. It is ſurely more reaſonable to protect him from an act which he is obliged to do, than for one which he performs by choice.—The preſent caſe is literally within the words of the ſeveral ſtatutes. The execution of a body-warrant is certainly "a thing done "and executed in purſuance of the laws relating to the "exciſe."—And though we know of no determination in point upon this queſtion, yet the practice of the courts of *Niſi prius*, never reprobated by the courts at Weſtminſter, has ever uniformly been to admit the officers executing the orders of the board to give the ſpecial matter in evidence upon the general iſſue in treſpaſs. In *Boſtock* and *Saunders*, T. 13 *Geo.* 3. A ſearch-warrant, by the commiſſioners of exciſe, was given in evidence by the officer on not guilty in treſpaſs, before *Lord Chief Juſtice De Grey*. In *Scott* and *Shearman*, *Hill.* 15 *Geo.* 3. The ſentence of condemnation in the Exchequer was read in evidence on the general iſſue. In *Oldfield* and *Licet. Ea.* 15 *Geo.* 3. The like evidence given on the like occaſion, before *Smythe*, Baron, at Maidſtone. In *Henſhaw* and *Pleaſance*, *M.* 18 *Geo.* 3. before BLACKSTONE, J. at Guildhall, a warrant of the commiſſioners to ſeize ſoap, and a ſubſequent condemnation by the board of exciſe were admitted to be read in evidence on not guilty; for theſe reaſons there ought to be a verdict for the defendant.—Verdict entered for the defendant.

Godin v. Ferris, Mic. Ter. 32 Geo. 3. C. B. 2 *Hen. Black.* 14.

An action cannot be maintained againſt officers of the cuſtoms, for ſeizing goods as forfeited by the revenue laws, unleſs it be brought within three months after the actual ſeizure; notwithſtanding a ſuit is inſtituted in the court of Exchequer for the condemnation of the goods, which is depending at the expiration of three months. This was an action of treſpaſs, for ſeizing, taking, and carrying away, at Cowes, in the Iſle of Wight, a lug-ſail boat of the plaintiff, together with her furniture, tackle, &c. and divers other goods and chattels of the plaintiff, to wit, 500 wooden caſks, 200 gallons of brandy, &c. &c. under pretence that the ſame were forfeited, and were ſeized as forfeited by the defendant, under and by virtue of ſome or one of the laws relating to his majeſty's cuſtoms: whereby, &c. &c. The ſecond count was for ſeizing the boat and goods, &c. generally. On the trial it appeared in evidence, that the ſeizure was made by the defendant, on the 11th of May, 1787; that it was returned

turned into the Exchequer in the name of the defendant where proceedings were had to condemn the seizure, but that on the 26th of February, 1789, the plaintiff obtained a writ of delivery. On the 9th of August, 1790, a notice was delivered to the defendant, dated the 6th of May, 1790, of the plaintiff's intention to commence this action, in pursuance of stat. 23 *Geo.* 3. c. 70. s. 30. and 24 *Geo.* 3. *Sess.* 2. c. 47. s. 35. On the 30th of September, the action was commenced by suing out a *capias ad resp.*—It was objected by the counsel for the defendant, that the action was not commenced, within three months next after the matter or thing was done, nor within three months next after the cause of action arose, as required by the statutes above mentioned. Lord *Loughborough* was of this opinion, and a verdict was found for the defendant, subject to the opinion of the Court on that point; and *Gould*, J. after the case had been spoke to, declared, that upon due consideration, the Court had no doubt, but that the opinion, which Lord *Loughborough* held at the trial, was right, viz. that the time when the limitation of the three months was to commence, was to be reckoned from the actual seizure, that being the wrongful act or thing done, according to the meaning of the legislature.

Baldwin *v.* Tankard, *et al.* Tr. Ter. 28 Geo. 3. C. B. 1 *Hen. Black.* 28.

A judge's certificate that a custom-house officer "had probable cause for seizing goods," does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under stat. 23 *Geo.* 3. c. 70. s. 29. and 26 *Geo.* 3. c. 40. s. 31.—Trespass against the defendants, who were officers of the customs, *for forcibly entering the plaintiff's house, breaking locks, doors, &c. making disturbance, &c.* and seizing the goods, &c. to wit, one piece of printed callico, &c. At the trial a verdict was found for the plaintiff, with 100*l.* damages. But the judge certified, "That there was a probable cause for the defendant seizing "the goods," according to the statutes of 23 *Geo.* 3. c. 70. s. 29. and 26 *Geo.* 3. c. 40. s. 31. whereby the plaintiff became entitled to no more than two-pence damages, besides the value of the goods. A rule was afterwards obtained, to shew cause why the plaintiff should not enter up judgment for his damages and costs, notwithstanding the judge's certificate, on the ground that the certificate of the judge extended only to seizing the goods, *and not to any injuries accompanying the seizure*, such as were charged in the declaration. And the Court, after time taken to consider, declared their opinion in favour of the plaintiff, and made the rule absolute.

The King *v.* Brady, Kierman, and Rooke, Mic Ter 38 Geo. 3. C. B. 1 *Pul.* & *Bos.* 187.

An excise officer seizing soap in the execution of his office, at any distance from the sea, is within the protection of 24 *Geo.* 3. *Sess.* 2. c. 47. s. 15. (1)—This was an indictment for

(1) By s. 15. enacts, That "if any officer or officers or his majesty's navy, or in the service of the customs or excise, being on shore or going on board, or being on board, or returning

for aſſaulting and forcibly hindering, oppoſing, and obſtructing an officer of exciſe on ſhore, in the due execution of his office and duty. On the trial of the indictment, the defendants were found guilty on the following facts:—Two of the deſendants, *Kierman* and *Rooke*, had taken a quantity of ſoap out of a copper in the manufactory of an entered ſoap-boiler near Rumford, in Eſſex, without the preſence of an exciſe officer, and were carrying it away in a cart, in order to conceal it, when *Wakely*, an exciſe officer, attempted to ſeize it; on which he was aſſaulted by the defendants, *Brady*, *Kierman*, and *Rooke*. *Wakely* had no warrant.—Several points having been reſerved at the trial for the opinion of the twelve judges, at the inſtance of *Brady*'s counſel, they were argued. The 1ſt objection was, that the offence charged in this indictment, being within the exciſe laws, did not come within either the letter or the ſpirit of the ſtat. 24 *Geo.* 3. *Seſſ.* 2. c. 47. ſ. 15. 2dly, That ſuppoſing this offence to be within 24 *Geo.* 3. *Seſſ.* 2. c. 47. yet ſ. 15. of that ſtatute, is virtually repealed as far as relates to the commodity in queſtion, by c. 48. ſ. 10. of the ſame year, which impoſes a penalty of 50*l.* on all perſons obſtructing an officer of exciſe in the execution of the powers given to him for ſecuring the duties upon ſoap, and that an act may be virtually repealed, appears from *Rex* v. *Cater*, 4 *Burr.* 2026. and *Rex* v. *Davis*, *Leach*, 1 *Edw.* 252. [*Heath*, J. There the ſtatutes by which the former were held to be repealed, were paſſed in ſubſequent ſeſſions; where both ſtatutes are paſſed in the ſame ſeſſion, the latter is only explanatory.] 3dly. That by 23 *Geo.* 2. c. 21. ſ. 34. and 5 *Geo.* 3. c. 43. ſ. 20. exciſe officers are directed to procure a warrant previous to their entering any place whatſoever for the purpoſe of ſeizing ſoap hid or concealed. *Wakely*, therefore, ſhould have had a warrant in this caſe, and not having been cloathed with the authority required, he was not obſtructed "in the due execution" of his duty. Lord KENYON, Ch. J. EYRE, Ch. J. and MACDONALD, Ch. B. expreſſed themſelves very clearly of opinion, that this laſt point could not be ſupported. Afterwards, at the Old Bailey ſeſſions, *Groſe*, J. delivered the unanimous opinion of the judges: that the words "on ſhore," uſed in the 24 *Geo.* 3. *Seſſ.* 2, c. 47. ſ. 15, mean on land, and that an officer of exciſe ſeizing ſoap in the execution of his office, at an inland place, at any diſtance from the ſea, is within the ſcope and protection of that act,

returning from on board any ſhip, boat, or veſſel, within the limits of any of the ports of this kingdom, or within four leagues from the coaſt thereof, ſhall be hindered, oppoſed, obſtructed, or aſſaulted, in the due execution of his or their office, or duty, by any perſon or perſons whatſoever, either in the day-time, or night," all perſons ſo hindering, &c. being convicted on indictment, ſhall be ſentenced to hard labour or imprisonment, not exceeding three years.

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Where in an action againſt officers of the exciſe for ſeizing goods, they do not tender amends before action brought, but pay money into court, and afterwards gain a verdict (the jury finding that the ſum paid in was ſufficient) they are entitled only to ſingle coſts, under the ſtat. 23 *Geo.* 3. c. 70. ſ. 31.—In an action of treſpaſs againſt the defendants as officers of the exciſe, for ſeizing a quantity of tea, and *other goods not exciſeable*, they pleaded the general iſſue, and paid 16*l.* into court, as allowed by the 33d ſection of 23 *Geo.* 3. c. 70. and *Perryn*, B. who tried the cauſe, left it to the jury to conſider, whether this ſum was ſufficient for the damages, and if ſo, that they ſhould find a verdict for the defendants, which they accordingly did. On taxing coſts, the prothonotary allowed treble coſts to the defendants; but on a rule to ſhew cauſe why the taxation ſhould not be reviewed, and the coſts taxed as ſingle, inſtead of treble, the Court afterwards ſaid, that it ſeemed on the true conſtruction of the ſtatute, that where the exciſe officers were originally in the wrong (as was admitted here by paying money into Court), unleſs they tendered amends in time, namely, before action brought, they were not entitled to treble coſts; and as there was no tender of amends in this caſe, they ought not to have more than ſingle coſts. Collins *et al.* v. Morgan *et al.* Tr. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 244.

But the Court alſo ſaid, that though at all events the officers of the exciſe had no right to treble coſts under this ſtatute, without having tendered amends, yet whether the tender of amends could give them that right, was a queſtion not involved in the preſent deciſion, and which it would be time enough to determine, when it actually aroſe.—Rule abſolute without coſts.

An exciſe officer is entitled to notice under 23 *Geo.* 3. c. 70. ſ. 30. before an action is brought againſt him for an act not warranted by his official capacity, if done *bonâ fide* in the ſuppoſed execution of his duty.—In an action of treſpaſs for an aſſault committed by an exciſe officer, the queſtion was, whether he was entitled to a month's notice before the bringing of the action, by the 23 *Geo.* 3. c. 70. ſ. 30. which enacts, "That no writ ſhall be ſued out againſt, nor proceſs "ſerved on, any officer of exciſe, for any thing done in the "execution, or by reaſon of his office, until after a month's "notice in writing." No notice was given in this caſe, and it was contended, that it was not neceſſary under the circumſtances, the defendant, at the time of the aſſault, not being in the execution of his office. As to which it appeared that the defendant, juſt before the aſſault in queſtion, had been in purſuit of ſome ſmugglers, and had, after a violent ſtruggle with them, in which he had been ſeverely beaten, taken ſome run goods, but the ſmugglers themſelves had retired; *and in about five minutes after, the plaintiff, who had* Daniel *v.* Wilſon, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 1.

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in truth no concern with the ſmugglers, or with any ſmuggled goods, paſſed by the defendant with ſomething upon his back, and being unknown to the defendant, and ſuſpected by him to be one of the gang of ſmugglers, was ordered to deliver what he was carrying; he anſwered, that he had nothing to deliver, being only a fiſherman; whereupon the defendant aſſaulted and ſtruck him. At the trial, the judge was of opinion, that the caſe fell within the meaning of the ſtatute requiring notice, and for want of it nonſuited the plaintiff. It was afterwards moved to ſet aſide the nonſuit. SED PER CURIAM: The act was clearly intended to protect ſuch officers, as, acting in the *bonâ fide* diſcharge of their duty, were inadvertently guilty of exceſſes beyond the ſtrict line of their duty. And here though the defendant's conduct was perhaps too haſty, yet, it manifeſtly appears that he acted in the ſuppoſed execution of his office, however illegally; and that is ſufficient to bring the caſe within the protection of the ſtatute. Rule refuſed.

Irving *v.* Wilſon *et al.* Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 485.

If a revenue officer ſeize goods as forfeited, which are not liable to ſeizure, and take money of the owner to releaſe them, the latter may recover back the money in an action for money had and received; and in ſuch an action a month's notice need not be given under the 23 *Geo.* 3. c. 70. ſ. 30. On the trial of an action for money had and received by the defendants to the plaintiff's uſe. It appeared that the defendants (cuſtom-houſe officers) had ſeized ſome hams near Carliſle, which the plaintiff was ſending in three ſeveral carts from Scotland to Carliſle. The plaintiff obtained one permit for the whole, but owing to ſome accident two of the carts were at the diſtance of two miles behind the other when the defendants met the firſt and demanded the permit; the driver informed them that the permit was with the other carts, which came up in an hour and a half afterwards, before the firſt reached Carliſle, but not till the officer, after waiting ſome time without ſeeing the other carts, had made the ſeizure. They were all three driven to the cuſtom-houſe at Carliſle, the defendants ſaying they could not releaſe them unleſs the collector were applied to. When the whole was explained to the collector, he ſaid he would have no concern in the taking. And the defendants then refuſed to give up the carts with the cargoes, unleſs the plaintiff would give them 2*l.* 11*s.* which he accordingly did. It was objected on the part of the defendants, that the plaintiff, by this tranſaction with revenue officers, had incurred a penalty of 50*l.* and that he could not recover back the money which he had paid to have the goods, which had been ſeized, returned to him; and the plaintiff was nonſuited, with leave to move to ſet that nonſuit aſide, and to enter up a verdict for him, if the Court ſhould be of opinion that the plaintiff could

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maintain this action. A motion having been made for this purpose and cause shewn.—PER CURIAM: The revenue laws ought not to be made the means of oppressing the subject. Here, if goods liable to a forfeiture be forfeited, the officer is to seize them for the king; but he is not to be permitted to abuse the duties of his station, and to make it a mode of extortion. If this money had been paid as a bribe, both parties would have been *in pari delicto*, and the plaintiff would not be entitled to recover. But here the plaintiff was in no fault whatever, this money was not paid as a bribe, for the goods were not liable to seizure. Neither was it a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power. The defendants acted right in stopping the goods at first, but when the permit came up, there was no pretence to detain them, still less to take the money. It was a payment by coercion; and which the plaintiff may recover from the defendants as money unconscientiously received by them. GROSE, J. In an action of trespass or tort, the officers are entitled to notice under the 23 *Geo.* 3. c. 70. s. 30. because they ought to have an opportunity of tendering amends; but that act does not extend to an action of *assumpsit*.—Rule absolute.

The King *v.* Cartwright, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 490.

The 9 *Geo.* 2. c. 35. s. 26. which enacts, that prosecutions for assaults on revenue-officers may be be tried in any county, only extends to assaults on them *quâ* officers. This was an indictment against the defendant for an assault upon an excise officer. Several counts charged the offence as committed against the prosecutor while in the exercise of his office: another count only charged a common assault; but even this described the prosecutor to be an excise-officer. And all the counts stated the offence to have been committed in Surrey. The *venue* was laid and the trial had in Middlesex; when the defendant was acquitted upon all the counts, but that charging him with a common assault, of which alone he was found guilty. A motion was made in arrest of judgment for a mis-trial, on the ground that the 26th clause in the 9th *Geo.* 2. c. 35. which enacts, "that for the "better and more impartial trial of any indictment or information, which shall be found, commenced, or prosecuted, "for any assault made or committed upon any of the officers of the customs or excise, every such offence shall "and may be inquired of, examined, tried, and determined, "in any county in England, in such manner and form as if "the same offence had been therein committed," only extended to assaults on officers when in the exercise of their office. And after cause shewn, THE COURT were all of opinion, That this act of parliament must be confined to prosecutions for assaults on the revenue officers when in the execution

execution of their office, and that the miſchiefs from a contrary determination would be intolerable.—Rule abſolute.

Whitbread v. Brookſbank.

An action for money had and received will not lie againſt an exciſe officer for an over payment. Ea. Ter. 14 *Geo.* 3. B.R. *Cowp.* 69.

Greenway v. Hurd, Hil. Ter. 32 Geo. 3. B. R. 4 *Ter. Rep.* 553.

So in this cauſe, which was an action for money had and received, it appeared that the action was brought to recover back 529*l.* which the plaintiff had paid in July, 1785, to the defendant, who was a collector of exciſe, for certain duties on the cotton manufacture, impoſed by the 24 *Geo.* 3. c. 40. which act, it was admitted, had been repealed, as far as related to theſe duties by the 25 *Geo.* 3. c. 24. before the duties were incurred; the latter ſtatute repealing the duties "from and after the paſſing of that act," and conſequently relating to the firſt day of the ſeſſions, the 25th of January, 1785. In June, 1785, the plaintiff poſitively refuſed to pay theſe duties, which, however, he afterwards paid on the 22d of July following. It was objected by the defendant's counſel, that as the defendant had paid the money over to his ſuperior officer before the action was brought, the plaintiff could not recover back the money from the defendant, who was a public officer, and who had been obliged, under the terrors of a penalty, to pay over this money; and that, if he could, the defendant was entitled to a month's notice before the action was brought, under the 23 *Geo.* 3. c. 70. ſ. 30. which had not been given, and the judge nonſuited the plaintiff. A motion having been made to ſet aſide that nonſuit, and cauſe ſhewn, THE COURT ſaid, That the queſtion was not whether the plaintiff had not ſome remedy, but whether he could recover againſt this defendant. This in principle is like the caſe of *Sadler* v. *Evans* (1), where it was held that an action for money had and received againſt a known agent would not lie, but that the party muſt reſort to the ſuperior. At all events the defendant was entitled to notice. It has been frequently obſerved by the courts, that the notice, which is directed to be given to juſtices and other officers before actions are brought againſt them, is of no uſe to them when they have acted within the ſtrict line of their duty and was only required for the purpoſe of protecting them in thoſe caſes where they intended to act within it, but by miſtake exceeded it.—Rule diſcharged.

Sullivan v. Montague, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 106.

A certificate under 19 *Geo.* 2. c. 34. or 4 *Geo.* 3. c. 15. that there was a probable cauſe of ſeizure, may be granted at a period ſubſequent to the trial, and out of court.—The defendant, being captain of a man-of-war, on the Quebec ſtation, had ſeized a trading veſſel, of which *Sullivan* was the maſter and owner, as a ſmuggler. Upon an information

(1) 4 *Burr.* 1984. ante vol. I. p. 232.

brought

brought in the vice-admiralty court at Quebec, ſentence was pronounced againſt *Sullivan*; whereupon he appealed to the ſuperior court of admiralty at Halifax, where the ſentence was reverſed. On the defendant's return to England, *Sullivan* brought the preſent action of treſpaſs in this court; and the trial coming on before Lord MANSFIELD, at Guildhall, at the ſittings after laſt Trinity term, and the fact of the treſpaſs being proved, the defendant produced the record (1) of the proceedings on the appeal in the court at Halifax, on which was indorſed a certificate of the judge of that court, that there was a probable cauſe of ſeizure. The ſentence of the court at Halifax bore date in May, 1776. The certificate indorſed upon it was dated thirteen months latter, viz. 21ſt of June, 1777, which was poſterior to the commencement of the preſent action.—The counſel for the defendant inſiſted, that this certificate was a bar to the action, and that the plaintiff muſt be nonſuited.—For the plaintiff it was anſwered, that the certificate ought to have been made at the time when the ſentence was pronounced.—The jury found a verdict for the plaintiff, with 1800*l.* damages, but ſubject to the opinion of the Court as to the effect of the certificate. The trial had once been put off upon an affidavit on the part of the defendant, that an application had been made to the judge at Halifax, to certify, at the time of the reverſal of the original ſentence, and that the judge then ſaid he would certify whenever he ſhould be required. Between the time when that affidavit was made, and the actual trial of the cauſe, the certificate had been obtained.—A rule having been obtained to ſhew cauſe why a nonſuit ſhould not be entered, two queſtions were made: 1. Whether the certificate could have been granted even at the time when the ſentence, on the appeal, was pronounced? 2. Whether it could be granted ſo long after the ſentence?—It was ſuppoſed, at the trial, and when the argument came on upon the rule to ſhew cauſe, by the counſel on both ſides, that the certificate had been granted under the 16th ſection of the ſtatute of the 19th of *Geo.* 2. c. 34. which conſiſts of two branches. "1. In caſe "any information ſhall be commenced and brought to trial, "on account of the ſeizure of any ſhip as forfeited for illegally carrying goods, or of any wool, goods, wares, or "merchandizes, as prohibited or uncuſtomed, or illegally "carried or exported, or intended or attempted to be exported, or as illegally relanded after having been ſhipt or "exported upon debenture or certificate, wherein a verdict "ſhall be found for the claimer thereof, and it ſhall appear "to the judge or court before whom the ſame ſhall be tried, "that there was a probable cauſe of ſeizure, the judge or "court before whom the ſame ſhall be tried, ſhall certify on

(1) *i. e.* A *copy*, by conſent of the plaintiff.

"the

" the record, that there was a probable cauſe for the proſe-
" cutor's ſeizing the ſaid ſhip or goods; and, in ſuch caſe,
" the defendant ſhall not be entitled to any coſts of ſuit
" whatſoever, nor ſhall the perſons who ſeized the ſaid ſhip
" or goods be liable to any action, indictment, or other ſuit,
" or proſecution, on account of ſuch ſeizure. 2. And in
" caſe any action, indictment, or other proſecution, ſhall be
" commenced and brought to trial againſt any perſon or
" perſons whatſoever, on account of the ſeizure of any ſuch
" ſhip, or of any wool, goods, wares, or merchandizes, as
" prohibited or uncuſtomed, or as illegally carried or ex-
" ported, or intended or attempted to be exported, or ille-
" gally relanded as aforeſaid, wherein a verdict ſhall be
" given againſt the defendant or defendants, if the court or
" judge before whom ſuch action or proſecution ſhall be
" tried, ſhall certify on the ſaid record, that there was a
" probable cauſe for ſuch ſeizure, then the plaintiff, be-
" ſides his ſhip or goods ſo ſeized, or the value thereof, ſhall
" not be entitled to above two-pence damages, nor to any
" coſts of ſuit, nor ſhall the defendant in ſuch proſecution be
" fined above one ſhilling." At the trial, Lord MANS-
FIELD was applied to, to certify under the ſecond branch of the clauſe, but his lordſhip refuſed, being of opinion that the caſe was not within it, for that it only related to caſes where there had never been a condemnation (1). When the argument came on again (which it did in the ſame term, viz. M. 19 *Geo.* 3.) it appeared, that by a clauſe in the ſtatute of 4 *Geo.* 3. c. 15. the 16th ſection of 19 *Geo.* 2. is expreſsly extended to America, and to caſes where there has either been a verdict, or ſentence (2). But it was ſtill inſiſted, 1. That the certificate could not be granted upon an appeal; and, 2. That it could only have been granted at the time when the ſentence was pronounced. Lord MANSFIELD delivered the opinion of the Court: 1. That the judge in the appellate juriſdiction had a power to certify, ſo that the words and meaning of the ſtatute of *Geo.* 3. were, that wherever a ſentence was pronounced, the judge might certify. That there could be no certificate in the original court, becauſe the ſentence was in favour of the defendant, and it would be ſtrange indeed if he were to be in a worſe ſituation than if that ſentence had been againſt him. 2. That the certificate might be granted after the trial. That there were no words confining it to the time of the trial, and a caſe on the ſtatute of 4 *Ann.* was a ſtrong authority on this

(1) *Vide Renalls* v. *Cooper*, B.R. E. *Geo.* 3. where it was held, that a judge may certify, under that ſecond branch of the clauſe, though there has been no information brought in the Exchequer, for the condemnation of the ſhip.

(2) 4 *Geo.* 3. c. 15. ſ. 46.

point.

point (1). That the caſe of a ſentence by a court of Admiralty was ſtronger than that of a verdict at law, becauſe the verdict is entered and completed immediately, but the ſentences in the admiralty court are often not drawn up for months after they are pronounced.

Afterwards a new objection was raiſed, viz. that as the certificate did not exiſt at the time of the commencement of the action, it could not be taken advantage of on the general iſſue, but ought to have been pleaded. THE COURT ſeemed all to agree, that matter happening after the beginning of the ſuit, but before plea pleaded, might be given in evidence; but WILLES, J. expreſſed with great earneſtneſs his doubts, whether the time of plea pleaded ought not to be reckoned from the time when the plea was actually delivered, the date on the record being a mere fiction. Lord MANSFIELD obſerved, that ſuppoſing the rule to be as WILLES, J. conceived it, both parties had been guilty of a ſlip; the plaintiff in not objecting to the evidence at the trial; the defendant in not pleading; and can the Court (he ſaid) decide that the plaintiff ſhall be relieved againſt the one, and the defendant caught by the other?—The caſe ſtood over.—And now, his lordſhip (after ſtating the facts and dates) delivered the unanimous opinion of the Court, to the following effect:—Lord MANSFIELD, THE QUESTION made at the trial was, WHETHER the judge of the court of Halifax could certify, after the cauſe was over? That was the point ſaved. If the Court ſhould be of opinion that the certificate was a bar, a nonſuit was to be entered. The queſtion was fully argued, and we were all of opinion, that the certificate was a bar to the action.—After that opinion was delivered, a motion was made to ſupport the verdict, and on grounds entirely new. For it has been objected, that the certificate ought not to have been read at the trial; 1. Becauſe it did not exiſt when the action was brought; 2. Becauſe it did not exiſt at the time of plea pleaded. This was no part of the queſtion meant to be ſubmitted to the Court, yet the plaintiff was fully apprized of the certificate before the trial, and a copy of it was read by conſent. The only way in which we could let the plaintiff have the advantage of the preſent objection, would be to grant a new trial; but, in that caſe, the defendant muſt be let in to plead the certificate. This alone is deciſive. But, to go farther. If the objec-

(1) By the ſtatute of 4 *Ann* c. 16. ſ. 5. the judge is authorized, where there have been ſeveral matters pleaded, to certify whether there was probable cauſe; but there being no expreſs words requiring this to be done in court at the trial, the court of Common Pleas has determined, that it may be done after an application has been made for taxing the coſts; *Cremer* v. *Dent*, Ea. Ter. 24 Geo. 2. *Barnes* 241. 4to ed. 1772.

tion had been made at the trial, we think it could not have prevailed. *Actio non* goes, in every caſe, to the time of pleading, not to the commencement of the action (1). In the preſent inſtance, the general iſſue is given by ſtatute, and that leaves every defence open which the defendant might otherwiſe have by ſpecial pleading. The certificate is dated the 21ſt of June, 1777, and the plea was actually delivered on the 10th of that month, but the plaintiff made up the record, and entered the plea of Hilary, 1778. We think he could not have been let in at the trial to contradict the record. *Legal fictions, and relations, can never be contradicted, to prevent juſtice, and let in mere objections of form and regularity.* If a writ is *teſted* the laſt day of a term, you cannot ſay it iſſued in a vacation, for the purpoſe of making it void, though you may ſhew when it really iſſued, if the juſtice of the caſe required it. But here, the plaintiff himſelf made up the record. Shall he be admitted to aver againſt his own act, by which he has miſled the defendant? By ſo doing he ſaid to the defendant, "Inſtead of pleading "this matter, you may give it in evidence." One caſe was mentioned at the bar, in which a certificate granted after iſſue joined, was admitted in evidence; but it is ſaid that no objection was made. There is great reaſon for conſidering the certificate, in caſes like this, as granted *nunc pro tunc*; but, without giving any opinion now on that point, as the objection was not made at the trial, as it would not have availed if it had been made, and as the defendant, if it were to prevail now, muſt be let in to plead; we are all of opinion, that a rule for a nonſuit ought to ſtand.—Rule abſolute.

Wenham, *et al.* *v.* Newport, *et al.* Tr. Ter. 35 Geo. 3. in the Exch. 5 *Wms. Jus.* 145.

Alſo, if an action be commenced in the court of King's Bench, againſt an officer of the cuſtoms, for ſeizing goods forfeited by the revenue laws, the court of Exchequer will, on a motion in a ſummary way, exerciſe an excluſive juriſdiction, and by an order of court, remove ſuch action out of the court of King's Bench, into the office of Pleas in the Exchequer; in which order they will likewiſe direct that all further proceedings in the action ſhall beſtayed until the ſeizure is determined; and to enforce obedience to this order, they

(1) *Vide Reynolds* v. *Beerling*, *B. R. M.* 25 *Geo.* 3. where it was determined on a demurrer, that a judgment obtained by the defendant, againſt the plaintiff, after the declaration was delivered, and before plea pleaded, may be pleaded as a ſet-off, and that, although it do not appear that the cauſe of action on which the defendant's judgment was obtained, was prior to the commencement of the plaintiff's action. But, in *Evans* v *Proſſer*, *E.* 29 *Geo.* 3 *B. R* 3 *Term. Rep.* 186. it was determined, that a plea of ſet-off, that the plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; and that it ſhould ſtate that he was indebted at the commencement of the action; and *Buller* J. ſaid, that on looking into the caſe of *Reynolds* v. *Beerling*, he found, that on the point here ſtated, it could not be ſupported.

will

will iſſue a writ, enjoining and commanding the plaintiff and his attorney to do and to perform all the matters required in and by ſuch order (1).

Exciſeable Articles.

Ale, Beer, &c.]—The price of barley *at the port*, is the rule for payment of the bounty upon the exportation of ſtrong beer, and not the average price of barley throughout the kingdom. Whitbread v. Brookſbank, Ea. Ter. 14 Geo. 3. B. R. *Cowp.* 66.

Coffee, Tea, &c.]—On the removal of a conviction into this court by *certiorari*, a rule was obtained to ſhew cauſe why the ſame ſhould not be quaſhed, on the ground that the juſtices had improperly proceeded to convict the defendant, *in treble the value* of a certain quantity of tea, ſeized on the defendant's grounds. The defendant was convicted on an information, which ſtated, that "he did *knowingly harbour*, "*keep*, and conceal, and permit and ſuffer to be knowingly "harboured, kept, and concealed, the ſaid tea, &c." The evidence appeared to be, "that the witneſſes in a field, about a quar-"ter of a mile from the defendant's houſe, and which field they "all ſwear they believed to be in the defendant's occupation; "ſaw two of his ſervants loading the tea in queſtion, into a "cart with two horſes, which one of the witneſſes ſwore "were the defendant's;" and another witneſs ſwore, that in a converſation with the defendant, he ſaid, "it was unfortu-"nate for him that his ſervants had taken his cart and horſes "without his knowledge." The cart and horſes, and the tea, were adjudged to be forfeited, but the treble value of the tea was mitigated. Upon ſhewing cauſe againſt the rule, ſo much of the conviction as related to the penalty of treble the value of the tea was quaſhed, but the reſt, as to the condemnation of the tea, and the cart and horſes, was, by conſent, and in order to accommodate the diſpute, adjudged good. Rex v. Hale, Hil. Ter. 18 Geo. 3. B. R. *Cowp.* 728.

Hops.]—It is an offence within the ſtat. 7 *Geo.* 2. c. 19. to mix the vapour of ſulphur and brimſtone with hops.—The defendant was convicted in the penalty of 5*l.* on the ſtat. 7 *Geo.* 2. c. 19. ſ. 2. which impoſes that penalty on any perſon who "mixes with, or puts into any quantity of hops, any drug or ingredient, or other thing whatſoever, to alter the colour or ſcent thereof," of uſing ſulphur and brimſtone in the drying of hops. The evidence was, that he put in the fire, by which one hundred weight of the hops were dried, a quantity of ſulphur and brimſtone, to alter the co- The King v. T. Pack, Ir. Ter. 35 Geo. 3. B. R. 6 *Ter. Rep.* 374.

(1) See alſo an anonymous caſe, and *Cawthorne* v. *Campbell*, in 1 *Anſtruther*, 205.

lour of the hops, the vapour and fumes of which ſulphur and brimſtone aſcended to the hops placed over ſuch fire, and the hops being then in a moiſt ſtate, ſuch fume and vapour ſettled and fixed on the hops, and mixed with the ſame; whereby the colour thereof was changed, and the hops appeared brighter than they would have done, if they had not been ſo mixed with the fume and vapour of brimſtone." It was urged, that this was univerſally practiſed, and conſidered as an improvement, and could not be conſidered as a dreg or ingredient within the ſpirit of the act. PER CUR. If it be true, as has been ſuggeſted, that the mixing of this vapour is an amelioration, inſtead of deterioration, of the commodity, application muſt be made to the legiſlature to amend the act; but as long as it remains in the ſtatute book, we muſt enforce it. This is very clearly an offence within the act.—Conviction affirmed.

The King v. the Juſtices of Surrey, Ea. Ter. 28 Geo. 3 B. R. 2 *Ter. Rep.* 504.

Printed Goods.]—No appeal lies to the ſeſſions from a conviction of two juſtices for an offence, under 25 *Geo.* 3. c. 72. ſ. 9. notwithſtanding it contains a general clauſe of reference to all former exciſe laws, ſome of which give ſuch appeal, and incorporates all the powers, &c. provided by 12 *Car.* 2. c. 24. or by any other law, relating to the exciſe or inland duties, under the management of the commiſſioners of exciſe, for managing, mitigating, or adjudging, the duties, or penalties, granted by this act.—A rule having been obtained to ſhew cauſe why a *mandamus* ſhould not iſſue, directed to the juſtices of Surrey at their ſeſſions, to compel them to hear and determine an appeal made by *Hannah Pleck*, who had been convicted on 25 *Geo.* 3. c. 72. ſ. 9. *for printing cotton before it was meaſured and marked by the proper officer of exciſe*, according to the direction of the act.—After cauſe ſhewn, and time taken to conſider, ASHHURST, J. delivered the opinion of the Court.—THE QUESTION is Whether an appeal lies in this caſe from the judgment of two juſtices? It was contended by the counſel who made this application, that an appeal was virtually given by the 34th ſec. of this act of parliament, which by reference incorporates all the remedies given by any exciſe laws, and that the power of appeal, and of mitigating penalties, are given by ſome of the exciſe laws. On the other hand it was contended, that no appeal lies but where it is given in expreſs words. It would be endleſs to ſtate all the acts that have been made upon the ſubject, but I will juſt ſhortly mention ſuch as ſeem to have a more immediate relation to the ſubject. The 12 *Car.* 2. c. 23. and 12 *Car.* 2. c. 24. which are uſually called the hereditary exciſe acts, give an exciſe on liquors of various denominations, and in theſe acts an appeal is expreſsly given from the judgment of the commiſſioners and ſub-commiſſioners, but not from the judgment of the juſtices. And it appears

pears plainly from 15 *Car.* 2. c. 11. ſ. 19. that it never was the intention of the legiſlature to give an appeal from the judgment of juſtices; for, ſpeaking on the ſubject of coſts upon appeals, it ſays, that in caſe the firſt judgment is affirmed, the party appealing ſhall pay coſts to the commiſſioners, or ſub-commiſſioners; and yet this very act gives a juriſdiction to juſtices in certain caſes. Now if the legiſlature had thought an appeal lay from their judgments, they would certainly have made the like proviſion as to them with regard to coſts. The 9 *Ann.* c. 11. ſ. 36. is *the firſt act which gives an appeal from the judgment of the juſtices*; this act *only relates to hides, ſkins, parchment, and vellum.* In the 12 *Ann.* c. 2. *the malt act*, there is a clauſe as to the recovering of penalties, &c. which incorporates the ſtatute of *Car.* 2. and all other laws then in force, relating to the revenue of exciſe, upon beer, ale, and other liquors. Yet by the 37th ſection, *there is an expreſs power given to appeal from the judgment of the juſtices to the quarter-ſeſſions*; which ſhews, that the legiſlature thought the clauſe of reference would not have given the right of appeal in that caſe. By 6 *Geo.* 1. c. 21. which relates to malt and the diſtillery, there is a clauſe (ſ. 22.) which enacts, that *all ſeizures of ſweets, and of every other forfeiture, and forfeitures*, which (after a particular day) ſhall be made by virtue, or in purſuance of that act, or any act whatſoever, relating to the duties of exciſe, ſhall be adjudged as preſcribed by that act; and that ſuch proceedings ſhall not be liable to appeal. A doubt aroſe on this general clauſe, whether it did not take away the right of appeal from the judgment of two juſtices as to malt, hides, and ſkins, or vellum; and for clearing this doubt, the 1 *Geo.* 2. c. 16. ſ. 3. declares, that by the above ſtatute the right of appealing in thoſe caſes is not taken away; from whence one may infer, that the legiſlature meant it ſhould be taken away in all other caſes. And where it has been thought fit to be given, the legiſlature have, in ſubſequent acts, given it in expreſs words; as in 20 *Geo.* 2. c. 10. and 29 *Geo.* 2. c. 14. *But it ſeeems generally by the whole tenor of the acts, that no appeal lies from the judgment of the juſtices, unleſs expreſsly given.* But it has been argued, that the general clauſe of reference in 25 *Geo.* 3. adopts all former laws of exciſe, and, therefore, inaſmuch as ſome former laws gave the power of appeal and mitigation, they are virtually included in this. But I think that this argument in its utmoſt extent, will not hold. For it may as well be argued, that as this clauſe of reference virtually incorporates all former exciſe laws, as to the mode of levying, &c. and there are ſome of theſe acts which in terms negative the appeal, theſe laws are virtually incorporated; and, therefore, that the appeal is virtually negatived in this. The fair conſtruction then to be put upon this act of 25 *Geo.* 3. c. 72.

ſ. 34. which is clauſe of reference in queſtion, ſeems to be this; that *all the general powers and proviſions given and made in acts in* pari materia *ſhall be virtually incorporated into this, but that ſuch proviſions as are always conſidered as ſpecial proviſions ſhall not.* The power of appealing from the judgment of the juſtices, ſeems to be of this kind, and does not attach without being expreſsly given. This conſtruction will prevent all the claſhing and inconſiſtence which will occur if a different conſtruction were to take place. As to the obſervation on the power of mitigation, the party does not, by this conſtruction, loſe the benefit, for the two juſtices will have power of mitigating, whether the appeal lies or not. There may be another reaſon given, in confirmation of the opinion we have formed, were it neceſſary, which is this; on a peruſal of the thirty-third and thirty-fourth ſections of the act in queſtion, the firſt of which relates to duties, and the latter to penalties and forfeitures, there appears a manifeſt difference in the penning of the two clauſes; the latter of which enacts, that all fines, penalties, and forfeitures, reſpecting the inland duties impoſed by the act, ſhall be ſued for, recovered, levied, or mitigated, by ſuch ways, &c. as any fines, &c. may be ſued for, &c. by any law of exciſe; dropping the words uſed in the former ſection, "or inland "duties under the management of the commiſſioners of ex- "ciſe." This led me to apply to a perſon who has long been concerned in the buſineſs of the exciſe, to know what was the diſtinction generally underſtood between exciſe laws, and inland duties under the management of the commiſſioners of the exciſe. He ſaid the difference they underſtood is this, that the law of exciſe is underſtood to relate only to liquors; and that inland duties under the management of the commiſſioners of exciſe are underſtood to relate to malt, dry goods, and other articles, which have of late been put under their management. If this diſtinction hold, it would be deciſive; for I believe there is not a ſingle inſtance of an appeal being given in any caſe relating to liquors; but, however, we need not rely on this diſtinction, as we think the former reaſons are perfectly ſatisfactory.—Rule diſcharged.

Hall v. Dracord, *et al.* Ea. Ter. 19 Geo. 3. C. B. 2 *Black.* 1289.

Spirituous Liquors.]—A dealer in ſpirits, having a permit to remove 420 gallons, and removing 450, forfeits the whole quantity; and the fraudulency of the tranſaction is not a matter of enquiry by a jury.—On a motion for a new trial, *De Grey* Ch. J. reported, that this was an action of treſpaſs againſt ſome exciſe officers, for ſeizing four caſks of Britiſh ſpirits as forfeited. That it appeared in evidence, that on the 19th of April, 1777, one *William Parker*, the exciſe officer, at Briſtol, granted a permit "for *Hall* and Son, of "London, to receive four caſks of Britiſh ſpirits, 420 gal- "lons, part of the ſtock of *James Croſs*, of which an ac-

"count

" count had been taken, and duties charged. In force for " ten days." That in the bill of parcels of the ſame date, four caſks of ſpirits, 110, 106, 112, and 110 = 438 gallons, are ſpecified as ſent from *Croſs* to *Hall*.—On the 21ſt of April, *Croſs* applied to the carrier to take the caſks to London, but he had not room. On Thurſday, the 24th of April, he undertook to carry them the next day; and they were ſent on Friday the 25th, and arrived at the three cups, in Bread-ſtreet, on Wedneſday, the 30th of April, at three in the morning. The defendants came there and gauged the caſks the ſame morning, *which they found to contain* 450 *gallons, and accompanied them to* Hall's *wharehouſe*; where they told his people not to meddle with the caſks, but did not ſet any mark upon them. On the 2d of May they came to *Hall* again, and told him to do nothing with the caſks, till they had laid the matter before the commiſſioners; but before this, a ſervant of the plaintiff had lowered the ſpirits as uſual, for ſale. On the 3d of May, the officers made ſeizure of the four caſks ſo lowered, and on the 12th of May, the plaintiff was ſummoned to the exciſe office, where the caſks were condemned as forfeited. The Chief Juſtice left it to the jury to determine whether this was a fair tranſaction according to the courſe of trade, who found that it was ſo, and therefore gave a verdict for the plaintiff. Damages 142*l.* 10*s.* De Grey, Ch. J. delivered the opinion of the Court.—On mature conſideration, and conference with my brethren, I am convinced, that the directions I gave to the jury were wrong. There can be no diſcretionary power lodged in the jury, to determine upon equitable circumſtances, they muſt, in theſe caſes, adhere to the letter of the rule. The revenue laws are laws of jealouſy, founded upon, and calculated to meet with ſuch frauds as have frequently occurred. And the law for the jury, muſt be the ſame as the law for the officer; elſe the officer muſt act by one rule, and be judged by another. If, in the preſent caſe, the law ſeems hard upon the trader, it is owing to his own neglect. For, though this permit does not tally with the goods removed, he might have had another that would. An opening is here left for fraud, and though the jury have found that no fraud was in fact committed, that inquiry was made without authority. No latitude was intended by the law. Where ſpecific quantities or meaſures are preſcribed, the letter of the rule muſt be adhered to. All queſtions of fairneſs, or otherwiſe, are out of the caſe. What, and how minute a quantity ſold, ſhall make a man a retailer;—how much tea or coffee ſhall be ſent without a permit;—the dimenſions of caſks in certain caſes;—the tonnage of ſhipping, &c. are all matter of poſitive law, and muſt be preciſely complied with. So as to place or diſtance, upon the hovering-act, and the like. There is no room to open the caſe and decide upon the fairneſs, or otherwiſe,

wiſe, of the tranſaction. That would be to introduce a new criterion, a vague and uncertain rule. We are all, therefore, of opinion, that this caſe ought not to have been ſo left to the jury.—A queſtion was moved, Whether the whole ſhould be forfeited, or only the caſk containing the ſurplus thirty gallons? We think it is one entire quantity, ſo conſidered in the permit and bill of parcels; ſuppoſe the whole had been in bottles, 1800 in number, ſhall only the ſurplus bottles, 120, be forfeited? The fraud would be then ſo little hazardous as to become very frequent.—Rule for new trial abſolute.

Rex *v.* Sikes, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 56.

The duty upon fermented waſh attaches as ſoon as the officer has gauged the waſh, and aſcertained the quantity; after which the commodity is at the entire riſk of the diſtiller, and the public have no concern with any ſubſequent loſs or deterioration to which it may be ſubject in the hands of the manufacturer. This caſe was as follows: The 26 *Geo.* 3. c. 73. which diſcontinued the former duties on low wines and ſpirits, impoſes, in lieu thereof, a duty on every gallon of fermented wort or waſh made for extracting ſpirits for home conſumption; and by the 69th ſection, the proviſions of former acts are exended to this; and, amongſt others, the proviſion contained in the 1 *W.* & *M.* c. 24. ſ. 13. whereby juſtices of the peace, within whoſe juriſdiction any brewer inhabits, upon complaint made to them of any overcharge returned upon him by any of the gaugers, are to hear and determine the ſame, and, on due proof, diſcharge or acquit ſuch brewer of ſo much of his charge as ſhall be made out. A complaint was made by *Cook* and others, diſtillers for home conſumption, before two juſtices of the peace, that the complainants, on the 15th of January, 1795, were charged by the officers of exciſe, ſurveying the diſtillery, in 208*l.* 2*s.* 8*d.* for duties upon 6244 gallons of waſh, which had been loſt by the burſting of the waſh-tub or ſtill in which it was contained, and while it continued to be waſh, whereupon they prayed to be acquitted and diſcharged of the overcharge, and that the defendant *Sikes*, being the collector of exciſe, might ſhew cauſe why they ſhould not be diſcharged: the parties were accordingly ſummoned; and, appearing before the juſtice, the evidence of the ſuperviſor was, that on the 15th of January, 1795, he gauged 12,489 gallons of waſh, upon which he charged the duty, and continued in the diſtillery until the whole of the waſh was put into the waſh-ſtill, in order to be reduced into ſpirits; that he locked and ſealed the ſtill about ſix o'clock in the ſame evening, and left the premiſes, after having made his charge according to the guage, and entered it in his book; that afterwards having, in the ſame evening, about ten o'clock, received a meſſage from the complainants, that the ſtill was burſt, he immediately attended,

tended, when he found the fire withdrawn from under the ſtill, which was leaking, and he, at the requeſt of the complainants, unlocked the diſcharge cock, in order to let off the waſh in the ſtill, to prevent the ſame from ſetting fire to the premiſes; that the quantity of waſh mentioned in the complaint, viz. 6244 gallons, was thereby, by inevitable accident, loſt and deſtroyed to the complainants, without any fraud or colluſion of them, or any other perſon. The defendant, the collector of exciſe, admitted the facts to be true, but objected, that they were not ſufficient in law to authorize the juſtices to diſcharge the complainants of the duty; whereupon the juſtices adjudged, that the complainants ſhould be diſcharged and acquitted of the ſaid ſum of 208*l.* 2*s.* 8*d.* being the duty on the ſaid 6244 gallons of fermented waſh. This adjudication of acquittal was removed by *certiorari*, into the court of King's Bench, and the caſe was fully argued. By Lord KENYON, Ch. J. This is a caſe of hardſhip on the part of the diſtillers, and therefore we wiſhed it to ſtand over, to afford them an opportunity of petitioning the Board of Treaſury for relief; but, upon the law of the caſe there is no difficulty. This is not one of the caſes over which the legiſlature intended to give the magiſtrates juriſdiction; but the clauſe referred to in the ſtat. of *W.* & *M.* whereby power is given to them, upon complaint of any overcharge, to afford relief, muſt be confined to overcharges of the duty, which were ſuch at the time when the charges were made by the officer. But that clearly does not apply to the preſent caſe; for, at the time when the charge was made, it was accurately calculated, and the diſtillers were liable to pay the whole duty aſſeſſed upon them. The loſs which unfortunately happened afterwards, can in no ſenſe convert this into an overcharge, but is a matter altogether of diſtinct conſideration. *Aſhhurſt*, J. of the ſame opinion. *Groſe*, J. the queſtion whether there was an overcharge or not, muſt depend ſolely upon the fact, whether the duty were charged too much at the time. By 26 *Geo.* 3. c. 73. ſ. 16. the duty is chargeable before the waſh is put into the ſtill, which was done accordingly in the preſent caſe; and there being no pretence for ſaying that there was any overcharge at that time, the magiſtrates had no authority to make any allowance in reſpect of the accident which happened afterwards. *Lawrence*, J. delivered himſelf to the ſame effect, and added: Neither can it be ſaid that the letting out of the waſh from the ſtill was the act of the officer, as ſuch; for he was then acting as the ſervant, and at the requeſt of the owner, who called on him for aſſiſtance in an hour of diſtreſs, and not in virtue of his office.—Order quaſhed.

A perſon who ſells ſpirituous liquors by retail without a regular licence from two juſtices of the peace, is liable to the penalties

The King *v.* M. Downes *et al.* Hil. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 560.

penalties of the 5 *Geo.* 3. c. 46 (1), for ſelling exciſeable liquors without a juſtice's licence, though he has a licence from the commiſſioners of the exciſe to retail ſpirituous liquors.—*R. Turner*, having been convicted in the penalty of 40*s.* with coſts, by the defendants, for ſelling gin and rum, being exciſeable liquors, without being licenſed ſo to do, appealed to the Weſtminſter ſeſſions, where the conviction was quaſhed, ſubject to the opinion of this Court on the following caſe.—The conviction was ſtated at length; and it appeared to be in the ſummary form preſcribed by the ſtatute of 5 *Geo.* 3. c. 46. ſ. 26. The caſe then ſtated, that *Turner* on the 8th of October, 1788, at his houſe in Norris-ſtreet, in the pariſh of Saint *James*, Weſtminſter, ſold gin by retail. *Turner produced a licence to ſell brandy, and other ſpirituous liquors, regularly granted by two commiſſioners of exciſe*, purſuant to the ſtatutes of 16 and 24 *Geo.* 2.; and alſo an *alehouſe licence in the common form, under the hands and ſeals of two juſtices for the city and liberty of Weſtminſter, in the county of Middleſex*, DATED THE 20TH OF SEPTEMBER, 1788, *by which he was licenſed to ſell by retail beer, ale, and other exciſeable liquors* (except brandy, rum, arrack, uſquebaugh, geneva, aquavitæ, and all ſuch other diſtilled ſpirituous liquors, and ſtrong waters, unmixed, or mixed, &c.)—No warrant, for appointing a meeting, was iſſued under the hands and ſeals of thoſe two juſtices who granted this laſt licence, or any other magiſtrates, previous to the granting of it in the uſual manner.—But it appeared that prior thereto, viz. on the 29th of Auguſt, 1788, a warrant of that date was regularly iſſued, under the hands and ſeals of the defendants, *two of his majeſty's juſtices of the peace, acting in and for the ſaid city and liberty, appointing a general meeting of the juſtices for granting licences to victuallers within the pariſh of Saint* James, *Weſtminſter*, ON THE 11TH OF SEPTEMBER. *And that on the ſaid 11th of September*, 1788, *the defendants, and ſeveral other magiſtrates, met, and proceeded to grant licences, but no application was made at ſuch meeting by* Turner *for any licence.*—In ſupport of the order of ſeſſions quaſhing the original conviction, it was contended, that *Turner* had not incurred any penalty under any act of parliament; inaſmuch as he had a proper ale licence as well as an exciſe licence: that the juſtices were authorized to grant this licence under the 5 and 6 *Ed.* 6. c. 25. under which they may licenſe alehouſes AT ANY TIME; and their power in the preſent caſe was not affected by the ſtatute of 2 *Geo.* 2. c. 28. nor by the 26th *Geo.* 2. c. 31. For the ſtat. 2 *Geo.* 2. c. 28. ſ. 11. enacts, that no licence ſhall be granted but at a general meeting of the juſtices of the diviſion, to be

(1) This act is repealed and other penalties inflicted by ſtat. 35 Geo. 3. c. 113.

held

held on the 1st of September yearly, or within twenty days after; but there is a proviso in the 12th section, that nothing in that act shall extend *to alter the method or power of granting such licences in any city or town corporate.* That the 26 *Geo.* 2. c. 31. s. 4. confines the time of holding the general meetings to the first twenty days of September, and the 16th section provides, that nothing in that act shall extend to alter the time or times of granting such licences in any city or town corporate. So that the power of granting licences in cities or towns corporate remains as it did under the 5 & 6 *Ed.* 6. c. 25. at any time; and that Westminster was not within the purview of those acts, which were passed to remedy the inconveniences of magistrates, residing in a distant part of the country, granting licences to persons, with whose characters they were not acquainted; but that it was directly within the exception in both those statutes, Westminster being a city. Lord KENYON, Ch. J. All the regulations prescribed by the 26 *Geo.* 2. c. 31. must be complied with, except so much of them as comes within the subsequent proviso. Now that proviso only extends to *the time or times of granting the licences in particular districts.* Such is the construction which the very words of the exception express, and which is a construction highly advantageous to the public. For it is of importance to the public that licences of this sort should be granted openly, and not by stealth, in order that they may have an opportunity of objecting to the granting of these licences to particular persons on the ground of unfitness. Inasmuch therefore as the regulations of that statute were not complied with in this instance, *this licence having been granted at a private meeting of two justices,* which was holden too after the general meeting was passed, I am of opinion that the licence is illegal, and that it cannot protect the person to whom it was granted from the penalties of the 5 *Geo.* 3. c. 46. and that the present conviction may be supported.—ASHHURST, J. The stat. 5 *Geo.* 3. c. 46. solely and purely relates to licences granted by the justices of the peace, and not to licences granted by the excise. It would be a most mischievous exposition of the stat. 26 *Geo.* 2. to say that justices of the peace, even in such places as fall within the meaning of the exception, *might grant licences privately, and without giving any public notice of their intention to grant licences on any particular day.* For though, perhaps, it was not necessary that such magistrates should be limited to the time mentioned in the act for granting licences, yet as the public are so much interested in the subject, the legislature thought it proper *to include all places in the general provisions of the act, so that in no place whatever can the justices grant a licence but at a public meeting, though in places within the exception of that act,*

the

the time of that meeting is not confined to the twenty first days of September. BULLER, J. agreed; and GROSE, J. I cannot think that Westminster is a city within the proviso in the 26 *Geo.* 2. which only means such a city or town corporate, as by virtue of its incorporation had a power of doing that which the magistrates for the county at large had within the body of the county. But even supposing this to be a city within the proviso, still the magistrates of such a place must pursue the regulations of the 26 *Geo.* 2. except as to the time of granting such licences; and the objection to this licence is not to the time, but to the manner and place in which it was granted.—Order of sessions quashed, and the conviction affirmed.

The King *v.* Commissioners of Excise, Ea. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 381.

Wines.] A person who intends to become a dealer in foreign wine, must take out his licence, and enter his warehouse, before he lays in his stock. And a dealer in wine is not entitled to a permit to remove wine sold, which wine was laid in before he took out his licence.—This was a rule, calling on the commissioners of excise to shew cause why a *mandamus* should not be directed to them, commanding them to grant a permit to *James Cadwalader Parker*, for the removal of six pipes of wine from the vaults of *Parker* to the vaults of Messrs. *J.* and *L. Bateman.* It appeared by the affidavits, that *Parker*, proposing to take up the business of a dealer in foreign wine, on the 15th of June, 1787, gave orders for a parcel of wines from Oporto. On the 19th of June he purchased six pipes of port, at a public sale of wines by auction, to remove which to his vaults he regularly obtained a permit from the officer of excise. In September he sold two pipes (his wine from Oporto not being then arrived) and in order to enable him to deliver them, he took out a licence, directed to be taken out by persons dealing in foreign wines, and made the entry (1) of the vaults; of which he gave notice to the excise officer, requesting the officer to take an account of his stock. The officer refused to give credit for the wines in his cellar, though the permit was shewn to him, assigning as a reason, that the permit was dated before he had taken out his licence, or made an entry of his vaults. *Parker* swore that he did not intend to commence the business till the arrival of his wine from abroad, and that he had no intention of defrauding the revenue. ASHHURST, J. An application for a *mandamus* is an application to the discretion of the Court; a *mandamus* is a prerogative writ, and is not a writ of right; therefore the Court ought not to grant a *mandamus* to the commissioners of excise, unless they see that the officer has done wrong in refusing the permit.

(1) 26 *Geo.* 3. c. 59. s. 12.

Now

Now I do not think that he has done wrong in this case, as the wine in question was not brought into *Parker*'s vaults in such a regular course as comes within the general purview of the act. It was the object of the act to prevent frauds; and it may be collected that it was not the intention of the legislature that any person should have a licence to sell wine, unless the officer of excise were satisfied that the wine was brought into his cellar in the regular way; for which reason it requires that the wine shall be brought in under his inspection. The eighth section of this act of parliament enacts, "that no person shall deal in or sell foreign wine by whole-"sale, without first taking out a licence for that purpose." For the purposes of this act, I think a man does commence to be a dealer from the moment when he buys the wine with an intention to sell it again. I do not mean to say that he is so for every purpose; as for instance, to subject him to the bankrupt laws, or to incur forfeitures: but for this purpose he does then become a dealer. On the true construction of this act of parliament, I am of opinion, that *Parker*, before he brought this wine into his cellars, should have complied with all the requisites which were intended as checks by the act: otherwise it would be an inlet to all those frauds against which the statute meant to guard, and the act itself would be nugatory. The merchant must not only have regular permits for all the wine brought into his cellar; but the act intended to impose further restrictions on him, by requiring that the excise officer should have notice when the wine is to be brought in; otherwise the officer could not put into execution the checks imposed by this act, nor guard against any increase of the stock. But this wine was brought into *Parker*'s cellars several months before such notice. Therefore on the general view of this act, and the intention of it, it appears that this wine was not so regularly brought into his stock, as that the officer was bound to grant the permit required, recognizing it as part of the stock of a dealer in wine. Thus it stands independently of the general clause of reference to the former excise laws; but if it were necessary to call that in aid of the present question, I think that it does incorporate the 6 *Geo.* 1. c. 12. *quoad hoc*, into this act of parliament; and that statute (1) enacts, that no spirits shall be brought into the merchants' warehouses till they have been duly entered, and notice thereof given to the officers of excise. But there is no occasion to have recourse to the former act; for the intention of the legislature appears sufficiently plain from the act in question. BULLER, J. The first question is, What is meant by a dealer in this act of parliament? I am of opinion, that according to the true

(1) S. 13.

construction

conſtruction of it a buyer is a dealer for this purpoſe. This bears no analogy to the caſe of bankrupts within the bankrupt laws; for there the words of the ſtatutes (1) are, "a "perſon who ſeeks his living by buying and ſelling;" therefore to conſtitute a trader within thoſe acts there muſt be both a buying and ſelling. But here the words are in the disjunctive, "deal in *or* ſell;" and we cannot vary the meaning of them by conſtruing them to be buying and ſelling; dealing muſt mean ſomething which does not include ſelling. This act of parliament has three claſſes of perſons in view; firſt, thoſe who were traders before the paſſing of the act, on whom particular reſtrictions are added by the ſixteenth ſection. But this does not fall within that deſcription. Secondly, thoſe who become dealers afterwards, upon whom the eighth ſection attaches. Thirdly, thoſe who are not dealers, but who are poſſeſſed of a quantity of wine which they wiſh to diſpoſe of; that is provided for by the tenth ſection. It is enacted by the eighth ſection that no perſon ſhall deal in, or ſell, any wine without firſt taking out a licence; therefore, any perſon who intends to become a dealer muſt, under this act, take out his licence before he does any act of dealing; and buying is an act of dealing. And here it appears, that *Parker* did not take out his licence before he purchaſed the wine in queſtion. The thirtieth ſection only applies to thoſe who are duly licenſed, that is, duly licenſed at the time of doing the firſt act of dealing, which is buying. This ſection requires the officer, who grants the permit, to certify one of three things; either that the duty has been paid; that the wine has been condemned; or that it is part of the ſtock of ſome dealer; but that ſtock only relates to the ſtock of thoſe who were dealers before the paſſing of the act. In that caſe, they have ſome rule to guide them; ſo if goods be condemned, the officers cannot miſtake. But in the other caſe, it is ſtrange to ſay that the officers ſhall be compelled to certify that to be true which they cannot know, unleſs the wine were brought in under their inſpection; now that they would be enabled to do, if they had notice before it was brought in. With regard to the argument which has been drawn from the general clauſe of reference, which it is contended, incorporates the ſtatute of 6 *Geo.* 1. into this; as far as ſtatutes are in *pari materiâ*, they may be taken into conſideration together, as to the general proviſions of the act: but it is not neceſſary to determine that point in this caſe. GROSE, J. The queſtion is, Whether the legiſlature meant, that a dealer ſhould or ſhould not be permitted to ſend wine out of his cellars, unleſs it has been regularly entered under the inſpection of the exciſe offi-

(1) 13 *Eliz.* c. 7. 12 *Jac.* 1. c. 19. ſ. 2.

cers? I am clearly of opinion, that he has no such right in any case. There are two classes of persons entitled to permits under this act; dealers, and those who are not so. As to the dealers, the thirteenth section shews in what manner permits are to be granted to them, requiring the certificate of the excise officer that the duty has been paid. Now, it is not possible that the officer can certify that fact, unless the wine be brought in under his inspection. It has been asked, in the course of the argument, at what time a man commences to be a dealer: I think that, for the purposes of this act, he must be considered to be a dealer when he purchases the wine, and brings it into his cellar; for the act undoubtedly means, that the person shall make his entry before he has the wine in his possession for the purpose of sale.—Rule discharged.

A TABLE.



A

TABLE

OF

THE PRINCIPAL MATTERS

CONTAINED IN

THIS VOLUME.

ABATEMENT.

AN action of treſpaſs for an injury done to the property of the wife, *dum ſola*, muſt be brought by the huſband and wife. But if ſuch an action be brought by the wife alone, the defendant muſt plead the coverture in *abatement*, and not in *bar*. *Milner* et al. v. *Milnes*. Page 325

2. And if the plaintiff take huſband after ſuing out the writ, and before the declaration, the defendant cannot give her coverture in evidence under the general iſſue, but muſt plead it in abatement if he wiſh to take advantage of it. *Morgan* v. *Painter*. 326

3. An action at law does not abate by the plaintiff's becoming a bankrupt; therefore, if after the interlocutory judgment, and awarding the writ of enquiry, the plaintiff becomes a bankrupt, and afterwards, in his own name, the inquiry is executed, it will be good without ſuing out a *ſcire facias*, at the ſuit of the aſſignees. *Bibbins* et al. v. *Mantel*. 201

4. So, where between the interlocutory and final judgment, the plaintiff became a bankrupt, and ſued out execution *in his own name*; the Court refuſed to ſet aſide the proceedings. *Waugh* v. *Auſtin*. 203

5. But if the plaintiff, after judgment and a writ of error allowed, become a bankrupt, his aſſignees cannot ſue out a *ſcire facias* in their own names to compel an aſſignment of errors, till ſome judgment be given: and then it muſt be done immediately after ſuch judgment. *Kretchman* v. *Beyer*. 203

ACT OF BANKRUPTCY.

See BANKRUPT; alſo the APPENDIX.

ACTION.

1. An action of treſpaſs lies at the ſuit of a perſon againſt whom a commiſſion of bankruptcy has been iſſued (he not being an object of the bankrupt laws) againſt the aſſignees under the commiſſion for taking poſſeſſion of his houſe and goods, for the commiſſion is void and of no avail. *Perkin* v. *Proctor*. 17

2. An action of treſpaſs and falſe impriſonment will lie againſt the commiſſioners for committing one ſuſpected to detain the effects of a bankrupt, for not attending to be examined on the firſt ſummons, *Dyer* v. *Miſſing.* 80

3. It will alſo lie againſt the commiſſioners for an illegal exerciſe of their diſcretion, in improperly committing a bankrupt who has made a ſatisfactory anſwer. *Miller* v. *Seare.* 80

4. If goods be ſold, and a certain credit, as for inſtance twelve months, be given by the ſeller, he cannot maintain an action until that time be expired. *Dobſon* v. *Lockart.* 111

5. Treſpaſs will not lie by the aſſignees of a bankrupt againſt a ſheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the iſſuing of the commiſſion; notwithſtanding he ſells them after the iſſuing of the commiſſion, and after a proviſional aſſignment, and notice from the proviſional aſſignee not to ſell. *Smith* et al. v. *Milles.* 179

6. If the aſſignees have brought an action of trover to recover the value of goods belonging to the bankrupt, and failed therein, they are thereby barred from bringing aſſumpſit for the ſame cauſe of action. *Hitchin* v. *Campbell.* 193

7. The aſſignees cannot maintain trover for goods fraudulently ſold, without proving a demand and refuſal. *Nixon* et al. v. *Jenkins.* 196

8. The aſſignees of a bankrupt, in aſſumpſit, againſt the vendee of goods, ſold by the bankrupt after the commiſſion, need not name themſelves aſſignees in the declaration; but if it be on a contract made by the bankrupt before the commiſſion, they muſt ſtyle themſelves in the declaration to be aſſignees. *Evans* et al. v. *Mann.* 196

9. The aſſignees of *A.* a bankrupt, and alſo of *B.* a bankrupt, under ſeparate commiſſions, cannot recover, in the ſame action, a *joint debt* due from the defendant to both the bankrupts, and alſo *ſeparate debts due to each.* And if in ſuch an action the jury have aſſeſſed the damages ſeverally on the ſeparate counts, the Court will arreſt the judgment on thoſe counts, which demand the debts due to each bankrupt ſeparately. *Hancock* et al. aſſignees of *Lomas*, and alſo aſſignees of *Edenſor* v. *Haywood.* 197

10. The plaintiffs ſued, as aſſignees of *A.* and *B.* and alſo aſſignees of *C.* for a joint demand due to all the bankrupts, and ſuch declaration was held good on motion in arreſt of judgment after verdict. *Streatfield* et al. aſſignees of *James de Druſina*, *James Clerk*, and *J. C. Ridder*, bankrupts, v. *Halliday*, et al. 198

11. Treſpaſs will lie againſt cuſtom-houſe officers for entering a houſe and ſearching for ſmuggled goods, if none be found. *Bruce* v. *Rawlins*, 811. *Redſhaw* v. Brook. 812

12. No action will lie in the court of C. B. to recover coſts ordered to be paid by a rule of an inferior court, in the courſe of a ſuit there, notwithſtanding the defendant may not be liable to an attachment of the inferior court, by being reſident out of its juriſdiction. But ſuch an action having been brought, the Court ordered the coſts awarded to the plaintiff in the inferior court to be deducted by the prothonotary from thoſe allowed to the defendant in the action. *Emerſon* one, &c. v. *Laſeley.* 780.

See alſo CHURCHWARDENS, No. 4. CUSTOMS and EXCISE, No. 14, 19.

ADMINISTRATORS.

See EXECUTORS and ADMINISTRATORS.

ADMITTANCE.

See COPYHOLD.

ADULTERY.

1. The huſband is not liable to anſwer for the contract of the wife, where ſhe has committed adultery. *Govier* v. *Hancock.* 291

2. But if the huſband permits the wife to remain in his houſe, he will be liable to anſwer for her contracts, though ſhe may have committed adultery,

tery, unleſs the plaintiff knew, or ought to have known, the circumſtances under which ſhe was living. *Norton* v. *Fazan.* 292

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ALEHOUSES.

1. An alehouſe-keeper or inkeeper, as ſuch, not liable to the bankrupt laws. *Saunderſon* v. *Rowles.* 10

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ALTERATION.

1. An alteration of the date of a bill of exchange, after acceptance, whereby the payment may be accelerated, avoids the inſtrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable conſideration. *Maſter* et al v. *Miller.* 377

See alſo BILLS of EXCHANGE, No. 10.

ANNUITY.

1. Where a by-will gave an annuity to *B.* directing that *B*'s receipt only ſhould be a diſcharge for it, that *B.* ſhould not alienate it, and that if he did, it ſhould ceaſe and determine. *B.* became a bankrupt, and his commiſſioners aſſigned the annuity, with his other effects, to the aſſignees; held that the annuity ceaſed. *Dommet* v. *Bedford.* 100

2. An annuity-bond, if forfeited before the bankruptcy, ſhould be valued and proved under the commiſſion; but if not forfeited till after, it cannot be ſo proved, and the obligor may be taken in execution on a judgment thereon. *Perkins* v. *Kempland*, et al. 212

3. And the receiving payment of the arrears of an annuity-bond, after the forfeiture has once taken place, will not be a waiver of the forfeiture. *Wyllie* v. *Wilkes.* 213

4. A bond for payment of an annuity for a term of years, is within the ſtatute 7 *Geo.* 1. c. 31. and may be proved under the commiſſion; and ſo are all bonds, bills, notes, and other perſonal ſecurities, payable at a future day certain, though not given by the bankrupt for goods ſold and delivered to him in the courſe of his trade. *Pattiſon* v. *Bankes.* 215

5. On an indictment on the annuity-act 17 *Geo.* 3. c. 26. ſ. 7. for taking more than 10*s.* in the 100*l.* for brokerage, &c. it is not neceſſary to prove that the defendant took the exact ſum laid in the indictment, though it be not laid under a viz. and on the trial of ſuch an indictment it muſt be left to the jury to conſider whether the exceſs above 10*s.* in the 100*l.* were really taken as a fair charge for drawing the writings, &c. or whether it were not ſo taken as a device to avoid the ſtatute. *The King* v. *Gillham.* 487

APPRENTICES.

1. A by-law made by a company, in a corporation, in reſtraint of trade, ſuch as to reſtrain the number of apprentices to be taken by any of the members, is void. *The King* v. *the Coopers' Company.* 507

APPROVEMENT.

1. The lord has no right under the ſtatute of *Merton*, to encloſe and approve the waſtes of a manor where the tenants of the manor have a right to dig gravel on the waſte, or take eſtovers there. *Duberley* v. *Page.* 569

2. The lord of a manor, or his grantee, may incloſe and approve part of a common againſt tenants having common of paſture, notwithſtanding they have alſo ſome other right on the common, as a right to dig ſand, &c. if he leave ſufficient common of paſture. *Shakſpear* v. *Peppin.* 570

3. If there be a cuſtom for the commoner to incloſe, and any of them do, by virtue of ſuch cuſtom, incloſe, the land remaining unincloſed is thereby freed and diſcharged from ſuch perſon's

former right of common therein. *How* v. *Strode*. 577

4. If the lord of the manor plant trees on a common, a commoner has no right to abate them. *Kirby* et al. v. *Sadgrove*. 579

ASSAULT.

See CUSTOMS and EXCISE, No. 2.

ASSIGNMENT.

1. An original ſubſcriber to a canal navigation, is not liable for any call made by the committee after he has aſſigned his ſhare. *The Huddersfield Canal Company* v. *Buckley*. 525

2. An aſſignment of goods at ſea, as a collateral ſecurity for a debt, and a ſubſequent indorſement of a bill of lading, are good as againſt the aſſignees of the aſſignor, who committed an act of bankruptcy between the aſſignment of the goods and the indorſement of the bill of lading. *Lempriere* et al. *Aſſignees of Syers* v. *Paſley*. 83

3. A delivery of the grand bill of ſale of a ſhip at ſea, on the mortgage of the ſhip, is equivalent to a delivery of the ſhip itſelf; and if the mortgagee take poſſeſſion on her arrival, he may maintain trover againſt the aſſignees of the mortgagor if they take the ſhip from him, notwithſtanding he has made no demand either on the bankrupt or his aſſignees. *Atkinſon* v. *Maling* et al. *Aſſignees of Burn*. 89

4. An abſolute bill of ſale of a ſhip then at ſea is void by 26 *Geo*. 3. *c*. 60. *ſ*. 17. unleſs the certificate of the regiſtry be recited therein; although the vendee give at the ſame time an undertaking to reſtore the ſhip on a future day, on payment of a certain ſum, advanced by him on the credit of this ſecurity. And though the vendee had alſo the grand bill of ſale, and had taken poſſeſſion of the ſhip immediately on her arrival, it was held that he could not retain the ſhip, as having a lien on her, againſt the aſſignees of the vendor, who became a bankrupt after this transfer of the ſhip. *Rolleſton* et al. v. *Hibbert* et al. 91

5. But notwithſtanding the 26 *Geo*. 3. *c*. 60. *ſ*. 17. enacts, that a bill of ſale of a ſhip ſhall be abſolutely void, unleſs the certificate of the regiſtry *be truly and accurately* inſerted therein, *a mere clerical miſtake* will not vitiate it. *Rolleſton* et al. v. *Smith*. 94

See alſo BANKRUPT.

ASSUMPSIT.

1. Aſſumpſit will lie for a creditor's ſhare, under an order of commiſſioners of bankrupt for a dividend. *Brown* et al. *Executors of Gravatt* v. *Bullen*. 223

See BANKRUPT, No. 68.

ATTACHMENT.

See COSTS. No. 62.

ATTACHMENT, FOREIGN.

1. If, after the aſſignment of a bankrupt's eſtate, a creditor, knowing it, and reſiding in England, attach the money of the bankrupt abroad, the aſſignees may recover it in an action for money received to their uſe. *Hunter* et al. v. *Potts*. 161

2. So if after an act of bankruptcy committed, but before an aſſignment, a creditor of the bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the aſſignment, money due to the bankrupt in the Weſt-Indies, the aſſignees may recover the money in an action for money had and received. *Sill* et al. v. *Worſwick*. 165

3. So alſo, if after a commiſſion of bankrupt has in fact iſſued, a creditor attaches, in the names of himſelf and his partners, a debt due to the bankrupt in a foreign country, by legal proceſs; and obtains payment of it, under the judgment of a court of juſtice of that country; the aſſignees have a right to recover the money ſo received, in an action for money had and received to the uſe of the aſſignees. *Philips* et al. v. *Hunter*. 172

4. But if the perſon, in whoſe hands the money is attached, be ſued by the aſſignees for the ſame, the court will, on application to them for that purpoſe, put off the trial till the party is able to procure evidence of the debt's having

having been attached in his hands. *Le Chevalier, Assignee of Dormer* v. *Lynch* et al. 178

ATTORNEY.

5. An attorney is not liable to pay the costs of taxing his bill, under the stat. 2 *Geo.* 2. c. 23. s. 23. where the deduction of one sixth is occasioned, not by the particular *items* being taxed, but by a whole branch of it being disallowed. *White* one, &c. v. *Milner.* 784

AUTHORS.

1. Two penalties may be incurred on the same day, on the 12 *Geo.* 2. c 36. for selling books originally written and published here, and afterwards reprinted in any other country, and imported into this, if the acts of sale be distinct. *Brooke* qui tam v. *Milliken* 650

2. But acting a piece on the stage is not a publication of an author's work. *Coleman* v. *Wathen.* *Ibid*

AWARD. See COSTS.

BAIL.

1. If husband and wife be rendered after judgment in discharge of bail, the wife may be discharged out of custody upon motion. *Roberts* v. *Andrews,* et ux. 306

2. On shewing cause against a rule to discharge the defendant out of custody on filing common bail, on the ground that she was a *feme covert,* that fact being positively sworn to on one side, and not contradicted by the other. The rule was made absolute. *Waters* v. *Smith.* *Ibid*

3. *Non est inventus* having been returned, to a writ sued out against both the defendants, as to the husband; the defendant's wife was arrested; and she afterwards obtained a rule and was discharged. *Edwards* v. *Rourke and Wife.* *Ibid*

4. So, where the defendant had been arrested and holden to bail, for penalties to the amount of 200 *l.* incurred by insuring tickets in the lottery. The Court discharged her on the ground of her being a married woman. *Pritchett* v. *Rachel Cross.* 307

5. But the Court will not discharge a *feme covert* on common appearance, unless the coverture be open and notorious. *Pearson* v. *Mary Meadon* 307

6. Neither will the Court discharge a woman under arrest on common bail, as being married, if she obtained credit pretending she was single. *Partridge* v. *Clarke.* 309

See also BANKRUPT, No. 110, 117, 118. COMMITMENT, No. 4. CUSTOMS and EXCISE, No. 12.

BANKER.

1. A banker is not justified in paying *the drafts of a person who has placed money in his hands, after he has notice of an act of bankruptcy* committed by him. *Vernon* et al. v. *Hankey* et al. 157

2. But when the assignees have recovered the money from the bankrupt's banker, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy. *Vernon* et al. v. *Hanson.* 160

3. If a bill or note is made payable at a banker's, it is sufficient to present it for payment at the banker's, and notice of non-payment sent by the post is sufficient. *Saunderson* et al. v. *Judge.* 408

See also BANKRUPT, No. 55. BILLS OF EXCHEQUER, No. 56.

BANKRUPT.

What Persons may become Bankrupt.

1. A feme covert who is a sole trader, and carries on a separate trade within the city of London, according to the custom of the said city, is liable to a commission of bankruptcy. *Lavie* v. *Phillips.* 1

2. *A butcher* is within the meaning of the acts concerning bankrupts. *Daley* v. *Smith.* 3

3. A brickmaker may be a bankrupt. *Port* v. *Turton. Wells* v. *Parker.* 4

4. Any person trading to England, whether native, denizen, or alien, though never resident as a trader in England, may be a bankrupt, if he comes over here occasionally, and during his occasional residence commits the act of bankruptcy. *Alexander* v. *Vaughan.* 7

5. Neither

5. Neither a victualler nor an innkeeper, merely as such, is within the bankrupt laws. *Saunderson* v. *Rowles*. 10

6. To decide whether a trader is within the bankrupt laws, it was formerly held to be material to consider the extent of his trading. *Buscall* v. *Hogg*. 11

7. But in subsequent cases it has been held that the extent of the dealing is not material; and that it is sufficient to subject the party to the bankrupt laws if he sells with a view to profit, although the extent of his dealings and the profits arising therefrom may be very inconsiderable. *Patman* v. *Vaughan*. *Bartholomew* v. *Sherwood*. 12

8. Neither the owner nor farmer of an interest in land, by buying and selling the same, or the profits thereof, are liable to the bankrupt laws. *Port* v. *Turton*. 13

9. Also drawing bills of exchange for a particular purpose will not render a man liable to the bankrupt laws. *Hanley* v. *Jones*. 15

10. Trespass lies at the suit of a person against whom a commission of bankruptcy has been issued (he not being an object of the bankrupt laws), against *the assignees* under the commission for taking possession of his house and goods; for the commission is void, and of no avail. *Perkin* v. *Proctor and Green*. 17

Act of Bankruptcy.

11. If a trader be denied in the morning, by express order, to the holder of a bill which is due, it is a complete act of bankruptcy, though he afterwards pay the bill, according to the custom of merchants, before five o'clock in the afternoon of the same day. *Colkett* et al. *Assignees of Falch* v. *Freeman* et al. 18

12. And in order to constitute an act of bankruptcy the debtor *must be denied* to a creditor, with intent to defraud or hinder that creditor: "keeping house" with that intent is not alone sufficient. *Garret* et al. *Assignees of Moule* v. *Moule*. 21

13. In order to constitute an act of bankruptcy by a trader, in departing from his dwelling-house, it is not alone sufficient that a creditor should be thereby delayed, but the departure must also have been with that intent. *Fowler* v. *Padget*. 21

14. And a declaration by a bankrupt of his motives for absenting himself from home, made at the time, is evidence in order to prove the act of bankruptcy. *Bateman* et al. *Assignees of Howard* v. *Bailey*. 22

15. A fraudulent disposition of a trader's property is void against his creditors; and if it is done by deed, it is by force of the statute an act of bankruptcy. *Devon* v. *Watts*, 23. *Hessells* v. *Simpson*, 24. *Butcher* v. *Easto*, 25

16. And though a trader do not assign *the whole* of his effects, it will be an act of bankruptcy, if the exception of a part is colourable. *Law* v. *Skinner*, 26. *Compton* v. *Bedford*, *Ibid.* *Hooper* v. *Smith*. 27

17. An assignment of part, in contemplation of bankruptcy, is fraudulent. *Linton* v. *Barlett*. 28

18. But a fraudulent judgment and execution, though void against creditors, is not in itself an act of bankruptcy. *Clavey* et al. v. *Haley*. *Ibid.*

19. An assignment of all his effects, in trust for creditors, in certain proportions, executed by a bankrupt, while resident in India, is not an act of bankruptcy within the meaning of the bankrupt laws. Neither is such assignment fraudulent and void in itself, being intended honestly at the time, and assented to by the generality of the creditors. *Inglis* v. *Grant*. 30

20. And the parties who are privies and assent to a deed of assignment cannot set it up as an act of bankruptcy. *Bamford* v. *Baron*. 31

21. And the examination of the defendant before the commissioners, in which he admitted that the bankrupt executed a deed to him, is sufficient evidence to prove the execution thereof, and supersedes the necessity of calling the subscribing witness. *Bowles* et al. *Ass. of James* v. *Langworthy*. 34

22. The depositions of the act of bankruptcy when recorded according to 5 *Geo.* 2. c. 30. s. 41. are evidence, in an

an action at law, to prove the preciſe time when the act of bankruptcy was committed, if ſpecified therein. *Janſon* v. *Willſon.* 35

23. If a trader become a bankrupt by lying in priſon two months after an arreſt, the act of bankruptcy ſhall relate to the time of the firſt arreſt. *King* v. *Leith.* 36

24. But the Court will not aſſiſt upon motion the relation of an act of bankruptcy. *Clarke* v. *Ryall.* 37

See alſo the APPENDIX.

Commiſſion.

25. There were three petitioning creditors, one to the amount of 161*l.*; but the whole debt proved, did not amount to 200*l.* Query, Whether ſufficient? *Smith* et al. v. *Miller.* 66

26. A ſecond commiſſion againſt a bankrupt, pending a former one, under which he has not obtained his certificate, is void. *Martin* v. *O'Hara.* 76

27. A debt at law, notwithſtanding the ſtatute of limitations incurred, will ſupport a commiſſion. *Quantock* et al. v. *England.* *Ibid.*

28. If a creditor to the amount of 100*l.* and upwards, take a bill drawn by his debtor for 20*l.* on a third perſon, who has not then, nor afterwards, any effects of the drawer in his hands; and the bill, when due, is diſhonoured, the creditor's demand on the bill is not diſcharged; although he may have neglected to give notice of its being diſhonoured; and he may ſue out a commiſſion of bankrupt againſt the debtor; and his debt will ſupport it. *Bickerdike* et al. v. *Bollman.* 68

29. A debt contracted *before* a man enters into trade, may be the ground of a petition for a commiſſion of bankruptcy. *Butcher* et al. v. *Eaſto.* 69

30. The indorſee of a note, after the act of bankruptcy, may be the petitioning creditor. *Anonymous.* 70

31. Although the petitioning creditor's debt was not, at the time of the act of bankruptcy, 100*l.* yet if it be increaſed to that ſum by a promiſſory note of the bankrupt's, due at that time, being indorſed to him before the petition, it will be a debt ſufficient to ſupport the commiſſion. *Glaiſter* v. *Hewer.* 70

32. A creditor of a bankrupt to the amount of 112*l.* previous to the bankruptcy receiving 50*l.* after notice of an act of bankruptcy, is not thereby precluded from ſuing out a commiſſion of bankrupt. *Mann* et al. v. *Shepherd.* 70

33. The bankrupt is not a competent witneſs to prove his own petitioning creditor's debt. *Chapman* et al. v. *Gardner.* 71

34. Where a commiſſion of bankrupt is taken out fraudulently or maliciouſly, the Chancellor may, under ſtatute 5 *Geo.* 2. c. 30. order a ſpecific ſum, by way of damages, to be paid by the petitioning creditor to the bankrupt, or aſſign the bond given by the former, and enable the latter to recover the whole penalty of the bond. And the aſſignment of the bond by the chancellor is concluſive evidence of the fraud or malice in an action brought on ſuch bond. *Smith* v. *Broomhead.* 71

35. Aſſignees muſt prove the petitioning creditor's debt by the ſame evidence which muſt be produced in an action againſt the bankrupt. *Abbot* et al. v. *Plumbe.* 72

See alſo the APPENDIX.

Commiſſioners, Power of.

36. A bankrupt not anſwering a queſtion reſpecting the diſpoſition of his eſtate and effects to the ſatisfaction of the commiſſioners, is a good cauſe of commitment by them. *Rex* v. *Perrot.* 72

37. A general anſwer to a particular queſtion, by a bankrupt under examination, will not be ſufficient. *Langhorn's caſe.* 77

38. And if upon the examination of a bankrupt, touching the diſpoſition of his property, he ſwear to an account of the ſame, which appears to be incredible, the commiſſioners may commit him to priſon. Ex parte *Nowlan.* 77

39. But the commiſſioners have no authority

authority to commit one ſuſpected to detain effects of the bankrupt, for not attending to be examined, on the firſt ſummons. *Dyer* v. *Miſſing*. 80

40. Treſpaſs and falſe impriſonment lies againſt commiſſioners of bankrupts, for an illegal exerciſe of their diſcretion, in improperly committing a bankrupt who has made a ſatisfactory anſwer. *Miller* v. *Seare* et al. 80

Aſſignment.

41. An aſſignment of goods at ſea as a collateral ſecurity for a debt, and a ſubſequent indorſement of a bill of lading, are good as againſt the aſſignees of the aſſignor, who committed an act of bankruptcy between the aſſignment of the goods and the indorſement of the bill of lading *Lempriere* et al. v *Paſley*. 83

42. A delivery of the grand bill of ſale of a ſhip at ſea, on the mortgage of the ſhip, is equivalent to a delivery of the ſhip itſelf; and if the mortgagee take poſſeſſion on her arrival, he may maintain trover againſt the aſſignees of the mortgagor if they take the ſhip from him, notwithſtanding he has made no demand either on the bankrupt or his aſſignees. *Atkinſon* v. *Maling*. 89

43. An abſolute bill of ſale of a ſhip then at ſea is void by 26 *Geo.* 3. c. 60. ſ. 17, unleſs the certificate of the regiſtry be recited therein; although the vendee give at the ſame time an undertaking to reſtore the ſhip on a future day, on payment of a certain ſum, advanced by him on the credit of this ſecurity. And though the vendee had alſo the grand bill of ſale, and had taken poſſeſſion of the ſhip immediately on her arrival, it was held that he could not retain the ſhip, as having a lien on her, againſt the aſſignees of the vendor, who became a bankrupt after this transfer of the ſhip. *Rolleſton* v. *Hibbert*. 91

44. But notwithſtanding the 26 *Geo.* 3. c. 60. ſ. 17. enacts, that a bill of ſale of a ſhip ſhall be abſolutely void, unleſs the certificate of the regiſtry *be truly and accurately* inſerted therein, *a mere clerical miſtake* will not vitiate it. *Rolleſton* et al. v. *Smith*. 94

45. If a leaſe contain a proviſo that the landlord ſhall re-enter on the tenant's committing any act of bankruptcy, whereon a commiſſion ſhall iſſue, and the tenant does become bankrupt, his aſſignees are not intitled to hold the premiſes againſt the landlord. *Roe on the demiſe of Hunter* v. *Galliers*. 97

46. So where *A.* by will gave an annuity to *B.* directing that *B*'s receipt only ſhould be a diſcharge for it, that *B.* ſhould not alienate it, and that if he did, it ſhould ceaſe and determine: *B.* became a bankrupt, and his commiſſioners aſſigned the annuity, with his other effects, to the aſſignees; it was held, that the annuity ceaſed. *Dommet* et al. v. *Bedford and Woodham*. 100

47. The ſtatutes of bankrupts do not extend to effects which the bankrupt may have in *auter droit*; therefore, if an executor becomes bankrupt, the commiſſioners cannot ſeize the ſpecific effects of his teſtator; not even in money, which ſpecifically can be diſtinguiſhed and aſcertained to belong to ſuch teſtator, and not to the bankrupt. *Howard* v. *Jemmet*. 102

48. So a debt due to a bankrupt, as truſtee for another, does not paſs under the aſſignment of his effects by his commiſſioners. *Winch* v. *Keeley*. 102

49. If one of two partners become bankrupt, the ſolvent partner may, if for a valuable conſideration and without fraud, diſpoſe of the partnerſhip effects; and if he afterwards fail, the aſſignees, under a joint commiſſion againſt both, cannot maintain trover againſt the *bonâ fide* vendee of ſuch partnerſhip effects. *Fox* et al. v. *Hanbury* et al. 103

50. If a trader, after committing an act of bankruptcy, take a ſhop, and agree to pay half a year's rent in advance, where, by the cuſtom of the country, half a year's rent becomes due on the day on which the tenant enters,

enters, the landlord, after an aſſignment under the commiſſion, and before the year expired, may diſtrain the goods on the premiſes for half a year's rent; or if he buy the tenant's goods at the ſale under the commiſſion, he may retain the amount of the year's rent. *Buckley, Aſſig. of Edm. Buckley, a Bankrupt* v. *Taylor.* 106

51. And the ſtatutes of ſet-off extend to aſſignees under a commiſſion of bankruptcy. *Ridout* et al. *Aſſignees* v. *Brough.* 107

52. A broker, with a commiſſion *del credere*, may ſet off, under the *general iſſue*, a loſs upon a policy happening before a bankruptcy, to an action by the aſſignees of the bankrupt, for premiums upon various policies underwritten by him, and for which he has debited the broker. *Grove* et al. *Aſſignees of Liotard* v. *Dubois.* 108

53. Alſo a creditor may, on the event of his debtor becoming a bankrupt, retain money come to his hands, where mutual credit has been given; though his debt is not payable till a future day, and ſuch retainer is contrary to the agreement between the parties. *Atkinſon* et al. v. *Elliot.* 111

54. If a trader become a bankrupt, being under acceptances to a large amount, in favour of another; and that perſon, in whoſe favour the bills have been accepted (not knowing of the bankruptcy) ſend a parcel of goods, for the ſpecific purpoſe of enabling the bankrupt to diſcharge the acceptances, which parcel is taken by the aſſignees; the perſon who ſo ſent ſuch goods having paid the bankrupt's acceptances, may recover back the goods ſo ſent after the bankruptcy; on the ground that they were ſent for the particular purpoſe of paying thoſe acceptances, and that, as that purpoſe was not anſwered, the property in the goods, &c. remained in him. *Toone* v. *Hollingworth* et al. *Aſſignees of Daniel.* 112

55. Alſo bills remitted to a factor or banker, while unpaid, are in the nature of goods unſold; and if the factor becomes bankrupt, muſt be returned to the principal, ſubject to ſuch lien as the factor may have thereon. *Zinck* v. *Walker.* 125

56. If a bankrupt, after his certificate, and who trades again for himſelf, is left for ſeveral years in poſſeſſion of his houſe, houſhold-goods, and furniture, in order to aſſiſt in ſettling the affairs of the bankrupt's eſtate, the aſſignees repeatedly ſtating the goods, &c. in their accounts with the creditors as part of the eſtate, ſuch poſſeſſion does not veſt the goods in aſſignees under a ſecond commiſſion. *Walker* et al. *Aſſ. of Bean*, v. *Burnell* et al. *Sheriff of Middleſex**. 126

57. If a woman, *before* marriage, with the conſent of her intended huſband, conveys all her ſtock in trade and furniture to truſtees to enable her to carry on her buſineſs ſeparately: and if the huſband do not intermeddle with them, and there be no fraud, ſuch effects (though fluctuating) are not liable to his debts. *Jarman* v. *Woolloton* et al. *Aſſignees of Dovey, a Bankrupt.* 127

58. If a perſon, ſubject to the payment of exciſe duties, who is in arrear for the ſingle duties, becomes a bankrupt, and is convicted after the aſſignment of his effects, the double duties are a lien upon the exciſeable commodities, utenſils, and materials, in the hands of his aſſignees; and the commiſſioners or magiſtrates may authoriſe the penalty to be levied upon all ſuch commodities, and all the materials, preparations, utenſils and veſſels for making thereof, *in the cuſtody of the bankrupt, or any perſon or perſons in truſt for him.* *Stracey* et al. v. *Hulſe* et al. 129

59. But if the warrant be iſſued to levy the penalty *on the goods of the bankrupt generally*, it will be bad, and cannot juſtify the ſeizure of goods in the hands of the aſſignees. *Auſtin* v. *Whitehead* et al. 130

60. The enacting part of the ſtatute 21 *Jac.* 1. c. 19. ſ. 11. is not reſtrained by the preamble; but it extends to the goods of *a third perſon*, left in the hands of a trader, who

* See alſo the APPENDIX.

afterwards becomes bankrupt, if he has been permitted to be in the poſſeſſion thereof, and to ſell the ſame as his own; as well as thoſe which were originally the bankrupt's property; for if the ſtatute meant to comprehend nothing more than is contained in the preamble, it means nothing at all: becauſe, even before the ſtatute, if a man had conveyed his own goods to a third perſon, and had kept the poſſeſſion, ſuch poſſeſſion would have been void, as being fraudulent, according to the doctrine in *Twyne*'s caſe (3 *Rep.* 81): at the ſame time the ſtatute does not extend to all poſſible caſes, where one man has another man's goods in his poſſeſſion: as for inſtance, it does not extend to the caſe of factors or goldſmiths, who have the poſſeſſion of other men's goods merely as truſtees, or under a bare authority, to ſell for the uſe of their principal: *the goods muſt in fact be ſuch as the party ſuffers the trader to ſell as his own.* *Mace* v. *Cadell.* 130

61. But, where a bankrupt is in poſſeſſion of the goods of another, *bonâ fide* with the conſent of the owner at the time of the bankruptcy, *for a ſpecific purpoſe*, beyond which he has not the right of diſpoſition or alteration, that is not ſuch a poſſeſſion as intitles the aſſignees to recover the value of them under the 21 *Jac.* 1. c. 19. ſ. 11. *Collins* v. *Forbes.* 131

62. But where it is clear that the bankrupt has not only the poſſeſſion, but the order and diſpoſition of the effects of a third perſon, ſuch a poſſeſſion falls within the ſtatute 21 *Jac.* 1. c. 19. ſ. 11. *Gordon* et al. *Aſſignees of Cameron* et al. v. *The Eaſt-India Company.* 133

63. *Property delivered by a Trader to a Creditor, in contemplation of Bankruptcy, and in order to give ſuch Creditor an undue preference, is fraudulent, and the value may be recovered back by the Aſſignees.* *Hague* v. *Rolleſton*, 136. *Alderſon*, et al v. *Temple.* *Harman* et al. v. *Fiſher.* 138

64. So alſo a *pretended ſale*, though of part of a trader's goods only, to a particular creditor, or any other contrivance *not in the courſe of trade*, but calculated to give *a fraudulent preference*, is void, though the delivery of the goods to ſuch creditor, and his aſſent to the tranſaction be complete before the act of bankruptcy. *Ruſt* et al. v. *Cooper.* 142

65. But if a bankrupt give a preference to a creditor, *under the apprehenſion of legal proceſs*, however groundleſs ſuch apprehenſion is, it is binding. *Thompſon* et al. v. *Freeman*, 145. *Coſſer* et al. v. *Gough.* 146

66. So if a creditor, knowing his debtor to be in diſtreſſed circumſtances, and not able to pay his debt, applies to him ſome time before his bankruptcy for a ſecurity, and take part of his ſtock in trade for that purpoſe; this is not an undue preference. *Smith* v. *Payne.* 146

67. But where a ſale of goods has been completed by actual delivery to the buyer, *who afterwards becomes inſolvent before they are paid for*, he cannot reſcind the contract and return the goods, with the conſent of the ſeller, ſo as to give the ſeller a preference to his other creditors. *Earnes* v. *Freeland*, 147. *Salte* et al. v. *Field.* 150

68. If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the aſſignees may diſaffirm the contract, and recover the value of the goods in trover: *but if they bring* aſſumpſit, *they affirm the contract, and then the creditor may ſet off his debt.* *Smith* et al. v. *Hodſon.* 151

69. A fraudulent purchaſe of goods from a perſon in inſolvent circumſtances, by a creditor who has knowledge thereof, to ſave himſelf and cheat the other creditors, of whom the inſolvent has bought ſuch goods upon credit, is void. *Martin* et al v. *Pewtreſs and Robarts.* 153

70. The aſſignees of a bankrupt may maintain an action of trover againſt the maſter of a ſhip, to recover the ſame, notwithſtanding the bankrupt may

may ſtand indebted to him for wages, ſtores, and repairs; for the maſter has no lien upon the ſhip. *Wilkins* et al. v. *Carmichael.* 155

71. One of three partners in a ſhip and cargo, the coſt and outfit of which was 4,568*l.* paid only 410*l.* in part of his third ſhare, and gave his notes for the remainder; but before they became due, was declared a bankrupt: held that the partners could not, by voluntarily diſcharging the notes, ſtand in his place, for any ſhare of the profits: but that the aſſignees were entitled to and might recover a full third, both of the profits of the adventure, and the value of the ſhip. *Smith* et al. v. *De Silva* et al. 157

72. A banker is not juſtified in paying *the drafts of a perſon who has placed money in his hands, after he has notice of an act of bankruptcy* committed by him. *Vernon* et al. v. *Hankey* et al. 157

73. But when the aſſignees have recovered the money from the bankrupt's banker, they cannot recover the ſame ſum from the creditor, though he received it after notice of the bankruptcy. *Vernon* et al. v. *Anſon.* 160

74. If, after the aſſignment of a bankrupt's eſtate, a creditor knowing it, and reſiding in England, attach the money of the bankrupt abroad, the aſſignees may recover it in an action for money received to their uſe. *Hunter* et al. v. *Potts.* 161

75. So if, after an act of bankruptcy committed, but before an aſſignment, a creditor of the bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the aſſignment, money due to the bankrupt in the Weſt-Indies, the aſſignees may recover the money in an action for money had and received. *Sill* et al. v. *Worſwick.* 165

76. So alſo, if after a commiſſion of bankrupt has in fact iſſued, a creditor attaches, in the names of himſelf and his partners, a debt due to the bankrupt in a foreign country, by legal proceſs; and obtains payment of it, under the judgment of a court of juſtice of that country; the aſſignees have a right to recover the money ſo received, in an action for money had and received to the uſe of the aſſignees. *Phillips* et al. v. *Hunter* et al. in Ex. Ch. in Error. 172

77. But if the perſon, in whoſe hands the money is attached, be ſued by the aſſignees for the ſame, the Court will, on application to them for that purpoſe, put off the trial till the party is able to procure evidence of the debt's having been attached in his hands. *Le Chevalier,* Aſſignee of *Dormer,* v. *Lynch* et al. 178

78. Treſpaſs will not lie by the aſſignees of a bankrupt againſt a ſheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the iſſuing of the commiſſion; notwithſtanding he ſells them after the iſſuing of the commiſſion, and after a proviſional aſſignment, and notice from the proviſional aſſignee not to ſell. *Smith* et al. v. *Milles.* 179

79. If the payee of a bill of exchange give time to the acceptor, on condition that he ſhall allow intereſt, and afterwards the acceptor diſcharge the bill, *having in the mean time committed an act of bankruptcy,* this is not ſuch a payment, in the ordinary courſe of trade, as is protected by the 19 *Geo.* 2. c. 32. and the aſſignees may recover the money from the payee. *Vernon* et al. v. *Hall.* 181

80. Money paid by a trader, after a ſecret act of bankruptcy, to a carrier, for the carriage of goods, may be recovered back in *aſſumpſit,* by the aſſignees of the bankrupt. *Bradley* et al. v. *Clark.* *Ibid.*

81. *A.* having recovered a verdict for a certain ſum of money againſt *B.*, *B.* commits an act of bankruptcy. Afterwards *A.* having had no notice of the bankruptcy, gives time to *B.* and, inſtead of entering up judgment and ſuing out execution, takes a bill drawn by *B.* on *C.* at a diſtant period, for the amount of the ſum recovered: this is not a payment protected by the ſtatute 19 *Geo.* 2. c. 32. *A.* therefore

therefore is liable to refund the money received for the bill to the aſſignees of *B. Pinkerton* et al. v. *Marſhall.* 183

82. The aſſignees of a bankrupt may recover from the winner, money loſt by the bankrupt before his bankruptcy at play, in an action of debt on the ſtat. 9 *Anne,* c. 14. *Brandon* et al. v. *Pate.* 184

83. A right of action to recover real property, is ſuch an intereſt as will paſs, by the aſſignment of the commiſſioners, to the aſſignees of the bankrupt. *Smith* et al. v. *Coffin.* 185

84. By the ſtat. 1 *Jac.* 1. c. 15. ſ. 11 and 12. and 5 *Geo.* 2. c. 30. ſ. 29. after any perſon has been convicted on an indictment, for falſely ſwearing to a debt under a commiſſion of bankrupt (on which indictment, he is to ſuffer the puniſhment inflicted by the ſeveral ſtatutes againſt perjury), the aſſignees of the bankrupt may recover from him double the ſum ſo ſworn to, *in an action*; in which it is ſufficient to ſtate the conviction of the defendant on the indictment, without alſo alleging, that the defendant did take ſuch falſe oath. And in ſuch an action, the defendant cannot take advantage of any defect in the judgment on the indictment; that can only be done on a writ of error. *Holmes* et al. Aſſ. of Brook, v. *Walſh.* 188

85. To an action brought by the aſſignees of a bankrupt, for a debt due to the bankrupt's eſtate, the defendant cannot ſet off caſh notes, iſſued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unleſs he ſhews further, that ſuch notes came to his hands before the bankruptcy. *Dickſon* et al. v. *Evans.* 190

86. Money paid to bankrupt after a ſecret act of bankruptcy in the courſe of trade, valid. *Wilkins* et al. Aſſ. of Cann v. *Caſey.* 192

Pleadings by and againſt the Aſſignees.

87. If the aſſignees have brought an action of trover to recover the value of goods belonging to the bankrupt, and failed therein, they are thereby barred from bringing aſſumpſit for the ſame cauſe of action. *Hitchin* v. *Campbell.* 193

88. The aſſignees cannot maintain trover for goods fraudulently ſold, without proving a demand and refuſal. *Nixon* et al. v. *Jenkins.* 196

89. In an action of trover for goods, by the aſſignees of the bankrupt; and the queſtion being, Whether they were or were not ſold? the defendant may have leave to inſpect the bankrupt's ſale-books. *Whitter* et al. v. *Cazalet.* *Ibid.*

90. The aſſignees of a bankrupt, in aſſumpſit, againſt the vendee of goods, ſold by the bankrupt after the commiſſion, need not name themſelves aſſignees in the declaration: but if it be on a contract made by the bankrupt before the commiſſion, they muſt ſtyle themſelves in the declaration to be aſſignees. *Evans* et al. v. *Mann.* *Ibid.*

91. The aſſignees of *A.* a bankrupt, and alſo of *B.* a bankrupt, under ſeparate commiſſions, cannot recover, in the ſame action, a *joint debt* due from the defendant to both the bankrupts, and alſo *ſeparate debts due to each.* And if in ſuch an action the jury have aſſeſſed the damages ſeverally on the ſeparate counts, the Court will arreſt the judgment on thoſe counts, which demand the debts due to each bankrupt ſeparately. *Hancock* et al. Aſſignees of Lomas, and alſo Aſſignees of Edenſor, v. *Haywood.* 197

92. The plaintiffs ſued, as aſſignees of *A.* and *B. and alſo* aſſignees of *C.* for a joint demand due to all the bankrupts, and ſuch declaration was held good on motion in arreſt of judgment after verdict. *Streatfield* et al. Aſſ. of James de Druſina, James Clerk, and J. C. Ridder, bankrupts, v. *Halliday.* 198

93. In an action of covenant for rent on an indenture, brought by the aſſignees of the leſſor (a bankrupt), the leſſee cannot plead that the leſſor *nil habuit in tenementis.* *Parker* et al. v. *Manning.* 200

94. An action at law does not abate

abate by the plaintiff's becoming a bankrupt; therefore, if after an interlocutory judgment and awarding the writ of inquiry, the plaintiff becomes a bankrupt, and afterwards, in his own name, the inquiry is executed, it will be good without ſuing out a *ſcire facias*, at the ſuit of the aſſignees. *Bibbins* et al. v. *Mantel*, 201

95. So in a more modern caſe, where between the interlocutory and final judgment the plaintiff became a bankrupt, and ſued out execution *in his own name*; the Court refuſed to ſet aſide the proceedings. *Waugh* v. *Auſtin*. 203

96. But if the plaintiff, after judgment and a writ of error allowed, become a bankrupt, his aſſignees cannot ſue out a *ſcire facias* in their own names to compel an aſſignment of errors, till ſome judgment be given: and then it muſt be done immediately after ſuch judgment. *Kretchman*. v. *Beyer, in error*. *Ibid.*

97. And in a declaration in a *ſcire facias* by the aſſignees of a bankrupt, ſtating "that he became a bankrupt, within the meaning of the ſtatutes, &c. and that his goods and effects were afterwards in due manner aſſigned to the plaintiff," is ſufficiently certain; without alleging that the party was declared a bankrupt, or that his effects were aſſigned by deed. *Winter* et al. v. *Kretchman*. 204

98. A tenant from year to year of a houſe, at a yearly rent, became a bankrupt in the middle of the year, and his aſſignees entered and kept poſſeſſion for the remainder of the year; and the Court held that the leſſor could not maintain an action for uſe and occupation, againſt the aſſignees for the bankrupt's occupation, as well as their own, without proving *their ſpecial inſtance and requeſt* for the bankrupt to occupy during the time that elapſed before the bankruptcy. *Naſh* v. *Tatlock* et al. Aſſignees of Lidiard. 205

Debts proveable under the Commiſſion.

99. A creditor, who has obtained a verdict before the commiſſion iſſued againſt a bankrupt, is intitled to prove *his coſts* as well as his debt under the commiſſion, though judgment be not ſigned till after the commiſſion iſſued. *Aylett* v. *Harford* and *Richards*, Bail of Lowe, 208.—*Gulliver* v. *Drinkwater*, 209 —*Longford* v. *Ellis*. 210

100. So, if a plaintiff become a bankrupt after he is nonſuited, and before the taxation of coſts, the coſts of the nonſuit are a debt proveable under the commiſſion. *Hurſt* v. *Mead*. 210

101. So, if a creditor recover a judgment againſt a trader before his bankruptcy, and revive it by *ſcire facias* after the bankruptcy, the coſts of the *ſcire facias* relate back to the judgment, and may be proved under the commiſſion. *Phillips* v. *Brown*, 210.—*Watts* v. *Hart*. 211

102. An annuity-bond, if forfeited before the bankruptcy, ſhould be valued and proved under the commiſſion; but if not forfeited till after, it cannot be ſo proved, and the obligor may be taken in execution on a judgment thereon. *Perkins* v. *Kempland* et al. 212

103. And the receiving payment of the arrears of an annuity-bond, after the forfeiture has once taken place, will not be a waiver of the forfeiture. *Wyllie* v. *Wilkes*. 213

104. A bond for payment of an annuity for a term of years, is within the ſtatute 7 *Geo.* 1. c. 31. and may be proved under the commiſſion; and ſo are all bonds, bills, notes, and other perſonal ſecurities, payable at a future day certain, though not given by the bankrupt for goods ſold and delivered to him in the courſe of his trade. *Pattiſon* v. *Bankes*, 215.—*Brooks* et al. v. *Samuel* and *Edward Lloyd*. 216

105. So alſo inſurances upon lives are within the ſtat. 19 *Geo.* 2. c. 32. ſ. 2. *Cox* v. *Liotard*. 217

106. When a creditor has a demand on his debtor which is capable of being aſcertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as

as a debt under the commiſſion. But if a perſon borrow ſo much ſtock, to be replaced as ſtock, *without naming any particular day*, and afterwards become a bankrupt, the party who lent ſuch ſtock cannot come in under the commiſſion for the price of the ſtock on the day of the bankruptcy. *Utterſon* v. *Vernon* et al. Aſſ. of Tyler. 217

Dividend.

107. Aſſumpſit will lie for a creditor's ſhare, under an order of commiſſioners of bankrupt for a dividend. *Brown* et al. *Executors of Gravatt*, v. *Bullen*. 223

Rights and Privileges of a Bankrupt.

108. Until a commiſſion is iſſued, it is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy, of which the defendant had notice, no commiſſion having iſſued, nor proceedings had for that purpoſe. *Foſter* v. *Allanſon*. 224

109. The 5 *Geo.* 2. c. 30. allows a bankrupt forty-two days to ſurrender in, but the ſooner he ſurrenders the better for his creditors: therefore, to induce bankrupts to ſurrender, a privilege is held out to them by the ſame ſtatute, namely, "that on coming to ſurrender, they ſhall be free from arreſt; and alſo, after actual ſurrender for the ſpace of forty-two days, or ſuch further time as ſhall be allowed for finiſhing their laſt examination." But this is a particular privilege to enable them to ſurrender; and until actual ſurrender, confined to the act of their going with that view; not a general privilege during the whole time which the act of parliament allows them to ſurrender in: nevertheleſs, if a bankrupt be abroad, and upon his return with an intention to ſurrender, is arreſted on his landing, before he can conveniently make his ſurrender, the privilege ſhall extend to him; but it muſt appear that he was actually going to ſurrender. *Kenyon* et al. v. *Salomon*. 225

110. The acceptor of a bill, which becomes due, and is paid by him *after the bankruptcy* of the drawer, cannot arreſt the drawer during the time allowed him by 5 *Geo.* 2. c. 30. ſ. 5. for attending the commiſſioners to be examined. *Darby* v. *Baughan* et al. 226

111. A bankrupt is not intitled to any maintenance out of his effects during his examination. *Thompſon* et al. v. *Councell*. *Ibid.*

112. A ſecond bankruptcy does not protect future effects, unleſs fifteen ſhillings in the pound are paid under the ſecond commiſſion, notwithſtanding the prior commiſſion was ſuperſeded. *Thornton* v. *Dallas*. 227

113. And a perſon, againſt whom a ſecond commiſſion of bankrupt has been iſſued, and who has not paid 15*s.* in the pound, is liable to an action by any of his creditors, notwithſtanding they have ſigned his certificate; by 5 *Geo.* 2. c. 30. ſ. 9. *Philpott* v. *Corden*. 228

114. And if a defendant rely on a certificate under a ſecond commiſſion of bankrupt againſt him, under which he has not paid 15*s.* in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commiſſion, and prove that he ſubmitted to it, without proving the trading, the act of bankruptcy, and the other facts which are neceſſary to ſupport the commiſſion as againſt third perſons. *Haviland* v. *Cook*. 229

115. Where an exception is in the enacting clauſe, giving a right or a forfeiture, the party ſuing for the right or forfeiture muſt negative the exception in his declaration, &c. Therefore, in a *ſcire facias* on a judgment againſt a perſon, who has been twice a bankrupt, under the ſtatute 5 *Geo* 2 c. 30. ſ. 9. which ſays "the future eſtate and effects of ſuch perſon ſhall be liable to his creditors, *unleſs* the eſtate ſhall produce ſufficient to pay 15*s.* in the pound, &c." it is neceſſary for the plaintiff to aver that the bankrupt's eſtate has not paid 15*s.* in the pound. *Gill* v. *Scrivens*. *Ibid.*

116. It is a ſettled rule, that a bankrupt

rupt may be a witneſs to diminiſh the fund, though he has not obtained his certificate. *Walker* v. *Walker*. 231

117. The Court will not diſcharge a bankrupt on common bail, where the commiſſion appears to be groſsly fraudulent. *Sowley* v. *Jones*, *Ibid.*—*Vincent* v. *Brady*. *Ibid.*

118. The teſtator and the defendant, both being reſident in this country, the defendant contracted a debt to the teſtator for work and labour, for which the executrix held him to bail. Upon this a rule was obtained, to ſhew cauſe why he ſhould not be diſcharged on entering a common appearance, on the ground that he had become a bankrupt in Ireland, and there obtained a certificate, but it was afterwards diſcharged. *Quin, Executrix of Quin,* v. *Keefe*. *Ibid.*

119. The Court will ſet aſide a regular judgment on an affidavit of merits, upon the ground that it was the intention of the defendant to plead his bankruptcy. *Evans* v. *Gill*. 232

120. Until the bankrupt's certificate is allowed it is nothing, and it has no relation back to the time of its being ſigned. *Walker* et al. v. *Giblett* et al. *Ibid.*

121. So an execution againſt the goods of a bankrupt taken out after his certificate is ſigned by the creditors, and before it is allowed by the chancellor, is valid. *Callen* v. *Meyrick*. 233

122. A bankrupt cannot call on his aſſignees for his allowance under the ſtat. 5 *Geo.* 2. c. 30. ſ. 7. (his eſtate paying 10*s.* in the pound), if his certificate be not allowed before payment of the dividends. *Groome* v. *Potts* et al. *Ibid.*

123. An uncertificated bankrupt has a right to goods acquired by him ſince his bankruptcy, againſt all the world, but his aſſignees, and may maintain trover for them. *Fowler* v. *Down*, 234.—*Webb* v. *Fox*. 236

124. On the trial of an action of aſſumpſit, where the pleas were non-aſſumpſit, and the general plea of bankruptcy, the plaintiff proved two ſeveral applications to the defendant, who admitted the debt after he had obtained his certificate, and ſaid, the plaintiff ſhould be no looſer, but *that he would pay when he was able*: held, that this was a conditional promiſe, and the plaintiff ought to have ſhewn that the defendant was able to pay. *Besford* v. *Saunders*. 239

125. If intereſt be paid on a bond by a bankrupt, it will be an admiſſion by him that the principal was then due, and he may be liable as on a new contract. *Alſop* v. *Brown*. *Ibid.*

See alſo the APPENDIX.

The Certificate.

126. What debts are barred by the certificate. *Johnſon* v. *Spiller*. 240

127. If a ſurety for the payment of a ſum certain, take an abſolute bond from the principal, payable the day before the original bond will become due, and the principal become a bankrupt before the day of payment, the ſurety may prove this debt under the commiſſion, and the bankrupt's certificate will be a bar to an action on the counter-bond. *Martin* v. *Court*, 241. *Roiſe* v. *Caſlon*, 242. *Bouteflour* v. *Coates*. *Ibid.*

128. What debts are not barred by the certificate. *Goddard* v. *Vanderheyden*, 242, 244.—*Baniſter* v. *Scott*. 245

129. The certificate does not diſcharge a baukrupt from his own expreſs collateral covenant, which does not run with the land. *Mayor* v. *Steward*. 245

130. Neither is the bankruptcy of the leſſee a bar to an action of covenant brought againſt him. *Mills* v. *Auriol*, 247

131. Where the debt accrues ſubſequent to the bankruptcy, it cannot be proved under the commiſſion. *Hodgſon* et al. v. *Bell*. 251

132. No debt can be barred by the certificate, but what was a debt contracted with certainty before the act of bankruptcy. *Chilton* v. *Whiffin* and *Cromwell*, 252.—*Young* et al. v. *Heckes*, 254.—*Vanderheyden* v. *De Paiba*, *Ibid.*—*Heſkuyſon* v. *Woodbrige* et al. *Ibid.*

Ibid.—*Howis* v. *Wiggins*, *Ibid.*—*Brooks* v. *Rogers*. 255

133. Where *A.* and *B.* exchanged acceptances, and each party having negociated the reſpective bills, became bankrupt; and *B.*'s aſſignees were afterwards obliged to pay a dividend, as drawer, on the bills accepted by *A.* as well as to pay *B.*'s own acceptances: the Court being divided in opinion, it was not finally decided, whether *A.*'s certificate was a bar to an action brought againſt him by *B.*'s aſſignees for money paid, &c. *Cowley*, Aſſ of Peters, v. *Dunlop*. 256

134. Where *A.* lent his acceptances to the defendant before his bankruptcy, but which were not paid till afterwards, it was held that *A.* might maintain an action againſt the defendant for money paid to his uſe, notwithſtanding his bankruptcy and certificate, and notwithſtanding the defendant before his bankruptcy gave his receipt to *A.* acknowledging the receipt of ſo much money as the acceptances amounted to. *Snaith* et al. Aſſignees of Parke, v. *Gale*. 269

135. The defendant had received, in his character as overſeer of the poor, 4*l.* previous to his bankruptcy, which was on the 5th of December, 1785: but his accounts were not made out till the Eaſter following; and he had afterwards been committed to Worceſter gaol, by two juſtices, for not paying over the 4*l.* as the balance of his accounts. It was moved for a rule to ſhew cauſe why a writ of *habeas corpus* ſhould not iſſue, directed to the gaoler at Worceſter, commanding him to bring up the defendant, in order that he might be diſcharged out of cuſtody, on the ground that *this ſum for which he had been committed to gaol was a debt exiſting previous to the bankruptcy, and might have been proved under the commiſſion*; and the defendant had ſince obtained his certificate, but the rule was diſcharged after cauſe ſhewn. *The King* v. *Eggington*. 270

136. If a demand reſt in *contingency*, whether it will be paid or not, it cannot be proved, unleſs it be ſecured by a penalty which is forfeited at law. *Hancock* et al. v. *Entwiſle* et al. 270

137. In collateral undertakings, if the party engaging to ſecure the debt of another himſelf becomes bankrupt before that debt is payable to the principal, the principal cannot prove under his commiſſion. *Alſop* et al. v. *Price*, 272.—Ex parte *Adney*. *Ibid.*

138. A ſurety in a bond, who pays the debt after a commiſſion of bankruptcy iſſued againſt his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. *Taylor* v. *Mills* and *Magnall*, 274.—*Paul* v. *Jones*. *Ibid.*

139. Bankruptcy is no plea in bar to an action of treſpaſs for meſne profits, for where the damages are uncertain, they cannot be proved under a commiſſion of bankruptcy. *Goodtitle* v. *North*. 275

140. So, bankruptcy is no bar to an action of trover, though the converſion happened before the bankruptcy. *Parker* v. *Norton*. *Ibid.*

141. So, where the cauſe of action ariſes *ex delicto* before the bankruptcy, the certificate is no bar. *Sir A. S. Hammond*, Bart. et al. v. *Toulmin* and *Kendrick*. 278

142. Inſuring in the lottery is not gaming within the ſtat. 5 *Geo.* 2. c. 30. ſ. 12. ſo as to avoid a bankrupts' certificate. *Lewis* v. *Piercy*. 280

143. If notes for money be given by a confidential friend to creditors, to ſign the certificate, it will avoid the certificate, though the bankrupt *did not know of this*. *Robſon* v. *Calze*, *Ibid.*—*Hollana* v. *Palmer*. 282

144. So, a bond given to a creditor of a bankrupt, in order to *induce him to withdraw a petition* which he has preferred to the chancellor againſt the allowance of the certificate, is *void* by ſtat. 5 *Geo.* 2. c. 30. ſ. 11. *Sumner* v. *Brady*, *Cartwright*, and *Fenton*. 283

145. On a general plea of bankruptcy under 5 *Geo.* 2. c. 30. the plaintiff may give the condition of a bond,

band, on which an action is brought in evidence, to ſhew that he is not barred by the certificate, for the plea given by the ſtatute opens the whole merits of the queſtion in evidence on both ſides. *Alſop* v. *Price.* 285

146. The defendant pleaded *puis darrein continuance:* viz. that on ſuch a day he became a bankrupt, and held bad, becauſe it was not alleged by the defendant that he had conformed. *Paris* v. *Salkeld.* 286

147. But, in a more modern caſe, the Court ſaid, that this was not neceſſary. *Willan* v. *Geordini.* *Ibid.*

148. But a plea of bankruptcy muſt ſtate that the *cauſe of action* accrued before the bankruptcy. *Charlton* v *King.* *Ibid.*

149. A plea of bankruptcy need not be ſigned by counſel. *Leigh* q. t. v. *Moteiro.* 287

150. If an executor or adminiſtrator ſue a defendant who pleads the general plea of bankruptcy, which, at the trial, is found for him, the executor or adminiſtrator is not liable to coſts under the ſtat. 5 *Geo.* 2. c. 30. ſ. 7. *Martin* et al. v. *Norfolk.* *Ibid.*

151. But if an executor, who becomes bankrupt, plead a falſe plea, after the commiſſion iſſued, he is liable to execution for the coſts. *Howard* et al. v. *Jemmett.* *Ibid.*

BAR.

What ſhall be a bar to an action. See ABATEMENT, No. 1. BANKRUPT, No. 151, 152, 153, 154, 155.

BARBERS' COMPANY.

1. The ſtatute of 32 *Hen.* 8. c. 42. by which the barbers and ſurgeons of London were made one company, and incorporated, continued in force as to the barbers, notwithſtanding that of 18 *Geo* 2. c. 15. which ſeparates them from the ſurgeons: for the latter ſtatute only means to diſſolve the union between the two companies. *Sharpe* q. t. v. *Law.* 288

BARON AND FEME.

1. The huſband may uſe neceſſary coercion, where the wife is inſane. *Rex* v. *Mackenzie.* 288

2. But, the Court will not deliver a wife out of the hands of her friends, into the cuſtody of the huſband, where it is clear that he has uſed her ill, and ſhe actually ſwears the peace againſt him. *Rex* v. *Anne Brooke* and *Thomas Fludgate*, or *Anne Gregory*'s caſe. 288

3. A man poſſeſſed of a term of years, in right of his wife, as executrix of her former huſband, has power to grant and convey the ſame. *Thruſtout* v. *Coppin.* 289

4. If a *feme ſole*, intitled to the profits of an eſtate veſted in truſtees for her ſeparate uſe, conveys them to a married woman, for her ſeparate uſe, without the interpoſition of a truſtee; and afterwards marries, and the truſtees, without notice of the conveyance pay the profits to the grantor: the huſband of the grantee cannot maintain an action againſt the grantor's huſband for the money, as money had and received to his uſe. *Daviſon* v. *Atkinſon.* *Ibid.*

5. A huſband is not bound to maintain his wife's child by a former huſband. *Tubb* et al. v. *Harriſon* et al. 291

6. The huſband is not liable to anſwer for the contract of the wife, where ſhe has committed adultery. *Govier* v. *Hancock.* *Ibid.*

7. But if the huſband permits the wife to remain in his houſe, he will be liable to anſwer for her contracts, though ſhe may have committed adultery, unleſs the plaintiff knew, or ought to have known, the circumſtances under which ſhe was living. *Norton* v. *Fazan.* 292

8. A voluntary penſion granted to the wife by the crown during pleaſure, ſhall not exempt the huſband from being liable to be ſued by his wife's creditors, for neceſſaries. *Thompſon* v. *Hervey.* 293

9. The huſband cannot be ſued alone for the debt of his wife, contracted before marriage. *Mitchinſon* v. *Hewſon.* *Ibid.*

10. If a *feme covert*, without any authority from her huſband, contract with a ſervant by deed, the ſervant having

having performed the ſervice ſtipulated, may maintain aſſumpſit againſt the huſband. *White* v. *Cuyler.* 295

11. A *feme covert* is liable to anſwer perſonally for a criminal offence; and though it may have been committed by her previous to her marriage, ſhe is ſtill the object of the law, as to criminal juriſdiction. *Rex* v. *Ellen Taylor*, late *Bent.* *Ibid.*

12. A *feme covert* living apart from her huſband, and having a ſeparate maintenance, may contract, and be ſued as a *feme ſole.* *Corbett* v. *Poelnitz* and *Ann*, his wife. 296

13. But in an action againſt a *feme covert* under ſuch circumſtances, the huſband muſt be joined for conformity ſake. *Hatchett* v. *Baddeley*, 300.—*Lean* v. *Schultz* 301.—*Gilchriſt* v. *Brown*, 302.—*Ellah* v. *Leigh*, 303.—*Clayton* v. *Adams.* 304

14. If huſband and wife be rendered after judgment in diſcharge of bail, the wife may be diſcharged out of cuſtody upon motion. *Roberts* v. *Andrews*, et ux. 306

15. The defendant was diſcharged out of cuſtody on filing common bail, on the ground that ſhe was a *feme covert*, that fact being poſitively ſworn to on one ſide, and not contradicted by the other. *Waters* v. *Smith.* *Ibid.*

16. *Non eſt inventus* having been returned, to a writ ſued out againſt both the defendants, as to the huſband, the defendant's wife was arreſted; and ſhe afterwards obtained a rule to be diſcharged. *Edwards* v. *Rourke & Wife.* *Ibid.*

17. The like, where the defendant had been arreſted and holden to bail, for penalties to the amount of 200*l.* incurred by inſuring tickets in the lottery *Pritchett* v. *Rachel Croſs.* 307

18. But the Court will not diſcharge a *feme covert* on common appearance, unleſs the coverture be open and notorious. *Pearſon* v. *Mary Meadon.* *Ibid.*

19. Nor where the huſband reſides broad. *De Gaillon* v. *Victorie Harel L'Aigle.* 308

20. Neither will the Court diſcharge a woman under arreſt on common bail, as being married, if ſhe obtained credit pretending ſhe was ſingle. *Partridge* v. *Clarke.* 309

21. A *feme covert*, who is a ſole trader, and carries on a ſeparate trade within the city of London, according to the cuſtom of the city, is liable to a commiſſion of bankruptcy. *Lavie* v. *Phillips.* 309

22. A redelivery by a *feme*, after death of *baron*, of a deed delivered by her whilſt covert, is a ſufficient confirmation of ſuch deed ſo as to bind her, without its being re-executed or re-atteſted. *Goodright* ex. dim. *Carter* v. *Straphan* et al. 310

23. Effect of a deed of ſeparation. *Compton* v. *Collinſon.* 312

24. Goods aſſigned to truſtees for the benefit of the wife, are not liable to be taken under an execution againſt the huſband. *Haſelinton* et al. v. *Gill* and another. 323

25. If a woman, *before* marriage, with the conſent of her intended huſband, conveys all her ſtock in trade and furniture to truſtees, to enable her to carry on her buſineſs ſeparately: and if the huſband do not intermeddle with them, and there be no fraud, ſuch effects (though fluctuating) are not liable to his debts. *Jarman* v. *Woolloton.* 127

26. The grant by the lord of the manor of copyhold lands to his wife, immediately, without the intervention of another, is void. *Firebraſs* ex dim. of *Jane Symes*, a widow, v. *Pennant.* 649

27. An action of treſpaſs for an injury done to the property of the wife, *dum ſola*, muſt be brought by the huſband and wife. But if ſuch an action be brought by the wife alone, the defendant muſt pleas the coverture in *abatement*, and not in *bar.* *Milner* et al. v. *Milnes* et al. 325

28. And if the plaintiff take huſband after ſuing out the writ, and before the declaration, the defendant cannot give her coverture in evidence under the general iſſue, but muſt plead it in abatement if he wiſh to take advantage of it. *Morgan* v. *Painter.* 326

29. A

29. A *feme covert* cannot ſue without her huſband as a ſole trader by the cuſtom of London in the ſuperior courts at Weſtminſter. *Caudell* v. *Shaw*. 327

30. Where the defendant is joined with his wife in the writ, he may enter an appearance for himſelf *only*. *Clark* v. *Norris* et al. 328

31. *Lee*, the defendant, had entered into a warrant of attorney *to confeſs a judgment to the woman plaintiff dum ſola*, and ſhe afterwards married *Marder*, the man plaintiff: after which marriage, the judgment was entered up by the huſband and wife: the plaintiffs having levied by virtue of a *fieri facias*; the Court held the judgment irregular for want of a previous leave of the Court to enter it up. *Marder* et al. v. *Lee*. *Ibid.*

32. Huſband and wife cannot join in aſſumpſit, without ſtating the intereſt of the wife. *Bidgood* v. *Way* and *Wife*. *Ibid.*

33. On a plea of coverture and verdict for the defendant, the huſband cannot have execution for the coſts without a *ſcire facias*. *Wortley* v. *Rayner*. 329

34. Huſbands and wives cannot, in any caſe, be witneſſes either for or againſt each other. *Davis* v. *Dinwoody*. *Ibid.*

35. Neither can any declaration, made by the wife in prejudice of her huſband's right, be given in evidence. *Alban* et ux. & *Ratcliffe* et ux. Executors, v. *Pritchett*. 330

BASTARDS.

1. The child of a married woman may be proved a baſtard by other evidence than that of the huſband's non-acceſs. *Goodright*, on the demiſe of *Tompſon*, v. *Saul*. *Ibid.*

2. Baſtards are within the meaning of the marriage-act, 26 *Geo.* 2. c. 33. which requires the conſent of the father, guardian, or mother, to the marriage of perſons under age, who are not married by banns. *The King* v. *the Inhabitants of Hodnett*. 332

3. If the putative father of a baſtard obtain the poſſeſſion of her from her mother by fraud, the Court will order her to be reſtored to the mother. *The King* v. *Moſes Soper*. 335

4. The reputed mother is a competent witneſs to prove the illegitimacy of her children. *The King* v. *the Inhabitants of Bramley*. *Ibid.*

5. A baſtard living with its mother for nurture, but having a different ſettlement, muſt be maintained by the pariſh in which it is ſettled. *Rex* v. *Inhabitants of Hemlington*. 336

6. No action can be maintained on a baſtardy bond, where the pariſh-officers are not liable to maintain the child. *Simpſon* v. *Johnſon*. 338

7. But where a baſtard child is born in a pariſh, for whoſe ſuſtenance the parents neglect to provide neceſſaries, *the pariſh-officers* are obliged to do it without an order from the juſtices. *Hays* v. *Bryant*. 339

8. The juſtices have authority to commit a *ſoldier* for diſobeying an order of baſtardy; for he is not protected againſt ſuch commitment by the *Mutiny Act*. *Rex* v. *Archer*, *Ibid.* —*The King* v. *W. Bowen*. 341

9. Both juſtices muſt be preſent at the ſame time and place when a woman is examined, and committed for not filiating a baſtard child. *Billings* v. *Prinn* and another. 342

10. It is not neceſſary, to the validity of an order of filiation, that the putative father ſhould be preſent at the examination of the woman before the two juſtices. *Rex* v. *Inhabitants of Upton-Gray*. *Ibid.*

11. An order of baſtardy, ſtating, "Whereas it hath appeared to us, &c." without *an expreſs adjudication* that the perſon charged is the putative father, is void. *Rex* v. *Pitts*. 343

12. The juſtices muſt *adjudge* a baſtard to have been born in the pariſh, to be charged by their order. *Rex* v. *Stanley*. 343

13. An *original order* of baſtardy may be made at the quarter ſeſſions. 344

14. If a court of *general quarter-ſeſſions*, next after an order of baſtardy, quaſh the order, this Court will not intend that a court of *general ſeſſions* intervened;

intervened; and unleſs that appear, the order will be confirmed. *Rex* v. *Chicheſter.* 344

15. If a perſon be bound by a recognizance by one magiſtrate under 6 *Geo.* 2. c. 31. to appear at the next ſeſſions and perform ſuch order as ſhall there be made on him under the 18 *Eliz.* c. 3. reſpecting baſtards, the ſeſſions may make an order of baſtardy on him, but they cannot order him alſo to give ſecurity for the performance of that order. *The King* v. *R. Price.* 345

16. The examination of a pregnant woman, taken before a juſtice of the peace, under the ſtat. 6 *Geo.* 2. c. 31. is admiſſible evidence on an application to the quarter-ſeſſions, to make an order of filiation on the putative father, even though the woman die before ſuch application can be made. *The King* v. *the Inhabitants of Ravenſtone.* 346

17. An order of baſtardy removed by *certiorari* in due time, may be quaſhed for objections on the face of it, without a previous appeal to the ſeſſions. *Rex* v. *Stanley.* 347

BILL OF EXCEPTIONS.

1. Form of proceedings under. *Money, Watſon, and Blackmore,* v. *Dryden Leach,* 349.—*Symmers* v. *Regem, Ibid.*

2. A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of coſts. *Gardner* v. *Baillie.* 350

BILLS OF EXCHANGE.

1. Drawing and re-drawing bills of exchange, will not ſubject the party to the bankrupt laws. *Hankey* v. *Jones.* 15

2. If the payee of a bill of exchange give time to the acceptor, on condition that he ſhall allow intereſt, and afterwards the acceptor diſcharge the bill, *having in the mean time committed an act of bankruptcy,* this is not ſuch a payment, in the ordinary courſe of trade, as is protected by the 19 *Geo.* 2. c. 32. and the aſſignees may recover the money from the payee. *Vernon* et al. v. *Hall.* 181

3. *A.* having recovered a verdict for a certain ſum of money againſt *B.*, *B.* commits an act of bankruptcy. Afterwards *A.* having had no notice of the bankruptcy, gives time to *B.* and inſtead of entering up judgment and ſuing out execution, takes a bill drawn by *B.* on *C.* at a diſtant period, for the amount of the ſum recovered: this is not a payment protected by the ſtatute 19 *Geo.* 2. c. 32. *A.* therefore is liable to refund the money received for the bill to the aſſignees of *B. Pinkerton* et al. v. *Marſhal.* 183

Their Form and Effect.

4. A bill of exchange is not good, when drawn on a ſpecific, and future and uncertain fund. *Dawkes* et ux. v. *the Earl of Deloraine.* 351—*Hauſſullier* v. *Hartſink.* 352

5. A promiſſory-note, payable to *A.* without adding *or to his order, or to bearer,* is good. *Smith* v. *Kendall.* 353

6. If a perſon ſigns his name upon a blank paper ſtamped with a bill ſtamp, and puts it into the hands of another perſon to draw a bill of exchange, in ſuch manner as he ſhall think fit, he will be anſwerable as the drawer of ſuch bill. *Collis* et al. v. *Emett.* *Ibid.*

7. But if a bill or promiſſory-note be made payable to a perſon not in *eſſe,* or his order, and is iſſued with an indorſement in blank, purporting to be made by him thereon, it is as againſt the drawer or maker to be conſidered as a bill or note payable to bearer; and ſo is the bill as againſt the acceptor, if he knew, at the time of his acceptance, that the payee was a fictitious perſon. *Stone* v. *Freeland.* 356.—*Tatlock* et al. v. *Harris.* 357.—*Vere* et al v. *Lewis* et al. 360.—*Minet* et al. v. *Gibſon* et al. *Ibid.*—*Gilſon and Johnſon* v. *Minet and Fector,* in Er. 362

8. If a bill or note is altered, after it has once iſſued, and after the time when it was originally payable, a new ſtamp is requiſite, though it be done with the conſent of the parties, and before its negotiation. *Bowman* v. *Nicholl.* 337

9. But

9. But a note given for ſecuring the weekly allowance to a priſoner, under the Lords' act, need not be ſtamped. *Pitman* v. *Haynes*; *and Bowring*. v. *Edgar*. 373

Acceptance.

10. If the drawee of a bill of exchange ſays he cannot accept it, till ſtores are paid for, it is an undertaking to accept when the ſtores are paid for. *Pierſon* v. *Dunlop*. 373

11. A conditional acceptance, the party is at liberty to refuſe, or not, as he chooſe. *Sproat* v. *Matthews*. 374

12. Upon a requeſt to *A.* to accept a bill, and draw upon *B.* for the like ſum, the mere act of drawing upon *B.* does not amount to an acceptance. *Smith* et al. v. *Niſſen*. 376

13. An alteration of the date of a bill of exchange, after acceptance, whereby the payment may be accelerated, avoids the inſtrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable conſideration. *Maſter* et al. v. *Miller*. Affirmed in Error, in the Exch. Cham. 377, 383

14. Nothing but an expreſs declaration by the holder will diſcharge the acceptor of a bill of exchange. *Dingwall* v. *Dunſter*. 384

15. If the holder of a bill receives a part of the money from the drawer, and gives him a further time for the payment of the remainder, this ought to be left to the jury to ſay whether it is not a waiver of the acceptance. *Ellis* v. *Gallindo*. 385

Indorſement.

16. A bill at firſt negotiable may, by the indorſement, be reſtrained from being further negotiable. *Ancher* et al v. *The Bank of England*. 386

17. A bill of exchange, payable to order, becomes negotiable, and may be indorſed over without the word order to the indorſement. *Edie* et al. v. *Eaſt-India Company*. 387

18. A blank indorſement, ſo long as it continues blank, makes a bill or note payable to the bearer; and, if it be loſt or ſtolen, and afterwards negotiated, the innocent indorſee may recover upon it. *Grant* v. *Vaughan*. 391

19. The *bona fide* holder of a bill is entitled to the contents, though it may have been ſtolen by a former indorſer. *Peacock* v. *Rhodes*. 392

20. But in an action by the indorſee againſt the acceptor of a bill of exchange, drawn payable to, "*A.* or order," it is competent to the defendant to give evidence that the perſon, who indorſed to the plaintiff, was not the real payee, though he be of the ſame name, and though there be no addition to the name of the payee on the bill. And if a bill of exchange, payable to *A.* or order, get into the hands of another perſon of the ſame name as the payee, and ſuch perſon, knowing that he was not the real perſon in whoſe favour it was drawn, indorſe it, he is guilty of a forgery. *Mead* v. *Young*. 393

21. If a bill or note be made payable to ſeveral perſons who are not in copartnerſhip, the indorſement muſt be by all of them. *Carvick* v. *Vickery*. 397

22. Where a payee of a bill of exchange indorſes it to *A.* and *B.* *as executors* they may declare as ſuch in an action againſt the acceptor. *King* et al. Executors of Stevenſon, v. *Thom, and the ſame* v. *M'Linnan*. *Ibid.*

23. If a promiſſory-note is indorſed after it becomes due, evidence may be given of its being a fraudulent tranſaction. *Taylor* v. *Mather*. The like point. *Brown* v. *Davis*. 398

24. But where the drawers of a banker's check, iſſued the ſame at nine months after it bore date, upon a conſideration which afterwards failed, as between them and the perſons to whom they delivered it; it was held that they could not be permitted to object this circumſtance in an action brought by a ſubſequent holder for a valuable conſideration, and without notice; though, by the general rule, any perſon receiving a negotiable inſtrument, after it is due, is deemed to have taken it upon the credit of the perſon from whom

whom he received it, and ſubject to the ſame equities as between him and the party ſued on ſuch inſtrument. *Boehm* et al. v. *Sterling* et al. 400

25. A bill or note cannot be indorſed over after it has been once paid. *Leeck* v. *Rebley.* 403

26. An indorſement, written on a blank note or cheque, will afterwards bind the indorſer for any ſum and time of payment which the perſon, to whom he intruſts the note, chooſes to inſert in it. *Ruſſel* v. *Langſtaffe.* *Ibid.*

27. If the holder of a bill of exchange gets it diſcounted, but poſitively refuſes to indorſe it, the indorſee takes it only upon the credit of the names on the bill, and he cannot recover againſt ſuch holder if the bill is diſhonoured. *Penn* et al. v. *Harriſon* et al. 404

28. But if an agent, employed by the indorſees of a bill to get it diſcounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund if the bill be afterwards diſhonoured by the acceptor. *Fenn* et al. v. *Harriſon* et al. 407

Preſentment.

29. If a bill or note is made payable at a banker's, it is ſufficient to preſent it for payment at the banker's, and notice of non-payment ſent by the poſt is ſufficient. *Saunderſon* et al. v. *Judge.* 408

30. If a bill be payable abroad, it is not neceſſary to ſend it by the firſt opportunity to the place where it is payable, and it is ſufficient if notice of ſuch a bill being diſhonoured is ſent to England by the firſt uſual and regular mode of conveyance. *Muilman* et al. v. *D'Eguino.* 409

31. And if a bond be given to indemnify an indorſee of a bill drawn on India *be returned proteſted for non-payment*, the bond is not forfeited by the obligor refuſing to pay the bill after it was returned to England *proteſted for non acceptance.* *French and Holſon* v. *Campbell.* 411

32. Three days' grace are allowed on promiſſory-notes as well as on bills of exchange; for the 3 and 4 *An.* c. 9. puts them both on the ſame footing in all reſpects. *Brown* v. *Harraden.* 419.—*Smith* v. *Kendal.* 420

33. If the ſeller of goods take notes or bills for them, without agreeing to run the riſk of the notes being paid, and the notes turn out to be worth nothing, this will not be conſidered as payment. *Owenſon* v. *Morſe.* 421

34. If a perſon take a draft upon another for payment of a debt, and hold it an unreaſonable time before he demands the money, and the perſon upon whom it is drawn, in the mean time, becomes inſolvent, he cannot afterwards recover againſt the drawer. *Chamberlyn* v. *Delarive.* 422

35. And if the perſon on whom a bill is drawn, refuſes to accept the ſame, the holder muſt give notice of ſuch refuſal, within a reaſonable time, to the indorſer from whom he received the ſame. *Bleſard* v. *Hirſt.* *Ibid.*

36. And though a propoſal be made by the indorſer to pay the bill by inſtalments, without knowledge of the indorſee's laches, this is not a waiver of the want of notice. *Goodall* et al. v. *Dolley.* 423

37. If the holder give time to the acceptor of a bill, or drawer of a note, after it has been diſhonoured, the indorſer is diſcharged; and notice of a bill of exchange, or promiſſory-note, being diſhonoured, muſt come from the holder. *Tindal* et al. v. *Brown.* 424

38. But the objection ariſing from want of notice of non-acceptance of a bill of exchange from the holder to the drawer, is done away by ſhewing that the latter had no effects in the hands of the drawee at the time. *Rogers* v. *Stevens.* 426

39. The like point. *De Verdt* v. *Atkinſon.* 428

40. But where it is known that the defendant is only an indorſer, to guarantee the debt of the party who is *primâ facie* liable to pay, the indorſee cannot maintain an action againſt ſuch indorſer, without having uſed due diligence in preſenting the note as ſoon as it was due for payment, and in giving

giving immediate notice of the non-payment. *Nicholſon* v. *Gouthit.* 429

41. A proteſt for non-acceptance on a foreign bill of exchange, muſt be proved. *Gale* v. *Walſh.* 430

42. An acceptor of an inland bill of exchange, made payable *after ſight*, who refuſes payment on the third day of grace, is not liable to any charge for the noting of the bill. *Leftley* v. *Mills.* 431

43. An indorſer cannot recover againſt a ſubſequent indorſee. *Biſhop* v. *Hayward.* 434

44. If a bill of exchange is not accepted on preſentment, an action on the bill will lie immediately againſt the drawer. *Milford* v. *Mayor.* 435

45. The coſts of a declaration againſt the drawer, are not chargeable on an indorſer, who is ſued, till the appearance-day of the return. *Golding* v. *Grace.* *Ibid.*

46. If ſeparate actions be brought againſt the acceptor and indorſers of a bill, the Court will ſtay proceedings againſt any of the indorſers, on payment of the bill and coſts of that action; but not againſt the acceptor, without payment of coſts in all the actions. *Smith* v. *Woodcock, and the ſame* v. *Dudley.* 436

47. The holder of a bill of exchange may ſue a ſubſequent indorſee, notwithſtanding he has ineffectually taken in execution the body of a prior indorſer, and afterwards ſet him at liberty. *Hayling* v. *Mullhall.* *Ibid.*

48. The acceptor of a bill having been charged in execution, at the ſuit of the holder, and afterwards diſcharged under the Inſolvent Act, does not exonerate the drawer. *Macdonald* v. *Bevington.* 437

49. It has been held that, although an indorſer may have paid part of the money, the indorſee may, nevertheleſs, recover the whole ſum in the bill againſt the drawer. *Johnſon* v. *Kenion.* *Ibid*

50. But it has been, in another caſe, determined, that if the indorſee of a bill of exchange receive part of the contents *from the drawer*, he cannot recover more than the reſidue from the acceptor. *Brown* v. *Searles.* 438

51. The like point. *Pierſon* v. *Dunlop.* 439

52. If a foreign bill of exchange be returned diſhonoured, the drawer is liable for the whole amount of the *re-exchange*. *Melliſh* et al. v. *Simeon.* *Ibid.*

53. The charge of 10*s.* per pagoda on a bill returned proteſted from India is not exceſſive, though it was taken in payment here at the rate of 6*s.* 6*d.* per pagoda. *Auriol* et al. v. *Thomas.* 440

54. A banker in London, if he give up a bill to the acceptor upon receiving a check upon a banker for the amount, although it turn out that ſuch check is diſhonoured, is not liable as for negligence. *Ruſſel* et al. v. *Hankey* et al. 442

55. A promiſſory-note, payable on a contingency, cannot be declared on as a promiſſory-note within the ſtatute 3 and 4 *Ann.* c. 9. *Carlos* v. *Fancourt.* 443

56. It is not neceſſary in a declaration on a bill of exchange, to aver that the maker *delivered* it: it is ſufficient to ſtate that he *made* it. *Churchhill* v. *Gardner.* 445

57. The plaintiff muſt lay in his declaration the demand on the acceptor, and notice to the indorſee of his refuſal *Ruſhton* v. *Aſpinal.* 446

58. In this caſe the Court held, that the neglect to allege a proteſt in an action on a foreign bill, is matter of form only, and cannot be taken advantage of on a general demurrer. *Salomons* v. *Stavely.* *Ibid.*

59 In an action on a promiſſory-note the general rule is, that the defendant cannot change the venue. *Evans* v. *Weaver.* *Ibid.*

60 Plea to aſſumpſit that the defendant (who was the payee of a promiſſory-note) indorſed it to the plaintiff "for and on account of" the ſaid debt, is a good plea. *Kearſlake* et al. v. *Morgan.* 447

61. The plaintiff and defendant had mutual

mutual dealings together, and had applied to one *Rawſley* to ſettle their accounts, who had accordingly adjuſted all matters in diſpute, except a bill on which this action was brought: this, the defendant ſaid, he could *prove he had paid:* upon which it was agreed, that the bill ſhould be depoſited in the hands of *Rawnſley*, and if the defendant *brought proof of the payment within a month*, the bill ſhould be delivered up to him, if not, *he promiſed to pay it to the plaintiff.* No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it. Held that the defendant might give evidence, that the *original debt was paid*, though he did not *within the month* find the witneſs by whom it might have been proved according to the agreement, he having abſconded to avoid an arreſt. *Elmes* v. *Wills.* 448

62. The drawer of a bill cannot be called as a witneſs, in order to prove that the plaintiff had no property in the bill; but that he had delivered it to him merely for the purpoſe of enabling him to get payment of it from the acceptor, and not with intent to convey any intereſt to him. *Buckland* v. *Tankard.* 449

63. In an action againſt the drawer proof muſt be given that notice had been given to him of the non-payment. *Daggliſh* v. *Wetherby.* *Ibid.*

64. Upon a judgment by default, in an action upon a promiſſory-note, or a bill of exchange, the ſum due thereon is admitted, and need not be proved upon the execution of a writ of inquiry. *Anon.* 450

65 Neither is it an objection where judgment has paſſed by default againſt the acceptor, that in point of fact the bill was not accepted. *Green* v. *Hearne.* 450

66. An indorſee of a bill of exchange, in an action againſt the acceptor, is obliged to prove the handwriting of the firſt indorſer. *Smith* v. *Cheſter.* 450

67. And now, where there is judgment by default, in an action on a promiſſory-note or bill of exchange, the Courts of *B. R.* and *C. B.* will refer it to the proper officer, to aſcertain the damages and coſts, and calculate intereſt, without a writ of inquiry. *Raſhleigh* v. *Salmon*, 451.—*Andrews* v. *Blake*, *Ibid.*—*Longman* et al. v. *Fenn*, *Ibid.*—*Shepherd* v. *Charter*, 452

68. But where it is for foreign money, the value can only be aſcertained by a jury. *Maunſell* v. *Lord Maſſareene.* 452

69. An actual acceptance is evidence that the acceptor admits the hand-writing of the drawer, and he is thereby precluded from afterwards denying it, though the bill be forged, if ſuch bill come to the hands of an innocent indorſee, for a valuable conſideration. *Price* v. *Neale.* *Ibid.*

70. A defendant may ſet up an illegal conſideration againſt an action on a note of hand, as that it was given for a ſmuggling tranſaction. *Guichard* v. *Roberts.* 453

71. Or for ſtock-jobbing. *Brown* v. *Turner.* 454

72. But to aſſumpſit on a bill of exchange, the Court will not allow a defendant to plead the general iſſue, and that the bill was given on a ſtock-jobbing tranſaction, contrary to 7 *Geo.* 2. c. 8. for any thing which goes to impeach the conſideration of the note, may be given under the general iſſue. *Shaw* v. *Everett.* *Ibid.*

73. And in an action, by an indorſee of a bill of exchange againſt the acceptor, the latter may call the payee as a witneſs, to prove that the bill was void in its creation. *Jordaine* v. *Laſhbrooke.* et al. *Ibid.*

BILLS OF LADING.

1. Where ſeveral bills of lading have been ſigned of different imports, no reference is to be had to the time when they were ſigned by the captain; but the perſon who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. And where ſuch bills of lading, though different upon the face

face of them, are conſtructively the ſame, and the captain has acted *bonâ fide*, a delivery according to ſuch legal title will diſcharge him from them all. *Caldwell* et al. v. *Ball.* 583

2. The indorſement and delivery of a bill of lading to a creditor *primâ facie*, conveys the whole property in the goods from the time of its delivery. But if the intention of the parties appear to have been only to bind the net proceeds in caſe of the arrival of the goods, then an inſurance made on account of the indorſer, after ſuch indorſement, is good. *Hibbert* et al. v. *Carter.* 589

See alſo ASSIGNMENT and STOPPAGE IN TRANSITU.

BOND.

1. If a bond be given to indemnify an indorſee if a bill drawn on India *be returned proteſted for non-payment*, the bond is not forfeited by the obligor refuſing to pay the bill after it is returned to England *proteſted for non-acceptance*. *French and Hobſon* v. *Campbell.* 411

2. A ſurety in a bond, who pays the debt after a commiſſion of bankruptcy iſſued againſt his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. *Taylor* v. *Mills and Magnall.* 274

3. Thus, if *A.* has a bond of indemnity from *B.* and the condition be broken, and afterwards *B.* becomes bankrupt before *A.* has been ſued or damnified: though *A.* had a good cauſe of action againſt *B.* before the act of bankruptcy, yet, as *A.* had not been damnified by paying any certain ſum of money by reaſon of *B*'s breach of the condition, *A.* cannot poſitively ſwear to any debt due and owing from *B.* at the time of the act of bankruptcy. *Goddard* v. *Vanderheydon.* 242

4. A bond given to a creditor of a bankrupt, in order to *induce him to withdraw a petition* which he has preferred to the Chancellor againſt the allowance of the certificate, is *void* by ſtat. 5 *Geo.* 2. c. 30. ſ. 11. *Summer* v. *Brady, Cartwright, and Fenton.* 283

BOOKS.

See AUTHORS.

BRIBERY.

1. An action for bribery will lie, though the party bribed does not vote according to the bribe. *Sulſton* v. *Norton.* 463

2. Bribery at parliamentary elections is ſtill puniſhable at the common law. *Rex* v. *Pitt, Rex* v. *Mead.* 464

3. And in this caſe the Court, ſentenced the defendant to pay a fine of 200l. and be impriſoned for two months, and until the fine be paid. *Rex* v. *Heydon.* 465

4. In an action on the ſtatute, it is not neceſſary to ſtate, and prove, all the parties for whom the bribe was given; nor that thoſe parties were candidates; nor the voter's right of voting. *Combe* q. t. v. *Pitt.* *Ibid*

5. So in this caſe, which was an action upon the ſtatute againſt bribery; there being a verdict for the plaintiff, ſubject to the opinion of the Court; the objection taken by the defendant was, that the averment, or allegation, in the declaration, "that the perſon corrupted had a right to vote," was material and ſubſtantial, and ought to be proved.—And the Court held that it is not neceſſary in this caſe to allege in the declaration, or to prove, that the parties bribed had a right to vote. *Rigg* v. *Curgenevn.* 467

6. The time of delivering the precept to the returning officer, need not be proved, in an action againſt a third perſon, for bribery at a parliamentary election. *Grey* v. *Smythies.* et al. 468

7. An offender on the ſtatute for bribery in parliamentary elections, diſcovering another ſo as to be convicted, and not having been before that time himſelf convicted, ſhall be

indemnified and discharged of all penalties and disabilities. *Sutton* v. *Bishop*. 470

8. But the bribery act of 2 *Geo.* 2 c. 24. respecting parliamentary elections, does not make the plaintiff the discoverer. *Curgenven* v. *Cuming*. 472

9. It was moved, on the behalf of the defendant, that judgment upon the *postea* might be stayed, upon affidavits that the defendant did, within the space of twelve months next after the said election (by making an affidavit), discover one *Cary*, who had offended against the said act, by receiving and taking money to give his vote at the said election; on shewing cause against the rule, it was contended, that the Court ought not to interfere, to determine this matter upon a motion, but leave *Curgenven* to his remedy, if he had any, by an *audita querela*; and that he ought to have pleaded it. And the Court held that this was not a case wherein they ought to interpose at all, upon a motion. *Pugh* v. *Curgenven*. 473

10. What will indemnify a party as a discoverer. *Sibley* v. *Cuming*. 474

11. A declaration charging "that the defendant did receive a *gift or* reward;" without specifying what held bad. *Davy* v. *Baker*. 476

12. No damages are recoverable for detention of the debt, in an action on the bribery act. *Cuming* v. *Sibly*. *Ibid.*

13. The plaintiff, in an action for bribery, on the 2 *Geo.* 2. c. 24. is bound to proceed without *wilful delay*. *Petrie* v. *White*. *Ibid.*

BRICKMAKER.

1. A brickmaker may be a bankrupt. *Port* v. *Turton*, *Wells* v. *Parker*. 4

BRIDGES.

1. If a bridge, built by a county, be of utility to it, the county ought to repair; but if built by a private person, and he has the benefit of it, he ought to repair. *Rex* v. *the Inhabitants of the West Riding of Yorkshire*. 480

2. And it seems, that those who are bound to repair a bridge are bound to widen it, if the exigencies of the public require it. And an indictment for not repairing a county bridge may be removed by the prosecutor, notwithstanding the stat. 1. *Ann.* c. 18. s. 5. *The King* v. *the Inhabitants of the county of Cumberland*. 482

3. The justices at sessions may appoint a committee of magistrates, to inspect the state of a county bridge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace, on behalf of the county; and the six days' notice required by 13 *Geo.* 2. c. 18. s. 5. before any application for a *certiorari* to remove proceedings by justices of the peace, must be given before making the motion for a rule to shew cause, why such *certiorari* should not be granted. *The King* v. *the Justices of Glamorganshire*. 484

See also COUNTY RATE.

BROKERS.

1. A person who for brokerage and hire negotiates and concludes bargains for stocks, is a broker in point of law. *Janssen, Bart. Chamberlain of London*, v. *Green*. 486

2. On an indictment on the Annuity-act, 17 *Geo.* 3. c. 26. s. 7. for taking more than 10*s.* in the 100*l.* for brokerage, &c. it is not necessary to prove that the defendant took the exact sum laid in the indictment, though it be not laid under a viz. and on the trial of such an indictment it must be left to the jury to consider whether the excess above 10*s.* in the 100*l.* were really taken as a fair charge for drawing the writings, &c. or whether it were not so taken as a device to avoid the statute. *The King* v. *Gillham*. 487

BUSHEL.

See WINCHESTER BUSHEL.

BUTCHER.

BUTCHER.

1. A butcher may be a bankrupt. *Dally* v. *Smith.* 3

2. A by-law, that a butcher in London ſhall be free of the butchers' company, is good. *Rex.* v. *Sir Tho. Harriſon Chamberlain of London* 499

3. A by-law made within a corporation, that no butcher, or other perſon ſhall within the walls of the city, ſlaughter any beaſt, upon pain to forfeit, &c. is good. *Pierce* v. *Bartrum.* 502

BY-LAW.

1. A corporation cannot make a by-law, and give a penalty to be ſued for by any other but the corporation. *Totterdell* v. *Glazby.* 708

2. If a power of making by-laws is, by charter, given to a ſelect body, they do not repreſent the whole community, and cannot aſſume to themſelves what belongs to it; but if the power of making by-laws is in the body at large, they may delegate their rights to a ſelect body. And a by-law cannot ſuperadd a qualification to an elector which the charter does not require. *Rex* v. *Spencer, common councilman of Maidſtone.* 489

3. A corporation has no power to exclude an integral part of the body, when a charter gives them the right of election. *Rex* v. *Abraham Head* et al. *freemen of Helſton.* 495

4. A power granted by charter, to a company exerciſing a particular trade, in a certain place, to make by-laws for the government of *all perſons* exerciſing that trade in the place, enables it to make by-laws binding on perſons ſo exerciſing the trade, who are *not members of the company*, as well as thoſe who are. *The Butchers' Company* v. *Morey.* 503

5. So a by-law, founded on a cuſtom, that no ſtrange perſon, of right, ought to uſe the craft of a taylor within a city, except he be free thereof, is a good by-law. *Woolley et al.* v. *Idle.* 507

6. But a by-law made by a company, in a corporation, in reſtraint of trade, ſuch as to reſtrain the number of apprentices to be taken by any of the members, is void. *The King on the proſecution of W. Coates* v. *the Wardens of the Coopers' Company of Newcaſtle-upon Tyne.* *Ibid*

7. Corporations, by charter, cannot make by-laws inconſiſtent with the intention, or counteracting the directions of, their charter. *Rex.* v. *Robert Cathuſe, common councilman of Maidſtone.* 510

8. A by-law, that any perſon ſhall be admitted to the freedom of a corporation, upon payment of money, together with the fees, is a bad by-law. *Rex.* v. *Breton, Eſq. mayor, and Joyes, gent. town-clerk of Northampton.* 513

9. A by-law in reſtraint of trade is bad, unleſs there be a cuſtom to ſupport it. *Heſketh* v. *Braddock.* 516

10. A corporation, created by letters patent, with a power of making by-laws, cannot make any laws to incur a *forfeiture*; neither can a corporation created by act of parliament, unleſs ſuch a power be expreſsly given. *Kirk* v. *Nowill and Butler.* 520

11. A by-law muſt be conſiſtent with the powers given by the charter. *The King* v. *J. Ginever.* 523

See alſo BUTCHER.

CANALS.

1. An original ſubſcriber to a canal navigation, is not liable for any call made by the committee after he has aſſigned his ſhare. *The Huddersfield canal company* v. *Buckley.* 525

CARRIER.

1. Money paid by a trader, after a ſecret act of bankruptcy, to a carrier, for the carriage of goods, may be recovered back in *aſſumpſit* by the aſſignees of the bankrupt. *Bradly* et al. v. *Clark.* 181

CARTS.

1. The owner of a cart, who does not reſide within the bills of mortality, or within five miles of Temple-Bar, need not enter his name and place of abode with the commiſſioners of hackney coaches, or have his name,

or any number upon the cart, though it be driven within thoſe limits. *The King* v. *J. Powell.* 529

CASE RESERVED.
See COSTS.

CERTIFICATE.
See BANKRUPT.
COSTS, No. 56, 57, 58.
CUSTOMS and EXCISE, No. 15, 22.

CERTIORARI.
1. A *certiorari* lies to remove a preſentment in a court leet; and when removed, the preſentment is traverſable in *B. R. Rex* v. *James Roupell.* 531

2. But the Court will not grant a *certiorari* to remove the record and proceedings out of a court-leet, in order to enquire into the propriety of an amerciament, where the fine has been eſtreated, and paid. *The King* v. *Heaton.* 532

3. If a ſtatute, creating an offence, give cognizance of it to one juſtice, with an appeal to the ſeſſions, and take away the *certiorari* as to all the proceedings, and afterwards further powers for the puniſhment of the offender, are given to the ſeſſions by another ſtatute, which does not take away the *certiorari*; the clauſe for taking away the *certiorari*, in the former act, cannot be extended to the proceedings under the latter: therefore, where there have been proceedings under both ſtatutes, thoſe under the former act cannot be removed, but thoſe under the latter may. *The King* v. *Mark Terret.* 533

4. A *certiorari* lies to a Welſh quarter-ſeſſions of the peace, to remove an indictment into the King's-Bench. *Rex* v. *Lewis and ſeven others.* 535

5. So alſo in this caſe, the Court granted a *certiorari*, to remove an indictment for a miſdemeanor, from the great ſeſſions in Wales into this court. *Rex* v. *Griffiths.* 536

6. So in this caſe, which was an indictment upon the ſtatute 13. *Geo.* 3. c. 78. for a nuiſance in the highway. The Court held that the highway-act, 13 *Geo.* 3. c. 78. 24. which provides, "that no indictment or preſentment ſhall be removed by *certiorari*, *till ſuch indictment be traverſed*, and judgment thereupon given does not extend to the crown, but only to a *certiorari* at the inſtance of a defendant. *Rex* v. *the Inhabitants of Bodenham.* *Ibid*

7. A *certiorari* lies to remove a conviction on 16 *Geo.* 3. c. 30. for dear-ſtealing, if the defendant has not appealed to the quarter-ſeſſions. *The King* v. *Eaton.* 537

8. The general words of the ſtat. 25 *Geo.* 2. c. 30. ſ. 10. that no indictment for keeping a diſorderly houſe ſhall be removed by *certiorari*, do not reſtrain the crown from removing the indictment by *certiorari*; there being nothing in the act to ſhew, that the legiſlature intended that the crown ſhould be bound by it. *The King* v. *R. Davies* et al. 538

9. The attorney-general moved, on behalf of the defendant, for a writ, of *certiorari*, to remove an indictment againſt the defendant, an officer of exciſe, who was indicted, with two others, for a riot and aſſault at the Dover ſeſſions; which *The Court* immediately granted, without any affidavit being produced to ſupport the motion. *The King* v. *S. Stannard.* 395

10. It is diſcretionary in the Court to grant or refuſe a *certiorari*, to remove a conviction before juſtices of the peace; and if the Court ſee that the juſtices have drawn the proper concluſion, from preſumptive evidence, they will not grant a *certiorari*. *The King* v. *Baſs.* *Ibid*

11. An indictment found at the quarter-ſeſſions, upon the toleration-act 1 *W.* an *M.* c. 18. for diſturbing a diſſenting congregation, may be removed into this court, by *certiorari*, before verdict; and, upon conviction of ſeveral defendants upon ſuch indictment, each is liable to the penalty of 20*l.* impoſed by that ſtatute. *The King* v. *Hube* et al. 540

12. A *certiorari* will not lie to remove an order of ſeſſions, committing a perſon for refuſing to enter into a baſtardy

baſtardy recognizance in order to move for his diſcharge, the proper courſe is by *Habeas Corpus*. *The King* v. *Archer*. 341

13. A *certiorari* does not lie for other than judical acts. *Rex* v. *Lloyd*, 452

14. A *certiorari* does not lie to remove an indictment upon the ſtatute of 30 *Geo.* 2. c. 24. for obtaining goods or money under falſe pretences. *Rex.* v. *Smith*. 542

15. The like point, *The King* v. *Young*. *Ibid*

16. A *certiorari* does not lie to remove an indictment for felony from the general ſeſſions of oyer and terminer, without the conſent of the proſecutor. *Rex* v. *Ducheſs of Kingſton*. 542

17. A *certiorari* will not lie to remove a conviction by the commiſſioners for the double duties on beer. *The King* v. *Whitbread*. 543

18. But a *certiorari* will lie to remove a conviction under the ſtat. 11 *Geo.* 1. c. 30. ſ. 16. for harbouring tea and ſpirits, either by juſtices of the peace or commiſſioners of exciſe. *The King* v. *Frances Abbot*. 545

19. A *certiorari* cannot be iſſued out as of courſe, and without laying a ſpecial ground before the court, to remove proceedings from the courts of the counties palatine. *Zink* v. *Langton*. 547

20. The like point. *Williams* v. *Thomas* et al. 548

21. Where a *certiorari* has iſſued and the juriſdiction of the Court is by the act of parliament *expreſsly excluded*, the Court will order the writ of *certiorari* to be *ſuperſeded*, *quia improvidè emanavit*, the return taken off the file, and the orders remanded. *Rex.* v. *Micklethwayte*. *Ibid*

22. When an appeal is allowed to the ſeſſions, and the party has appealed, a *certiorari* cannot iſſue till the ſeſſions has determined the caſe. *The King* v. *Sparrow and Urquhart*. *Ibid*

23. The Court will not grant a *certiorari* to remove the aſſeſſment of the land tax. But if an information be moved for againſt the commiſſioners of the land tax, the Court will admit an atteſted copy of the aſſeſſment as evidence, inſtead of the original. *The King* v. *King* et al. *Commiſſioners of the Land-Tax for the tower diviſion of the City of London*. 549

24. In the caſe of ſummary proceedings, orders and convictions before magiſtrates, the proceedings may be removed by *certiorari* after judgment, becauſe ſuch proceedings can only be removed by *certiorari*; but where a judgment has been given on an indictment, the record muſt be removed by writ of error. *The King* v. *the Inhabitants of Seaton*. *Ibid*

25. A *certiorari* will not lie to remove the record of an indictment, *between the verdict and the judgment*. *The King* v. *D. Jackſon*. 550

26. It is neceſſary to give notice of the intention to move for a *certiorari* before the rule to ſhew cauſe is applied for. *Rex* v. *Nicholls*. *Ibid*

27. It is no objection to a *certiorari* to remove a preſentment of a road made by a juſtice of peace under the 24th ſection of 13 *Geo.* 3. c. 78. that it is proſecuted by another than the juſtice preſenting, if it is by his conſent. *The King* v. *the Inhabitants of Penderryn*. 551

28. Where an act gives a general form of conviction, the party can have no benefit from a *certiorari*, becauſe the proceedings or examinations need not be returned, but the conviction only, which being general, cannot exhibit the error on the proceedings. *The King* v. *Eaton*. *Ibid*

29. Although the proper parties, in whoſe keeping a record is any object to make any return of it, if the *certiorari* be improperly directed, yet if they do return the record into this Court, no ſuch objection can be ſtarted by third perſons. *Daniel* v. *Phillips*. 552

30. A *certiorari* to remove a conviction muſt, by 13 *Geo.* 2. c. 18. ſ. 5. be applied for within ſix months after the date of conviction; and the party proſecuting a *certiorari* to remove

move a conviction, &c. *muſt himſelf enter into a recognizance with two other perſons*, to proſecute it with effect, &c. by the 5 *Geo.* 2. c. 19. ſ. 2. *The King* v. *Loughey* et al. 552

31. Under the 3d ſection of 5 *G.* and *M.* c. 11. for regulating the removal of indictments from the ſeſſions by *certiorari*, the repreſentatives of the proſecutor are entitled to the coſts taxed during his life, *though no perſonal demand were ever made by him.* For though it takes away the remedy by attachment, it does not affect the debt, the coſts when taxed, becoming a *debt*. *The King* v. *Robert Chamberlayne.* 553

32. But no coſts are due on a *certiorari*, removing ſummary proceedings, unleſs a recognizance be entered into at the time of removing the proceedings. *The King* v. *Jenkinſon.* 554

33. Where a *certiorari*, to remove a conviction under a penal ſtatute is brought, not for vexatious purpoſes, but to enable the defendant to plead the conviction in an action founded on the ſame offence, the proſecutor is not entitled to coſts upon his own affirmation of the conviction. *Rex* v. *Midlam, and Idem* v. *Eundum.* *Ibid*

34. Where a defendant hath removed an indictment, entered into a recognizance, been convicted and fined, and the proſecutor has received one-third thereof, ſo much ſhall be deducted out of the coſts. *Rex* v. *Oſborne.* 556

35. A return to a *certiorari* need not be under hand and ſeal, though the writ be directed to the juſtices, to make a return *under ſeal*; for it is not neceſſary or uſual, on returns to writs of inquiry, or the return of a coroner's inqueſt *Rex* v. *Pickerſgill.* *Ibid*

See alſo the APPENDIX.

CHARTER.

See BY-LAW, CORPORATION. CUSTOM.

CHURCH.

1. The words, *dues, and profits*, in ſtat. 10 *Ann.* c. 11. ſ. 16. for dividing of pariſhes, includes ſurplice fees, as well as ſtrict fees. *William Selon, clerk*, v. *Roger Parry, clerk.* 556

2 The *conſent* of the whole pariſh is not eſſentially neceſſary to the ordinary's ſetting up an organ; nor will the pariſh be bound to repair it, when ſet up. *Butterworth and Parker* v. *Walker and Waterhouſe.* 557

See CURATES.

CHURCHWARDENS.

1. *Lis pendens* is not a good return to a mandamus to ſwear in churchwardens, though accompanied with very ſpecial circumſtances. *Rex* v. *Doctor Harris.* 559

2. The court will not grant a *quo warranto* information, to try the validity of an election to the office of churchwarden. *The King* v. *Shepherd* et al. 560

3. The ſpiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. *Leman* v. *Goulty.* 560

4. Thoſe who are admitted and ſworn into the office of churchwardens, and act as ſuch, may maintain an action againſt a former churchwarden, for money received by him for the uſe of the pariſh, although they may neither have been duly appointed to the office, nor be the immediate ſucceſſors. *Turner* v. *Baynes.* 562

COFFEE.

See EXCISE, No. 2.

COIN.

1. The defendant had counterfeited the impreſſion of a half-guinea, on a piece of gold, which was previouſly hammered, and was not round, nor would paſs in the condition it then was: held not high treaſon. *The King* v. *Varley, Ibid.*—*The King* v. *Lennard.* 562

2. What mould ſhall be deemed a tool or inſtrument mentioned in the ſtatute 9 *Will.* 3. c. 25. *The King* v. *Lennard.* 562, 563

COMMITMENT.

1. A warrant of commitment muſt be

be certain, and not in the disjunctive *Rex* v. *Evered*. 561

2. A commitment for *treasonable practices* is legal. *The King* v. *E. M. Despard*. 564

3. But a warrant of commitment in execution, after conviction, must shew before whom the conviction was, and the authority to convict. *Rex* v. *Frances York and Jane Fielding*. 568

4. The long-established practice of the court of King's Bench, upon an application to bail a party committed on a charge of felony, is, that even if the commitment be regular, the court will look into the depositions to see if there be a sufficient ground laid to detain the party in custody, and if there be not, to bail him; and so if the warrant of commitment be irregular, and a serious offence be shewn to have been committed, they will not discharge or bail the prisoner, without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody. *Rex* v. *Horner*. *Ibid.*

COMMON.

1. The lord has no right under the statute of *Merton* to enclose and approve the wastes of a manor where the tenants of the manor have a right to dig gravel on the waste, or take estovers there. *Duberley* v. *Page* et al. 569

2. The lord of a manor, or his grantee, may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig sand, &c. if he leave sufficient common of pasture. *Shakspeare* v. *Peppin*. 570

3. In the case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another. *Hall* v. *Harding* et al. 572

4. There is no such thing as common, *without stint*, belonging to land: *common belonging to land* can only be for cattle *levant* and *couchant* thereon: also, if there be a custom for the commoner to inclose, and any of them do, by virtue of such custom, inclose, the land remaining uninclosed is thereby freed and discharged from such persons former right of common therein. *How* v. *Strode*. 577

5. If the lord of the manor plant trees on a common, a commoner has no right to abate them. *Kirby* et al. v. *Sadgrove*. 579

6. Common for cattle, *levant* and *couchant*, cannot be claimed by prescription, as appurtenant to a house without any curtilage or land. *Scholes* v. *Hargreaves*. 580

7. In case for a surcharge of common, the plaintiff need not shew that he turned on any cattle of his own, at the time of the surcharge; but only, that he *could not* enjoy his common so beneficially as he ought. *Wells* v. *Watling*. 581

COMMON-LAW.

1. The common law, now so called, is founded on the law of nature and reason. *Miller* v. *Taylor*. 582

CONDEMNATION.

1. A condemnation in the Exchequer is conclusive evidence. *Scott* v. *Sherman*. 817

2. But a condemnation before commissioners of excise is not. *Henshaw* v. *Pleasance*, 819. *Salmon* v. *Gordon*. 820

CONSCIENCE, COURTS OF.

See COUNTY-COURT.

CONSIDERATION.

1. A defendant may set up an illegal consideration against an action on a note of hand. *Guichard* v. *Roberts*. 453

2. Or a bill of exchange. *Brown* v. *Turner*. 454

CONSIGNMENT.

1. Where several bills of lading have been signed of different imports, no reference

ference is to be had to the time when they were ſigned by the captain; but the perſon who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. And where ſuch bills of lading, though different upon the face of them, are conſtructively the ſame, and the captain has acted *bonâ fide*, a delivery according to ſuch legal title will diſcharge him from them all. *Caldwell* et al. v. *Ball*. 583

2. The indorſement and delivery of a bill of lading to a creditor *primâ facie*, conveys the whole property in the goods from the time of its delivery. *Hibbert* et al. v. *Carter*. 589

See alſo ASSIGNMENT, BILLS OF LADING, STOPPAGE IN TRANSITU.

CONSPIRACY.

1. The quarter-ſeſſions has a juriſdiction over conſpiracy; and it is ſufficient whether the conſpiracy be to charge a man with criminal acts, or ſuch as only may affect his reputation. *The King* v. *Riſpal* et al. 591

2. There is no occaſion, on the trial of an indictment for a conſpiracy, to prove the actual fact of conſpiracy, but it may be collected from collateral circumſtances. *The King* v. *Parſons* et al. 592

CONSTABLE.

1. One who is a reſiant within a private leet within the hundred is not, therefore, exempt from ſerving the office of *conſtable of the hundred*; and a cuſtom to elect ſuch a one conſtable, is good. *Rex* v. *Genge*. 592

2. An high conſtable may be appointed, *de novo*, for a town erected into a county of itſelf by charter many years before, although no ſuch officer had been appointed before. *James* v. *Green*. 799

3. A younger brother of the corporation of the Trinity-Houſe is not exempt from ſerving the office of headborough.—Alſo the office of conſtable may be ſerved by deputy.—And the crown may grant exemptions from ſerving offices of this ſort, provided a ſufficient number of perſons be left to ſerve them. *The King* v. *Thomas Clarke*. 593

4. A conſtable of a manor, including a pariſh, is notexempt from ſerving this office, by having a ſtatutable certificate of exemption from all ward offices. *Rex* v. *Darbyſhire*. 597

5. But a naturalized foreigner is not eligible into the office of conſtable. *Rex* v. *Ferdinand de Mierre*. 599

6. No conſtable can act under a warrant out of his diſtrict. *Blatcher* v. *Kemp*. *Ibid.*

7. In ſearches by exciſemen where the preſence of a peace-officer is required, an officer by reputation, attending the rotation of juſtices is not ſufficient. *Hill* v. *Barnes*. 813

8. To entitle a conſtable, &c. to double coſts under 7 *Jac.* 1. c. 5. after a verdict for him, it muſt be certified, by the judge who tried the cauſe, that he was acting in the execution of his office. *Grindley* v. *Holloway*. 776

9. But, where there is a ſpecial verdict, and it appears by the facts there found, that the act for which the action was brought was done by the defendant by virtue or reaſon of his office, the maſter muſt tax double coſts, though there has been no certificate, nor allowance by the judge who tried the cauſe. *Rann* v. *Perkins*. *Ibid.*

10. And to entitle a defendant (an officer) to double coſts under the ſtatute of 7 *Jac.* 1. c. 5. the certificate of the judge who tried the cauſe, may be granted either at the trial or afterwards. *Harper* v. *Carr*. 777

CONTRACTS.

1. An officer appointed by government, treating as an agent for the public, is not liable to be ſued upon *contracts* made by him in that capacity. *Macbeath* v. *Haldimand*. 600

2. The like point. *Unwin* v. *Wolſeley*. 603

CONVICTIONS.

1. If a conviction under a ſtatute which enacts, that all convictions againſt that act may be made out "in that

that form, or to the effect following" (giving the form), contain all the ſubſtantial parts of that preſcribed, it is good, though it alſo contains ſomething more; for ſurpluſage will not vitiate a conviction. *The King* v. *J. Jefferies.* 606

2. An information founded on a penal ſtatute muſt negative the exceptions in the enacting clauſe, creating the penalty, and alſo thoſe contained in a former clauſe, to which the enacting clauſe refers in expreſs terms. *The King* v. *J. Pratten.* 606

3. Where a conviction by a juſtice is grounded upon an information taken at a time paſt, ſuch conviction may ſtate that the informer came and gave the juſtice to be informed, in the preter-perfect tenſe. And the offender ſhould be called on to plead to the charge, before any evidence in ſupport of it is given; but if the evidence be given firſt, though not in his preſence, and he confeſs the offence, the irregularity is cured. Alſo where the proſecutor is not obliged to negative the exceptions in a ſtatute, and negatives ſome of them only, that part of the information will be rejected as ſurpluſage. *The King* v. *Hall.* 607

4. The evidence in ſupport of a conviction, ought to be taken in the defendant's preſence, and the juſtices muſt, at the ſame time, adjudge the forfeiture. *Rex* v. *Vipont.* 608

5. The like point. *Rex* v. *Kellett.* 609

6. The like point. *The King* v. *Read.* 610

7. But if enough appears on the face of the conviction, to ſhew that the evidence was given in the preſence of the defendant, it is ſufficient, without ſtating that he was actually preſent at the time. *Rex* v. *Kempſon, Ibid.*

8. The evidence muſt, however, ſtate the offence to have been committed where it is laid. *The King* v. *Jeffries.* *Ibid.*

9. A conviction for the ſaid offence where there are two diſtinct offences charged in the information, is bad. *The King* v. *Henry Salomons.* 610

10. Where juſtices of the peace are required by a penal ſtatute to diſtribute the penalty on conviction among certain perſons according to their diſcretion, an adjudication that the forfeiture be diſpoſed of as the law directs, is bad. *The King* v. *Dimpſey, and the ſame* v. *Potts, Softly, and Wood.* 611

11. A conviction, adjudging a diſtribution of part of a forfeiture (which a ſtatute ſays ſhall be paid to the overſeers of the poor of the pariſh, for the uſe of the poor of the pariſh) to the overſeers of the poor of a townſhip, cannot be ſupported. *The King* v. *W. Prieſt.* 612

12. If a conviction do not ſtate an adjudication, it cannot be ſupported, whether the puniſhment be or be not fixed by the ſtatute. *The King* v. *J. A. Harris.* 613

13. And where coſts are to be paid by offenders, they muſt be aſcertained in the conviction. *Rex* v. *Abraham Hall.* 614

14. If juſtices of the peace acquit a defendant, againſt whom an information is laid before them for a penalty, the judgment cannot be reverſed, though the juſtices ſtate (on a return to a *certiorari*) evidence which *primâ facie* is ſufficient to convict. *The King* v. *John Reaſon.* *Ibid.*

15. A warrant of commitment in execution, after conviction, muſt ſhew before whom the conviction was, and the authority to convict. *Rex* v. *Frances York and Jane Fielding.* 518

COPYHOLD.

1. A copyhold cannot be created by operation of law, but muſt have been demiſed or demiſable by copy time out of mind. Alſo by a grant of a manor, with an exception of the waſtes, they are thereby ſevered from the manor, though the copyholders continue to have a right of common thereon by immemorial cuſtom. And

after a grant of the ſoil of thoſe waſtes to truſtees for the uſe of the copyholders in free ſocage, the lands, when incloſed, will be freehold, and not copyhold. *Revell* et al. v. *Jodrell*. 615

2. A cuſtom within a manor, that lands ſhall deſcend to the elder ſiſter, where there is neither a ſon nor a daughter, does not extend to the eldeſt niece; but the lands muſt deſcend according to the common law, in default of ſuch a ſon, daughter, and ſiſter; and a cuſtomary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from ſteward to ſteward, although not ſigned by any perſon, is good evidence to prove the courſe of deſcent within the manor. *Denn*, on the ſeveral Demiſes of Ann Goodwin, and George Wragg, and Ann his wife, v. *Spray*. 619

3. One ſeiſed in fee of a copyhold of inheritance by deſcent, *ex parte materná*, ſurrendered the ſame to the uſe of himſelf for life, remainder to ſuch perſons, and for ſuch eſtates as he ſhould by deed or will, atteſted by three witneſſes, appoint, remainder in default of appointment to himſelf in fee; after which he made a mortgage, and ſurrendered to the uſe of the mortgagee in fee, who, upon repayment of the principal and intereſt, ſurrendered again to the mortgagor; the Court held that the line of deſcent was broken, and that the eſtate deſcended to the paternal heir. *Doe* on the demiſe of Harman and wife, v. *Morgan*. 623

4. A ſurrender is the conveyance of the ownerſhip of the eſtate, admiſſion only form: and the admiſſion relates back to the ſurrender. *Roe*, on the Demiſe of Henry Noden v. *Geo. Griffiths* and *Eliz.* his wife, and *Charles Thomas*, and *Mary* his Wife. *Ibid.*

5. If the wife be tenant in tail, ſhe may, if ſhe ſurvive her huſband, bar the entail, *being a copyhold*, or (with her huſband) bar it during the coverture. If ſhe be only tenant for life, with a contingent eſtate to the heirs of her huſband, and her own body, that may be barred by the huſband, in caſe of his ſurvivorſhip. *Frogmorton* ex dim. *Robinſon* v. *Wharrey*. 628

6. A ſurrender of copyhold lands, to the uſe of a will, only operates on the eſtate which the ſurrenderor has at the time of the ſurrender. And therefore, if a copyholder, having an eſtate, *pur autre vie*, ſurrender all his eſtate, in poſſeſſion, remainder, or expectancy, to the uſe of his will, and afterwards take the fee by deſcent, and then diſpoſe of the fee by will, the fee will not paſs by it. *Doe* ex dim. Ibbot, v. *Cowling and Wife*. 630

7. In order to effectuate the intention of the parties, the Court will conſtrue the word "or" to mean "and," as well in a ſurrender of copyhold premiſes, as in a will. *Wright* ex dim. Ann Burrill, otherwiſe Wallis, and Mary Burrill, otherwiſe Wallis, v. *Kemp*. 631

8. The title to copyhold lands, relates back from the time of the admittance, to the ſurrender, as againſt all perſons but the lord. So that the ſurrenderee may recover, in ejectment, againſt the ſurrenderor, on a demiſe, laid between the times of ſurrender and admittance. *Holdfaſt* ex dim. Woollams v. *Clapham*. 633

9. If a copyhold, ſurrendered to the uſe of a will, is demiſed to ſeveral perſons, and one offers to be admitted, the lord cannot refuſe to admit him, or ſeize *quouſque*. *Roe* ex dim. Aſhton v. *Huton* et al. 634

10. A lord of a manor cannot ſeize copyhold eſtates, as forfeited, *pro defectu tenentis*, without a cuſtom. Therefore, where, on the death of a copyholder of inheritance, the lord, after three proclamations, for the heir to come in and be admitted, ſeized the eſtate into his hands, and afterwards granted it in fee to another: the Court conſidered it as an *abſolute ſeizure*, and conſequently irregular, there being no cuſtom to warrant it; and

and being irregular, as an abſolute ſeizure, it could not afterwards be ſet up, by the lord, as a *ſeizure quouſque*. Alſo, if one of ſeveral co-heirs of a copyholder be a *feme covert*, at the time of the anceſtor's death, and the lord ſeize the whole eſtate (in default of the heirs not coming in to be admitted after three proclamations), without firſt appointing an attorney or guardian for the *feme covert*, according to the requiſites of the 9 *Geo.* 1. c. 29 a ſeizure of the *whole* eſtate is irregular, though it be not known to the lord that one of the heirs is a *feme covert*. Likewiſe, a forfeiture, by a copyholder's levying a fine, may be waived by the lord. And a forfeiture of a copyhold eſtate can only be taken advantage of by him who is lord at the time of the forfeiture, except in thoſe caſes where the act of forfeiture deſtroys the eſtate. Alſo, a fine levied by a copyholder, who continues in poſſeſſion, is void, as againſt the lord. *Doe* ex dim Turrant and others, v. *Hellier* and others. 635

11. If the lord of a manor refuſes to admit a perſon to whom a copyhold is ſurrendered, on account of a diſagreement reſpecting the fine to be paid, the Court will grant a *mandamus* to compel the lord to admit without examining the right to the fine. *The King* v. *the Lord of the Manor of Hendon*, and *Richard Troward*, the ſteward of the manor. 642

12. But the Court will not grant a *mandamus* to admit a copyholder, claiming by deſcent. *The King* v. *Rennet*. *Ibid.*

13. A copyholder ſurrendered to the uſe of his will, and by his will ordered and directed two perſons to ſell and to apply the monies ariſing thereby, for the purpoſes in the will, theſe truſtees by virtue of the ſaid will and ſurrender, did by deed indented bargain and ſell the premiſes to a purchaſer; the death of the teſtator was duly preſented at a court-baron, and at that and two ſubſequent courts proclamations were made for his heirs to come in, and be admitted to the premiſes: at the laſt court the purchaſer attended with the deed of bargain and ſale, and craved to be admitted thereon, which the lord refuſed, inſiſting that the truſtees ſhould have been firſt admitted and paid a fine. Held only one fine due. *Holder* ex dim. Sulyard v. *Preſton*. 643

14. The land-tax is not to be deducted out of the two years, value, payable as an arbitrary fine for admiſſion to a copyhold eſtate. *Grant* v. *Aſtle*. 644

15. Where a copyhold eſtate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the eſtate. *Mardiner* v. *Elliot*. 648

16. The grant by the lord of the manor of copyhold lands to his wife, immediately, without the intervention of another, is void. *Firebras* ex dim. of Jane Symes, widow, v. *Penant*. 649

See alſo CUSTOM.

COPY-RIGHT.

1. Two penalties may be incurred on the ſame day, on the 12 *Geo.* 2. c. 36. for ſelling books originally written and publiſhed here, and afterwards reprinted in any other country, and imported into this, if the acts of ſale be diſtinct. *Brooke* qui tam v. *Milliken*. 650

2. Evidence that the defendant acted a piece on the ſtage, of which the plaintiff had bought the copyright, is not evidence of a publication by the defendant, within the meaning of the ſtat. 8 *Ann.* c. 19. *Coleman* v. *Wathen*. *Ibid.*

3. The aſſignee of a print may maintain an action on the ſtat. 17 *Geo.* 3. c. 57. againſt any perſon who pirates it, and in ſuch an action it is not neceſſary to produce the plate itſelf in evidence; one of the prints taken from the original plate is good evidence. *Thompſon* v. *Symonds* et al. 651

CORN.

1. It is illegal to ſell corn by any other meaſure than the Wincheſter meaſure. *The King* v. *J. Major.* 653

2. And the buyer of corn, by any other than the Wincheſter meaſure, forfeits the penalty of 40*s.* beſide the value of the corn, by ſtat. 22 and 23 *Car.* 2. c. 12. *The King* v. *J. Arnold.* 654

CORONER.

1. In regard to the bodies of perſons manifeſtly drowned at ſea, and caſt upon the ſhore, it is ſaid to be the conſtant uſage of the inhabitants of the place to bury them, without any inquiſition being taken by the coroner; and unleſs the coroner has taken an inquiſition in due form, he is not entitled to any fees. *The King* v. *The Juſtices of Norfolk.* 655

2. Neither are the coroners of franchiſes, that do not contribute to the county rates, entitled to the fees given by the ſtat. 25 *Geo.* 2. c. 29. nor to any fees to be paid by the county. *The King* v. *the Juſtices of the Weſt Riding of Yorkſhire.* 656

CORPORATIONS.

1. A corporation being diſabled to act, accepting a new charter is not diſſolved, but dormant; and after ſuch acceptance, the new corporation is the ſame as the old one. *Mayor and Commonalty of Colcheſter* v. *Seaber*, Executor of William Seaber, his late father. 656

2. The proclamation of *James* the Second, in the 4th year of his reign, for reſtoring corporations to their ancient charters, &c. operates (when accepted) as a grant of revival to ſuch of the old corporations as had ſurrendered their corporate franchiſes to *Charles* the Second (but which ſurrenders were not enrolled), who had granted new charters; and overturns ſuch new charters. And when the mode of electing officers is not regulated by charter or preſcription, the corporation may make by-laws to regulate the election. *Newling* v. *Francis.* 659

3. When an integral part of a corporation is gone, and the corporation has no power of reſtoring it, or of doing any corporate act, the corporation is ſo far diſſolved that the crown may grant a new charter. *The King* v. *J. Paſmore.* 667

4. It was held by the Court of King's bench, that a judgment of ſeizure *quouſque*, &c. againſt a corporation, in default of appearance, operates as a final judgment to diſſolve the corporation, if they do not appear in the ſame term, or the next at furtheſt. And a new charter of incorporation granted after that time to a new body in the ſame place is good, notwithſtanding a charter of reſtitution be afterwards granted to the old corporation; and ſuch charter of reſtitution is abſolutely void. —Alſo a power reſerved to the crown, in a charter of incorporation, to amove, by order of council, one or more of the corporators, which declared that all or any of them ſo amoved ſhould actually and without further proceſs be amoved, and which alſo provided at the ſame time that upon ſuch amotion the remaining corporators might proceed to fill up the vacancies, cannot be exerciſed to ſuch an extent as not to leave a ſufficient number to make a re-election; and therefore an amoval of all is illegal and void. *The King* v. *T. Amery* and *the King* v. *John Monk.* 681

5. The above JUDGMENT was afterwards reverſed in the Houſe of Lords, on a writ of error. 697

6. If it appear in evidence that a charter has been accepted, and acted under for ſome years, it ſhall be taken to have been accepted as far as it could, and muſt ever afterwards be taken to have been accepted. *The King* v. *Thomas Amary.* *Same* v. *J. Monk.* 697

7. To

7. To prove the exiſtence of an aggregate corporation, conſiſting of different trades; entries of admiſſion into the ſeparate trades, as *into the company of Carpenters, into the company of Plaiſterers*, are evidence to be left to a jury. But a perſon who has acted in breach of an alleged cuſtom, is not a competent witneſs to diſprove the exiſtence of the cuſtom. *The Company of Carpenters, Brickmakers, Bricklayers, Tylers, and Plaiſterers* of Shrewſbury v. *Hayward*. 707

8. A corporation cannot make a by-law, and give a penalty to be ſued for by any other but the corporation. *Totterdell and Harris*, Maſters of the Taylor's Company at Bath, v. *Glazby*. 708

9. The maſter, wardens, and commonalty of a company, cannot ſue for a penalty forfeited to the maſter and wardens, to the uſe of the maſter, and wardens, and company. *The Maſter, Wardens, and Commonalty of Feltmakers* v. *Davis*. 709

10. The corporation of Lynn brought an action of *aſſumpſit* againſt the defendant for tolls upon coming into their port, and leave was given to inſpect the corporation books. *The Mayor of Lynn* v. *Denton*. 712

11. The conſtitution of a corporation as ſettled by act of parliament, cannot be varied by the acceptance of any charter inconſiſtent with it.—And where an integral part of a corporation compoſed of a definite number is required to vote at an election of a corporate officer, a majority of ſuch integral definite part muſt attend, otherwiſe there can be no elective aſſembly, although other parts of the corporation alſo join in ſuch election, and a majority of the whole exiſting body actually attend: but a majority of thoſe preſent, when legally aſſembled, will bind the reſt. *The King* v. *Miller*. *Ibid.*

12. So in this caſe, where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, ſhould elect; and the common-council was a definite body conſiſting of thirty-ſix; it was held that a majority of the whole number muſt meet to form an elective aſſembly; and that if the corporation be ſo reduced as that ſo many do not remain, no election can be had at all. *The King* v. *Bellringer*. 717

13. A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. And in a preſcriptive corporation, an uſage to this effect is evidence of ſuch a charter. Conſequently, in either caſe, a perſon is well elected by a majority of the ſubſiſting members, as diſtinguiſhed from a majority of the full body.—*The King* v. *Hoyte*. 721

14. Where a charter directs an election to be by the majority of the whole number of ſubſiſting burgeſſes, an election by the minor part of them is void. *Rex* v. *Grimes*, capital Burgeſs of Yarmouth, in the Iſle of Wight. 723

15. The like point. *Rex* v. *Varlo*. 726

16. Alſo, *Rex* v. *Montlay*. 727

17. A perſon who has not taken the ſacrament within a twelvemonth preceding the election, according to the ſtat. 13 *Car.* 2. ſ. 2. c. 1. cannot be compelled to take upon himſelf any office or place, concerning the government of any corporation to which he may have been elected.—*Harriſon* v. *Evans*. 730

18. No election in corporations made by ſurprize on a by-day, can be valid. *Rex* v. *May* et al. and *Rex* v. *Little*, freemen of Saltaſh. 731

19. A corporate officer, elected under a mandamus, muſt be ſworn in before the officer preſiding at ſuch election. *Rex* v. *Charles Malden*. 732

20. If a corporation chooſe only one bailiff where the charter directs two, the one alone cannot act. *Rex* v. *Smart*. 733

21. The Court will grant a new trial in an information *quo warranto* if the queſtion has never been fully before

before the jury. *Rex* v. *Jonas Malden.* 733

22. The Court will ſet aſide a judgment of ouſter, which has been ſigned againſt a mayor, by default, upon the foot of his colluſion with the proſecutor. *Rex* v. *Dawes*, Mayor of Winchelſea. 735

23. The Court will not decide on the validity of the election of a corporate officer, if the queſtion is new or doubtful, on a rule to ſhew cauſe for an information in the nature of *quo warranto*. *The King* v. *Godwin.* 736

24. Where reſidence is a neceſſary qualification for an election to a corporate office, an occaſional reſidence, if it be *bonâ fide*, is a ſufficient legal reſidence to ſatisfy the qualification required. *The King* v. *Sargent.* 739

25. The writ *de effendo quietum de theolonio*, is not merely prohibitory, but remedial, on which the parties may plead to iſſue on a queſtion of right. And a corporation to whom it is directed, cannot be attached for contempt, in their corporate capacity, for not returning it; but an attachment in the nature of a *pone*, is the proper remedy to compel them to appear, and the Court will not grant a trial at bar, in an iſſuable term. Alſo in an action by one corporation againſt another, each may inſpect ſo much of the books and records of the other, as relates to the ſubject in diſpute. *The Mayor, &c. of London*, v. *The Mayor, &c. of King's Lynn.* 741

COSTS.

1. A creditor, who has obtained a verdict before the commiſſion iſſued againſt a bankrupt, is intitled to prove *his coſts* as well as his debt under the commiſſion, though judgment be not ſigned till after the commiſſion iſſued. *Aylett* v. *Harford* and *Richards.* 208

2. So, where the defendant ſuffered judgment to go by default in this action, which was treſpaſs for the meſne profits after a recovery in ejectment. On executing the writ of inquiry, the jury gave their verdict for the rent of the premiſes, but did not include the coſts of the ejectment. *The defendant became a bankrupt after the judgment in ejectment*, and before the preſent action was brought. A rule having been obtained to ſhew cauſe why the inquiſition ſhould not be ſet aſide, becauſe the jury had not given the coſts of the ejectment in their damages, it was, on ſhewing cauſe againſt the rule, inſiſted, that *the coſts of the ejectment were become a liquidated debt, which might have been proved under the commiſſion of bankrupt which had iſſued againſt the defendant*; and the rule was diſcharged. *Gulliver* v. *Drinkwater.* 209

3. And there is no diſtinction between a tort and a contract, where a judgment follows the verdict. *Longford* v. *Ellis.* 210

4. So, if a plaintiff become a bankrupt after he is nonſuited, and before the taxation of coſts, the coſts of the nonſuit are a debt proveable under the commiſſion. *Hurſt* v. *Mead. Ibid.*

5. So, if a creditor recover a judgment againſt a trader before his bankruptcy, and revive it by *ſcire facias* after the bankruptcy, the coſts of the *ſcire facias* relate back to the judgment, and may be proved under the commiſſion. *Phillips* v. *Brown. Ibid.*

6. Under the 3d ſection of 5 *W.* and *M.* c. 11. for regulating the removal of indictments from the ſeſſions by *certiorari*, the repreſentatives of the proſecutor are entitled to the coſts taxed during his life, *though no perſonal demand were ever made by him.* For though it takes away the remedy by attachment, it does not affect the debt; the coſts when taxed, becoming a *debt*. *The King* v. *Robert Chamberlayne.* 553

7. No coſts are due on a *certiorari*, removing ſummary proceedings, unleſs a recognizance be entered into at the time of removing the proceedings. *The King* v. *Jenkinſon.* 554

8. Where a *certiorari* to remove a conviction under a penal ſtatute is brought, not for vexatious purpoſes, but to enable the defendant to plead the

the conviction in an action founded on the ſame offence, the proſecutor is not entitled to coſts upon his own affirmation of the conviction. *Rex* v. *Midlam*, and *Idem* v. *Eundem*. *Ibid.*

9. Where coſts are to be paid by offenders, they muſt be aſcertained in the conviction. *Rex* v. *Abraham Hall*. 614

10. On a plea of abatement by a *feme covert*, and verdict for the defendant, the huſband cannot have execution for the coſts without a *ſcire facias*. *Wortley* v. *Rayner*. 329

11. The coſts of a declaration againſt the drawer, are not chargeable on an indorſer, who is ſued, till the appearance-day of the return. *Golding* v. *Grace*. 438

12. Where juſtices of the peace are complained of without reaſon, they ſhall have coſts. *Rex* v. *Palmer* and *Baine*. 743

13. If a plaintiff has a verdict on one count only, yet he ſhall have coſts on the whole declaration, for it is frequently prudent in a plaintiff to lay his demand in two different ways; and as coſts at law are a legal right under the ſtatute, and there is alſo a remedy by application to the Court, to ſtrike out ſupernumerary counts in caſe they be frivolous or vexatious; it would be hard to tie up a plaintiff in point of coſts, to lay his caſe in ſuch a way only as he is ſure to prove. *Bridges* v. *Raymond*. 744

14. But where there is double pleading, and each plea goes to the whole declaration; and there is a demurrer to any one plea which goes to the whole, and judgment for the defendant thereupon; there the defendant ſhould have coſts; for the plaintiff ſhould not try his iſſue, after the defendant has had judgment upon a demurrer which goes to the whole. *Sir John Aſtley*, Bart. v. *Young*. *Ibid.*

15. So, when there are iſſues joined on ſeveral counts, and on ſome a verdict for the plaintiff, and on others for the defendant, the defendant ſhall not have coſts on that part of the record on which the verdict is found for him. *Butcher* v. *Green*. 744

16 But if there be two diſtinct cauſes of action in two counts, and as to one the defendant ſuffers judgment to go by default, and as to the other, takes iſſue and obtains a verdict, he is intitled to judgment for his coſts on the latter count, notwithſtanding the plaintiff is entitled to judgment and coſts on the firſt count. *Day* v. *Hanks*. 745

17. So where an incloſure-act directed, that the parties who were diſſatisfied with the determination of the commiſſioners, might bring actions to try their rights, adding, "that if the verdict ſhould be in favour of the commiſſioners' determination, the coſts ſhould be borne by the plaintiff, and if againſt ſuch determination, then by the proprietors at large." And a proprietor brought an action, claiming nine diſtinct rights, and recovered for three only. The Court held, that he ſhould only have his coſts on thoſe iſſues found for him, and that the defendant ſhould have his coſts of the other iſſues. *Braithwaite* v. *Bradford*. 746

18. On a feigned iſſue, coſts follow the verdict. But it ſeems that, in future, when the Court permit parties to try a feigned iſſue, they will compel them to conſent, that the coſts ſhall be in the diſcretion of the Court, and a feigned iſſue cannot be tried without the conſent of the Court. *Hoſkins* v. *Lord Berkeley*. 747

19. When a cauſe remains untried, without any fault in either party, the coſts of this going down to trial ſhall be paid by the unſucceſsful party to the party finally ſucceeding in the cauſe, as the other coſts are. *Sadler* v. *Evans*, or *Lady Windſor*'s caſe. 748

20. The Court of B. R. in this caſe (in order to make the practice of the courts of B. R. and C. B. correſpond), directed that for the future, in all caſes where a cauſe goes down to trial,

trial, and goes off, upon any occaſion, without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial; the coſts of ſuch former abortive going down to trial ſhall be taxed and allowed to the party finally prevailing, in the ſame manner as if the cauſe had gone off upon a *remanet*. *Burchall* v. *Bellamy*. 749

21. So alſo coſts are now in C. B. as well as B. R. allowed when a cauſe goes off and remains to be tried *pro defectu juratorum*. *Sparrow* v. *Turner*. 750

22. But where a *venire de novo* is awarded, the party ultimately ſucceeding is only entitled to the coſts of the laſt trial. *Lickbarrow* v. *Maſon*. *Ibid.*

23. The Court will ſtay proceedings, in an action on the caſe for promiſes for 10,000*l.* till the plaintiff pay the coſts of a nonſuit on the ſame cauſe of action, in a ſuit brought in the King's Bench. *Melchart* v. *Halſey*. *Ibid.*

24. The like in an action of treſpaſs. *Weſton* v. *Withers*. 752

25. And proceedings in ejectment may be ſtaid the day before trial, till the coſts of a former ejectment be paid. *Doe*, on the demiſe of Chadwick, v. *Law*. *Ibid.*

26. If the defendant in a former ejectment, who was then evicted, bring another ejectment for the ſame premiſes, the Court will ſtay the proceedings until he pay the coſts of the former cauſe; for it is immaterial whether the preſent leſſor were the plaintiff or defendant before. *Thruſtout*, on the demiſe of Williams, v. *Holdfaſt*. *Ibid.*

27. But the Court will not ſtay proceedings in a *qui tam* action till coſts on a *non pros* in a former action, by a different plaintiff, againſt the ſame defendant, be paid for. *Engliſh*, q. t. v. *Cox*. *Ibid.*

28. Where a new trial has been granted, and nothing is ſaid in the rule concerning the coſts of the firſt, although the ſame party ſucceed on the ſecond trial, he ſhall not have the coſts of the firſt: for unleſs the coſts be reſerved in the rule to abide the event of the ſecond trial, the party ſucceeding is not entitled to receive them. *Maſon* v. *Skurray*. 753

29. The like point. *Hankey* et al. Aſſignees of John and Benjamin Vaughan, v. *Smith* et al. 753. *Smith* v. *Hale*. *Ibid.*

30. But where after the argument of a ſpecial caſe, the Court directed a new trial, becauſe the caſe was inſufficiently ſtated; and the defendant, without going to trial again, gave the plaintiff a cognovit; the Court held, that the defendant was liable to pay the coſts of the former trial. *Booth* v. *Atherton*. *Ibid.*

31. Where a cauſe having been once tried, a new trial is granted, but a juror withdrawn, on the party who gained the verdict at the firſt trial, undertaking generally to pay the other his coſts, ſuch an undertaking includes only the coſts of the ſecond trial. *Rouſe* v. *Bardin*. *Ibid.*

32. Where there are two trials, and the verdicts are the ſame way in each, the party in whoſe favour they are found, is entitled to the coſts of both trials; but where the verdicts are different ways, there the coſts of the former trial are not allowed. *Trelawney* v. *Thomas*, 754.—*Parker* v. *Wells*. 754

33. But where a cauſe has been referred by rule of *Niſi Prius, and the coſts are directed to abide the event*, that muſt be taken to mean the *legal event*. *Swinglehurſt* v. *Altham* et al. *Ibid.*

34. To an action of treſpaſs, the defendant pleaded the general iſſue, and three ſpecial pleas of juſtification. At the trial, a verdict was given for the plaintiff on the general iſſue and the two juſtifications, and for the defendant on the laſt juſtification. A rule had been obtained to ſhew cauſe, why the maſter in the taxation of coſts ſhould not allow ſuch coſts only

only as were incurred upon the iſſues found for the plaintiff, without allowing to the plaintiff any coſts upon the iſſue found for the defendant; and after cauſe ſhewn, the rule was made abſolute. *Kirk* v. *Nowill* et al. 755

35. If one of ſeveral pleas pleaded by a defendant be adjudged bad on a demurrer to the plaintiff's replication, the plaintiff is entitled to have the coſts of thoſe pleadings deducted from the coſts taxed for the defendant upon the *poſtea*, if afterwards upon trial of the iſſues joined on the other pleas, the defendant ſhould have a verdict, even though it ſhould appear on the whole of the record, that the plaintiff had no cauſe of action. *Duberley* v. *Page* et al. 756

36. Where a defendant removes proceedings by *recordari facias loquelam*, from a county court into one of the ſuperior courts, and ſigns judgment of *non pros* in default of the plaintiff's appearing, he is entitled to coſts. And where by the writ each party has a day to appear in court, and the defendant may be damnified by the plaintiff's not appearing, he may appear and demand him; and if the plaintiff do not appear, the defendant is entitled to ſign judgment of *non pros*, and to have his coſts. *Davies* v. *James*. 758

37. Wherever a plaintiff would be entitled to coſts, the defendant is ſo reciprocally. As in an action brought by the party grieved, againſt the inhabitants, on 9 *Geo.* 1. c. 22. ſ. 7. for ſatisfaction and amends for damages ſuſtained by the maliciouſly ſetting on fire a barn and outhouſe belonging to the plaintiff. *Greetham*, widow, v. *the Inhabitants of the Hundred of Theale*, 759 —*Jackſon*, v. *the Inhabitants of Caleſworth*. 760

38. So where a *qui tam* informer on the ſtat. 21 *Hen.* 8. c. 13. for non-reſidence is non-ſuited, the defendant is intitled to coſts. *Wilkinſon*, q. t. v. *Allot*. 761

39. So in debt for the penalty of the *habeas corpus* act, 31 *Car.* 2. c. 2. ſ. 5. againſt the defendant, who was keeper of Colcheſter gaol, for refuſing the plaintiff (being the party grieved) a copy of the warrant of commitment. Plea *nil debet*. *Ward* v. *Sell*. 762

40. So in this caſe, which was an action upon the caſe againſt the defendant as ſheriff of the county of Lancaſter, for refuſing to take bail under the ſtat. 23 *Hen.* 6. c. 9. wherein the plaintiff had obtained a verdict, with 40*s.* damages. *Creſſwell*, v. *Hoghton*. *Ibid.*

41. So in this caſe, which was an action on the ſtat. 29 *Eliz.* c. 4. againſt the ſheriff for treble damages, for taking more upon a levy of execution upon the plaintiff's goods than the fees allowed by that act. *Tyte* v. *Glode* et al. 764

42. In an action of debt on the ſtat. 2 & 3 *Ed.* 6. c. 13. to recover treble the value of tithes not ſet out: there was alſo a count for the ſingle value: and the Court allowed the coſts to be taxed on the count for the ſingle value. *Barnard* v. *Moſs*. *Ibid.*

43. An award of "coſts ſuſtained in the action," does not include the coſts of the reference. *Browne* v. *Marſden* et al. 765

44. If the plaintiff enter a *noli proſequi*, the defendant is entitled to coſts under the 8 *Eliz.* c. 2. ſect. 2. *Cooper* v. *Tiffin*. *Ibid.*

45. If there be two defendants in an action of *aſſumpſit*, one of whom ſuffers judgment by default, and the other obtains a verdict, he who obtains the verdict is entitled to coſts. *Shrubb* v. *Barrett* et al. *Ibid.*

46. Coſts for not going to trial, ſhall be paid to a defendant, by the courſe of the Court, on informations for miſdemeanors, where the proſecutor does not countermand notice of trial in time. *Rex* v. *Heydon*, *Head*, and *Roper*. 766

47. Coſts are not payable for not going to trial on a traverſe according to notice, if they be not occaſioned by the party's own default. *Rex* v. *Righton*. *Ibid.*

48. The king is only a truſtee for the

the party, in a forfeited recognizance. *Rex* v. *Eyres* and *Bond*, manucaptors of Houncel. 767

49. On a defendant's acquittal on an information, he is not entitled, under the 4 and 5 *W.* & *M.* c. 18. ſect. 2. to coſts beyond the extent of the recognizance entered into by the proſecutor in 20*l.* under that act. *The King* v. *Filewood* et al. *Ibid.*

50. The Court will not on granting an information to compel the proſecutor to undertake to pay all the coſts in caſe he does not ſubſtantiate his charge. *Rex* v. *Brooke.* 768

51. One of two defendants in replevin, cannot have his coſts upon acquittal. *Ingle* v. *Wordſworth* et al. *in replevin.* *Ibid.*

52. An avowant is not a plaintiff within the meaning of 3 *Hen.* 7. c. 10. ſo as to be entitled to coſts on a judgment in his favour. *Stone* v. *Forſyth.* 769

53. Where ſome iſſues in replevin are found for the plaintiff, which entitle him to judgment, and ſome for the defendant; the defendant muſt be allowed the coſts of the iſſues found for him out of the general coſts of the verdict, unleſs the judge certify that the plaintiff had probable cauſe for pleading the matter on which thoſe iſſues are joined. *Dodd* v. *Joddrell.* 770

54. Where the plaintiff in replevin pleads ſeveral pleas in bar of an avowry, on which iſſues are joined, and one of them is found for him, which eſtabliſhes his right of action, and the others for the defendant, and the judge does not certify under ſtat. 4 *Anne*, c. 16. the defendant is entitled to the coſts, not only of the pleadings which form, but alſo of the trial of thoſe iſſues which are found in his favour. *Brooke* v. *Willet.* 771

55. By a canal act, the company were authorized to take certain lands for the purpoſes of the act, on making certain payments, either by annual rents or ſums in groſs; and the perſons from whom the lands were to be taken, were empowered to diſtrain the goods of the company, even off the premiſſes, in caſe of non-payment of ſuch ſums: an avowant, ſtating a diſtreſs under this act of parliament, has been held not entitled, on obtaining a verdict, to double coſts under the ſtat. 11 *Geo.* 2. c. 19. ſec. 22. *Leominſter Canal Navigation*, v. *Thomas Norris and Harold*, 772. *Idem* v. *Cowell.* 775

56. To entitle a conſtable, &c. to double coſts under 7 *Jac.* 1. c 5. after a verdict for him, it muſt be certified, by the judge who tried the cauſe, that he was acting in the execution of his office. *Grindley* v. *Holloway.* 776

57. But where there is a ſpecial verdict, and it appears by the facts there found, that the act for which the action was brought was done by the defendant, by virtue or reaſon of his office, as a juſtice of peace, &c. the maſter muſt tax double coſts, though there has been no certificate, nor allowance by the judge who tried the cauſe. *Rann* v. *Pickins.* 776

58. To entitle a defendant (an officer) to double coſts under the ſtatute of 7 *Jac.* 1. c. 5. there muſt be a certificate of the judge who tried the cauſe (which may be granted either at the trial or afterwards), that the defendant was ſuch an officer, and that the action was brought againſt him for ſomething done by him in the execution of that office. *Harper* v. *Carr.* 777

59. A juſtice of peace, who has proſecuted a gaoler to conviction for ſuffering a priſoner to eſcape, committed by him on a charge of felony, is not entitled to the coſts of the conviction under the 5th *W.* & *M.* c. 11. ſ. 3. *The King* v. *Sharpneſs.* 777

60. A juſtice of the peace who indicts a road for being out of repair (the indictment being afterwards removed here by *certiorari*), is entitled to coſts under ſtat. 5 & 6 *W.* & *M.* c. 11. ſ. 3. if the defendant be convicted. *The King* v. *Kettleworth.* 778

61. The proſecutor of an indictment for ſtopping a common footway, who had uſed it for ſome years before

before it was ſtopped, is a party grieved within the meaning of 5 *W. & M.* c. 11. ſ. 3. *The King* v. *W. Williamſon.* 780

62. An attachment for non-payment of coſts taxed and liquidated, may be moved for on the laſt day of term. *Ibid.*

63. A clerk in court's bill included in an attorney's, and taxed together with it, was ordered, after the attorney's death, to be paid by his client to the clerk in court, and the remainder to the attorney's executrix. *Rex* v. *Smollet*, and *Rex* v. *Hamilton. Ibid.*

64. No action will lie in the court of C. B. to recover coſts ordered to be paid by a rule of an inferiour court, in the courſe of a ſuit there, notwithſtanding the defendant may not be liable to an attachment of the inferior court, by being reſident out of its juriſdiction. But ſuch an action having been brought, the Court ordered the coſts awarded to the plaintiff in the inferior court, to be deducted by the prothonotary from thoſe allowed to the defendant in the action. *Emerſon one*, &c. v. *Laſhley. Ibid.*

65. An attorney is not liable to pay the coſts of taxing his bill, under the ſtat. 2 *Geo.* 2. c. 23. ſ. 23. where the deduction of one-ſixth is occaſioned, not by the particular *items* being taxed, but by a whole branch of it being diſallowed. *White one*, &c. v. *Milner.* 784

66. The court will not compel the plaintiff in a *qui tam* action, to give ſecurity for coſts upon the affidavit of the lowneſs of his circumſtances. *Golding*, q. t. v. *Barlow*, 785. *Field* q. t. v. *Carron.* 785

67. The court of B. R. ſtayed the proceedings in this action, till the leſſor of the plaintiff, who lived in Ireland, ſhould give ſecurity for the coſts; although it was an ejectment brought under the direction of the court of Chancery, where the bill was retained till after trial of the ejectment; and ſecurity had already been given there for 40*l.* *Denn*, ex dimiſſ. *Lucas* v. Fulford. *Ibid.*

68. But a rule for the leſſor of the plaintiff to give ſecurity for coſts, in an ejectment depending, was refuſed in this caſe. *Doe*, on the demiſe of Selby v. *Alſton*, *Bart.* 785

69. Formerly the court of B. R. did not require ſecurity for coſts of a foreign plaintiff, nor of one gone abroad. *Boſwell* v. *Iriſh*, 786. *Nuncomar* v. *Burdett.* 786

70. But it is now the practice of the B. R. if the plaintiff reſide abroad, to ſtay proceedings till he give ſecurity for the coſts. *Pray* et al. v. *Edie*, 786. *Fitzgerald*, v. *Whitmore. Ibid.*

71. But the court of B. R. will not ſtay the proceedings till the plaintiff, a foreigner, give ſecurity for the coſts unleſs the defendant have put in bail. *De la Preuve* v. *The Duc de Biron.* 787

72. And if a foreigner ſue two defendants, and only one of them puts in bail, that one may, in B. R. require the plaintiff to give ſecurity for the coſts, without putting in bail for the other defendant. *Carr* v. *Shaw and Price. Ibid.*

73. And a rule calling on the plaintiff, who had left the kingdom, to give ſecurity for the coſts, may be made after the parties are at iſſue, and the plaintiff has given notice of trial for the ſittings after term. *Parker* v. *Hargreaves. Ibid.*

74. Formerly the court of C. B. would not require the plaintiff to give ſecurity for coſts, either on account of his being a foreigner, or inſolvent, if he reſided in England, though the affidavit ſtated, "that he was a foreigner, had left his country to avoid being arreſted for debt, and was in England inſolvent." *Parquot* v. *Eling. Ibid.*

75. So in this caſe the Court refuſed to require the plaintiff to give ſecurity for the coſts, merely on account of his reſidence abroad. *Porrier* v. *Carter. Ibid.*

76. However, the practice of the court of C.B. is now conformable with that of the court of B. R. in this reſpect. *Ganesford* v. *Levy. Ibid.*

77. But a foreign ſeaman having brought an action for his wages, againſt a foreigner, the court of C. B. refuſed to compel him to give ſecurity for coſts, on account of his being on a voyage on board an Engliſh ſhip. *Henſchen* v. *Garves.* 787

78 Nor will the court of C.B. ſtay proceedings till ſecurity is given for the coſts, in an action by a foreign ſeaman ſerving on board an Engliſh ſhip. *Jacobs* v. *Stevenſon.* 788

79. And, after a defendant had agreed to take ſhort notice of trial, the court of C. B. will not compel the plaintiff, a foreigner, and reſident abroad, to give ſecurity for coſts. *Michel* v. *Pareſki.* *Ibid.*

80. Coſts cannot be given on refuſal of a rule to ſhew cauſe. *Waldron* v. *Norris.* *Ibid.*

81. The ſtatute for judgment, as in caſe of a nonſuit, does not extend to a writ of right, ſo as to give coſts to the tenant. *Newman* v. *Goodman.* 789

82. Coſts are not allowed in C. B. where a defendant pleads a tender of half a guinea, which is found againſt him, if the judge certifies, upon the 43 *Eliz.* that the damages are under 40*s.* *Bartlet* v. *Robins.* *Ibid.*

83. If the plaintiff in treſpaſs *vi et armis* for beating the plaintiff's dog, recover leſs than 40*s.* the judge may certify under the 43 *Eliz.* c. 6. to prevent his recovering more coſts than damages. *Dand* v. *Sexton.* *Ibid.*

84. If the plaintiff, in an action for meſne profits recover leſs than 40*s.* and the judge do not certify that the title came in queſtion, the plaintiff is entitled to no more coſts than damages. *Doe* . *Davis.* 790

85. The 8 & 9 *W.* 3. c. 11. giving coſts in all ſuits of *ſcire facias*, does not extend to a *ſcire facias* to repeal a patent proſecuted in the name of the king. *The King* v. *Miles.* *Ibid.*

86. As to coſts in a ſuit in *formâ pauperis.* *Blood* v. *Lee.* 791

87. A pauper, as ſuch, can never pay coſts, though, it ſeems, that he may receive them for the defaults of his opponents. *Rice* v. *Brown.* 792

See alſo BANKRUPT, No. 158, 159.
BARON AND FEME, No. 33.
COUNTY COURT, No. 2.
COUNTY RATE, No. 3.

COVENANT.

1. In an action of covenant for rent on an indenture, brought by the aſſignees of the leſſor (a bankrupt), the leſſee cannot plead that the leſſor *nil habuit in tenementis.* *Parker* et al. v. *Manning.* 200

2. Where the plaintiff declared in covenant, that the defendant had agreed to build and cover in eighteen houſes within a year and a quarter, yet that the defendant did not, within the time preſcribed, do ſo: the Court held, that the bankruptcy of the defendant did not diſcharge him from the plaintiff's demand. *Baniſter* v. *Scott.* 245

3. A bankrupt's certificate does not diſcharge him from his own expreſs collateral covenant, which does not run with the land. *Mayor* v. *Steward.* *Ibid.*

COUNTY RATE.

1. The ſeſſions have no power to vary the proportions, in which the county rate has uſually been aſſeſſed on the ſeveral pariſhes. *Rex* v. *the Inhabitants of St. Paul, Covent-garden.* 795

2. If a fine be impoſed on a county, which the juſtices at the ſeſſions think illegal, they may order the treaſurer to defray the expence of litigating the queſtion out of the county ſtock. *The King* v. *the Inhabitants of Eſſex.* 796

3. But the juſtices of the peace at the quarter-ſeſſions have no authority to order the coſts of a proſecution for a miſdemeanor, carried on under the direction

direction of the magiſtrates, to be allowed out of the county rates. *The King* v. *the Inhabitants of the Weſt Riding of Yorkſhire.* 798

4. A county rate may be levied, and a high conſtable appointed, *de novo*, for a town erected into a county of itſelf by charter many years before, although no ſuch officer had been appointed, or ſuch rate levied before, the corporation having defrayed the expences out of their own funds.—Alſo a building given by the corporation for the purpoſe of a houſe of correction about ſeventy years ago, and maintained by them to the preſent time, is not a houſe of correction within the exception of the 17 *Geo.* 2. c. 5. ſ. 31. liable to be maintained by the corporation; but the public may be called upon to ſupport it by a county rate. *James* v. *Green.* 799

COUNTY COURT.

1. A defendant is not liable to be ſued in the county court for a debt under 40*s.* if it does not ariſe within the county, though he be reſident therein. *Smith* v. *O'Kelly.* 793

2. If there is a plea of tender as to part, and *non aſſumpſit* as to the reſidue, and the plea of tender being found for the defendant, the balance proved on the *non aſſumpſit* is under 40*s.* yet, if that added to the ſum tendered exceed 40*s.* the defendant, though ſubject to the juriſdiction of the county court of Middleſex, is not entitled to double coſts under 23 *Geo.* 2. c. 33. ſect. 19. *Heaward* v. *Hopkins.* *Ibid.*

3. The juriſdiction of the court of conſcience does not extend to contracts made on the high ſeas; nor will the Court allow a ſuggeſtion for double coſts under 23 *Geo.* 2. c. 33. where the original debt being above 40*s.* has, by a balance of accounts, been reduced below that ſum. *M'Collam* v. *Car.* 794

4. The 25 *Geo.* 3. c. 80. which gives a penalty againſt attornies proſecuting or defending any ſuit in any court, holding pleas, where the debt or damage ſhall amount to 40*s.* or more, does not extend to the ſheriff's court, though an attorney proſecute a ſuit there by virtue of a writ of juſtices for more than 40*s.* *Croſs* v. *Kaye.* *Ibid.*

CURATES.

1. There is a diſtinction between curates licenſed, and curates not licenſed: if not licenſed they are removeable at the pleaſure of the incumbent: but if licenſed, they are only removeable *ſub modo*, for inſtance, by the conſent of the biſhop; or where the rector does the duty himſelf. *Martyn* v. *Hind.* 802

2. It has been decided, that if a rector give a perſon a title to the biſhop, by which he appoints him curate of his church, and undertakes to continue him and pay him a ſalary, till he ſhall be otherwiſe provided of ſome eccleſiaſtical preferment, or for fault by him committed, lawfully removed, he cannot remove him, without cauſe, while he continues rector of that pariſh, and during that time the curate may recover the ſalary in an action upon the title. But if the rector is *bona fide* preferred to another living, the obligation ceaſes. *Martyn* v. *Hind.* *Ibid.*

See alſo CHURCH.

CUSTOM.

1. A cuſtom for "all the inhabitants of a pariſh to play at all kinds of lawful games, ſports, and paſtimes, in the cloſe of *A.* at all ſeaſonable times of the year, at their free will and pleaſure, is good." But a ſimilar cuſtom, "for all perſons for the time being, being in the ſaid pariſh, is bad. *Fitch* v. *Rawling*, *Fitch*, *and Charteris.* 804

2. A cuſtom for poor and indigent houſeholders to cut and carry away rotten boughs and branches in a chaſe cannot be ſupported. *Selby* v. *Robinſon.* 806

3. A cuſtom for the homage to make

make by-laws. *Gerriſh* v. *Rodman*, alias *Rodborne*. 807

4. An ancient cuſtom, that time out of mind the lord of the manor, upon the death and alienation of every tenant, was entitled to the ſecond beſt beaſt; if but one, then to that beaſt; and, if no beaſt, then to a compenſation in lieu of it: is not well laid in a declaration if there be alſo an exception of *meſne ſeigniories*, burgage tenures, and alienations to the uſe of the alienees and their heirs. *Griffin* v. *Blandford*. 808

See alſo COPYHOLD.

CUSTOMS AND EXCISE.

1. The practice of making prime and poſt entries at the cuſtom-houſe is legal and valid. *Timſon* et al. v. *Nodin*. *Ibid.*

2. The taking an active part in company with armed perſons, in defiance of the laws of cuſtoms and exciſe, is a capital felony within the ſtat. 19 *Geo.* 2. c. 34. *Rex* v. *Franklyn*. 809

3. If goods prohibited from being ſold in this country by 11 & 12 *W.* 3. c. 10. are taken out of a warehouſe, and put on board a veſſel, as if for exportation, but in fact with a view to be re-landed, they are liable to be ſeized, though no actual attempt to re-land them has been made. *Wilſon* v. *Saunders*. 810

4. There is no right to ſeize contraband goods in the river before the goods are landed, or offered to ſale; for there is no right to ſeize unleſs the goods be landed, or offered to ſale; the mere bringing the ſhip into port gives no right to ſeize; and this opinion of the Court was grounded on the ſtat. 18 *Car.* 2. c. 7. *Smyth* v. *Reynolds*. 811

5. Treſpaſs will lie againſt cuſtom-houſe officers for entering a houſe and ſearching for ſmuggled goods, if none be found. *Bruce* v. *Rawlins*. *Ibid.*

6. The like point. *Redſhaw* v. *Brook*. 812

7. In ſearches by exciſemen where the preſence of a peace-officer is required, an officer by reputation, attending the rotation juſtices, is not ſufficient. *Hill* v. *Barnes*. 813

8. An exciſe-officer who obtains a ſearch-warrant obtains and executes it at his own peril. *Boſtock* v. *Saunders* et al. 814

9. But where an action of treſpaſs was brought againſt an officer of exciſe for entering under a warrant of two commiſſioners: The Court held, that the defendants were not treſpaſſers; and that the only remedy was by an action on the caſe for obtaining or executing the warrant from bad motives. *Boot* v. *Cooper*. 817

10. A condemnation of goods in the exchequer is ſo concluſive, and ſo alters their property, that treſpaſs will not lie againſt the officer who ſeized them to try the point of forfeiture again. *Scott* v. *Sheerman*. *Ibid.*

11. But a condemnation of goods by the commiſſioners of exciſe is not concluſive evidence to a jury in an action of treſpaſs. *Henſhaw* v. *Pleaſance*, 819. *Solomon* v. *Gordon*. 820

12. An officer of the cuſtoms ſued in trover for ſeizing a ſmuggling veſſel, and held to ſpecial bail, ſhall not be diſcharged on a common appearance, unleſs the true foundation of the ſeizure be ſhewn, and that the defendants are doing all they can to get the veſſel condemned. *Barker* v. *Chalk and Griffith*. 822

13. Upon not guilty in treſpaſs, exciſe officers executing a body warrant iſſued by the commiſſioners, may give the ſpecial matter in evidence. *Wood* v. *Cheſſal*. *Ibid.*

14. An action cannot be maintained againſt officers of the cuſtoms, for ſeizing goods as forfeited by the revenue laws, unleſs it be brought within three months after the actual ſeizure; notwithſtanding a ſuit is inſtituted in the court of exchequer for the condemnation of the goods, which is depending at the expiration of three months. *Godin* v. *Ferris*. 824

15. A judge's certificate that a cuſtom-houſe

tom-houſe officer "had probable cauſe for ſeizing goods," does not extend to injuries accompanying ſuch ſeizure, ſo as to prevent the plaintiff from recovering damages and coſts under ſtat. 23 *Geo.* 3. c. 70. ſ. 29. and 26 *Geo* 3. c. 40. ſ. 31. *Baldwin* v. *Tankard.* 825

16. An exciſe officer after ſeizing ſoap in the execution of his office, at any diſtance from the ſea, is within the protection of 24 *Geo.* 3. Seſſ. 2. c. 47. ſ. 15. *The King* v. *Brady, Kierman, and Rooke.* *Ibid.*

17. Where in an action againſt officers of the exciſe for ſeizing goods, they do not tender amends before action brought, but pay money into court, and afterwards gain a verdict (the jury finding that the ſum paid in was ſufficient) they are entitled only to ſingle coſts, under the ſtat. 23 *Geo.* 3. c. 70. ſ. 31. *Collins* et al. v. *Morgan* et al. 827

18. An exciſe officer is entitled to notice under 23 *Geo.* 3. c. 70. ſ. 30. before an action is brought againſt him for an act not warranted by his official capacity, if done *bonâ fide* in the ſuppoſed execution of his duty. *Daniel* v. *Wilſon.* *Ibid.*

19. If a revenue officer ſeize goods as forfeited, which are not liable to ſeizure, and take money of the owner to releaſe them, the latter may recover back the money in an action for money had and received; and in ſuch an action a month's notice need not be given under the 23 *Geo.* 3. c. 70. ſ. 30. *Irving* v. *Wilſon.* 828

20. The 9 *Geo.* 2. c. 35. ſ. 26. which enacts, that proſecutions for aſſaults on revenue-officers may be tried in any county, only extends to aſſaults on them *quâ* officers. *The King* v. *Cartwright.* 829

21. An action for money had and received will not lie againſt an exciſe officer for an over-payment. *Whitebread* v. *Brookſbank*, 830. *Greenway* v. *Hurd.* 830

22. A certificate under 19 *Geo.* 2. c. 34. or 4 *Geo.* 3. c. 15. that there was a probable cauſe of ſeizure, may be granted at a period ſubſequent to the trial, and out of court. *Sullivan* v. *Montague.* 830

23. Alſo, if an action be commenced in the court of King's Bench, againſt an officer of the cuſtoms, for ſeizing goods forfeited by the revenue laws, the court of exchequer will, on a motion in a ſummary way, exerciſe an excluſive juriſdiction, and by an order of court, remove ſuch action out of the court of King's Bench, into the office of Pleas in the Exchequer. *Wenham*, et al. v. *Newport*, et al. 834

See alſo EXCISE.

DAMAGES.

1. Damages are not recoverable for the detention of the debt in an action on a penal ſtatute. *Cuming* v. *Solby.* 476

See alſo COSTS.

DEL CREDERE.

See BANKRUPT, No. 52.

DEEDS.

1. A redelivery by a *feme*, after death of *baron*, of a deed delivered by her whilſt covert, is a ſufficient confirmation of ſuch deed ſo as to bind her, without its being re-executed or re-atteſted. *Goodright* ex dim. *Carter* v. *Straphan*, et al. 310

DEER-STEALING.

1. A *certiorari* lies to remove a conviction on 16 *Geo.* 3. c. 30. for deer-ſtealing, if the defendant has not appealed to the quarter-ſeſſions. *The King* v. *Eaton.* 537

DELAY.

1. What ſhall be conſidered wilful delay in the proſecution of a penal action. 477, 478, 479

DESCENT.

1. A cuſtom within a manor, that lands ſhall deſcend to the elder ſiſter, where there is neither a ſon nor a daughter, does not extend to an eldeſt niece; but the lands muſt deſcend according to the rules of the common law, in default of ſuch a ſon, daughter,

ter, and ſiſter; and a cuſtomary of a manor, appearing to be of great antiquity, and delivered down with the court rolls from ſteward to ſteward, although not ſigned by any perſon, is good evidence to prove the courſe of deſcent within the manor. *Denn*, on the ſeveral demiſes of Ann Goodwin, and George Wragg, and Ann his wife v. *Spray*. 619

See alſo COPYHOLD, No. 1.

DISORDERLY HOUSE.

1. The crown may remove an indictment for keeping a diſorderly houſe by *certiorari*. *The King* v. *Davies*. 538

DISTILLERS.

See EXCISE, No. 6.

DISTRESS.

1. In the caſe of an abſolutely ſtinted common, in point of number, one commoner may diſtrain the ſupernumerary cattle of another. *Hall* v. *Harding* et al. 572

DISSENTERS.

1. An indictment found at the quarter-ſeſſions, upon the toleration-act 1 *W.* & *M.* c. 18. for diſturbing a diſſenting congregation, may be removed into this court, by *certiorari*, before verdict; and, upon conviction of ſeveral defendants upon ſuch indictment, each is liable to the penalty of 20l. impoſed by that ſtatute. *The King* v. *Hube* et al. 540

2. A perſon who has not taken the ſacrament within a twelvemonth preceding the election, according to the ſtat. 13 *Car.* 2. ſ. 2. c. 1. cannot be compelled to take upon himſelf any office or place, concerning the government of any corporation to which he may have been elected. *Harriſon* v. *Evans*. 730

EJECTMENT.

See COSTS, No. 67, 68.

ELECTION.

See BRIBERY, CORPORATION.

ELOPEMENT.

See ADULTERY.

ENGRAVINGS.

1. The aſſignee of a print may maintain an action on the ſtat. 17 *Geo.* 3. c. 57. againſt any perſon who pirates it, and in ſuch an action it is not neceſſary to produce the plate itſelf in evidence; one of the prints taken from the original plate is good evidence. *Thompſon* v. *Symonds* et al. 657

ESTATE FOR LIFE.

1. Where a copyhold eſtate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the eſtate. *Mardiner* v. *Elliot*. 648

EVIDENCE.

1. Parol evidence cannot be admitted to vitiate a record, and prove it to have been wrong, though it may be admitted to prove it right. *Dickſon* v. *Fiſher*. 468

2. Huſbands and wives cannot, in any caſe, be witneſſes either for or againſt each other. *Davis* v. *Dinwoody*. 329

3. Neither can any declaration, made by the wife in prejudice of her huſband's right, be given in evidence. *Alban* et ux. & *Ratcliffe* et ux. Executors, v. *Pritchett*. 330

See alſo BILLS OF EXCHANGE, No. 22, 25, 63, 64, 65, 66, 68, 71.
BARON AND FEME, No. 34, 35.
BASTARDS, No. 1, 4. 16.
BROKERS, No. 2.
CONDEMNATION.
CONSPIRACY, No. 2.
CUSTOMS and EXCISE, No. 13.
ENGRAVINGS.

EXCHEQUER.

See CUSTOMS and EXCISE, No. 7.
CONDEMNATION, No. 1, 2.

EXCISE.

EXCISE.

1. The price of barley *at the port*, is the rule for payment of the bounty upon the exportation of ſtrong beer, and not the average price of barley throughout the kingdom. *Whitbread* v. *Brook Bank.* 835

2 A conviction, *in treble the value* of a certain quantity of tea, ſeized on the defendant's grounds; ſo far as related to the penalty of treble value was quaſhed, but the reſt, as to the condemnation of the tea, and the cart and horſes, was, by conſent, and in order to accommodate the diſpute, adjudged good. *Rex* v *Hale. Ibid.*

3. It is an offence within the ſtat. 7 *Geo* 2. c. 19. to mix the vapour of ſulphur and brimſtone with hops. *The King* v. *T. Pack. Ibid.*

4. No appeal lies to the ſeſſions from a conviction of two juſtices for an offence, under 25 *Geo.* 3. c. 72. ſ. 9. relating to printed goods, notwithſtanding it contains a general clauſe of reference to all former exciſe laws, ſome of which give ſuch appeal, and incorporate all the powers, &c. provided by 12 *Car.* 2. c. 24. or by any other law, relating to the exciſe or inland duties, under the management of the commiſſioners of exciſe, for managing, mitigating, or adjudging, the duties, or penalties, granted by this act. *The King* v. *the Juſtices of Surrey.* 836

5. A dealer in ſpirits, having a permit to remove 420 gallons, and removing 450, forfeits the whole quantity; and the fraudulency of the tranſaction is not a matter of enquiry by a jury. *Hall* v. *Dracord.* 838

6 The duty upon fermented waſh attaches as ſoon as the officer has guaged the waſh, and aſcertained the quantity; after which the commodity is at the entire riſk of the diſtiller, and the public have no concern with any ſubſequent loſs or deterioration to which it may be ſubject in the hands of the manufacturer. *Rex* v. *Sikes.* 840

7. A perſon who ſells ſpirituous liquors by retail without a regular licence from two juſtices of the peace, is liable to the penalties. *The King* v. *M Down s* et al. 841

8. A perſon who intends to become a dealer in foreign wine, muſt take out his licence, and enter his warehouſe, before he lays in his ſtock. And a dealer in wine is not entitled to a permit to remove wine ſold, which wine was laid in before he took out his licence. *The King* v. *Commiſſioners of Exciſe.* 844

9. If a perſon, ſubject to the payment of exciſe duties, who is in arrear for the ſingle duties, becomes a bankrupt, and is convicted after the aſſignment of his effects, the double duties are a lien upon the exciſeable commodities, utenſils, and materials; in the hands of his aſſignees; and the commiſſioners or magiſtrates may authoriſe the penalty to be levied upon all ſuch commodities, and all the materials, preparations, utenſils and veſſels for making thereof, *in the cuſtody of the bankrupt, or any perſon or perſons in truſt for him* *Stracey* et al. v. *Hulſe* et al. 129

10. But if the warrant be iſſued to levy the penalty *on the goods of the bankrupt generally*, it will be bad, and cannot juſtify the ſeizure of goods in the hands of the aſſignees. *Auſtin* v. *Whitehead* 130

See alſo CUSTOMS and EXCISE.
CERTIORARI, No. 17, 18.

EXECUTIONS.

1. An execution againſt the goods of a bankrupt taken out after his certificate is ſigned by the creditors, and before it is allowed by the chancellor, is valid. *Callen* v. *Meyrick.* 233

See alſo COSTS, No. 10.

EXECUTORS AND ADMINISTRATORS

1. If an executor becomes bankrupt, the commiſſioners cannot ſeize the effects of the teſtator. *Howard* v. *Jemmett.* 102

2. Where a payee of a bill of exchange indorſes it to *A.* and *B.* as *executors*, they may declare as ſuch

an action againſt the acceptor. *King* v. *Thom, and the ſame* v. *M Linnan* 397

3. If an executor or adminiſtrator ſue a defendant who pleads the general plea of bankruptcy, which at the trial, is found for him, the executor or adminiſtrator is not liable to coſts under the ſtat. 5 *Geo* 2. c. 30. ſ. 7. *Martin* et al. v. *Norfolk* 287

4. But if an executor, who becomes bankrupt, plead a falſe plea, after the commiſſion iſſued, he is liable to execution for the coſts. *Howard* et al. v. *Jemmett*. *Ibid.*

5. A man poſſeſſed of a term of years, in right of his wife, as executrix of her former huſband, has power to grant and convey the ſame *Thruſtout* v. *Coffin*. 289

EXPORTATION.

See CUSTOMS and EXCISE, No. 3.

FARMERS.

1. Farmers are not liable to the bankrupt laws. *Port* v. *Turton*. 13

FEIGNED ISSUE.

1. On a feigned iſſue, coſts follow the verdict. But in future, when the Court permit parties to try a feigned iſſue, they will compel them to conſent, that the coſts ſhall be in the diſcretion of the Court.—A feigned iſſue cannot be tried without the conſent of the Court.—But if feigned iſſues be tried without ſuch conſent, the Court will order all the proceedings to be ſtayed; for ſuch a proceeding is a contempt of the Court. *Loſkins* v. *Lord Berkeley*. 747

FELONY.

1. The taking an active part in company with armed perſons, in defiance of the laws of cuſtoms and exciſe, is a capital felony within the ſtat. 19 *Geo.* 2. c. 34. *Rex* v. *Franklyn*. 809

See alſo COIN.

FINE.

See COPYHOLD, No. 11, 13.

FORFEITURES.

See BY-LAW. CONVICTION.

FORGERY.

See BILLS of EXCHANGE, No. 7, 19, 20, 69.

FORMA PAUPERIS.

See COSTS, No. 85, 86.

FRAUDULENT CONVEYANCE.

1. What ſhall be deemed an act of bankruptcy. 23

FRAUDULENT SALES.

See BANKRUPT, No. 15, 16, 17, 18.

FUNDS.

See BANKRUPT, No. 106.
BROKERS.

GAMES.

See CUSTOM, No. 1.

GAMING.

1. Inſuring in the lottery is not gaming within the ſtat. 5 *Geo.* 2. c. 30. ſ. 12. ſo as to avoid a bankrupt's certificate. *Lewis* v. *Piercy*. 280

2. The aſſignees of a bankrupt may recover from the winner, money loſt by the bankrupt before his bankruptcy at play, in an action of debt on the ſtat. 9 *Anne*, c. 14. *Brandon* et al. v. *Pate*. 184

GOVERNMENT.

1. Agents for government are not liable on contracts for them. *Macbeath* v. *Haldemand*, 600.—*Unwin* v. *Wolſeley*. 603

HIGHWAYS.

1. The proſecutor of an indictment for ſtopping a common footway, who had uſed it for ſome years before it was ſtopped, is a party grieved within the meaning of 5 *W.* & *M.* c. 11. ſ. 3. and entitled to coſts. *The King* v. *W. Williamſon*. 780

See alſo CERTIORARI, No. 6.
COSTS, No. 60, 61.

HOPS.

See EXCISE, No. 3.

HOUSE

HOUSE OF CORRECTION.

See COUNTY RATE, No. 4.

HUNDRED.

See COSTS, No. 37.

INCLOSURE ACT.

1. Where an inclosure-act directed, that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large." And a proprietor brought an action, claiming nine distinct rights, and recovered for three only. The Court held, that he should only have his costs on those issues found for him, and that the defendant should have his costs of the other issues. *Braithwaite* v. *Bradford.* 746

INDIA.

See BANKRUPT, No. 62. BILL OF EXCHANGE, No. 52, 53.

INFORMATION.

See COSTS, No. 27, 38, 50, 66.

INSOLVENT ACT.

1. The acceptor of a bill having been charged in execution, at the suit of the holder, and afterwards discharged under the Insolvent Act, does not exonerate the drawer. *Macdonald* v. *Bovington.* 437

See STAMP. No. 2.

INQUIRY.

1. Where there is judgment by default, in an action on a promissory note or bill of exchange, the Courts of B. R. and C. B. will refer it to the proper officer, to ascertain the damages and costs, and calculate interest, without a writ of inquiry. *Rashleigh* v. *Salmon* — *Andrews* v. *Blake.* — *Longman* et al. v. *Fenn*, 451 — *Shepherd* v. *Charter.* 452

2. But where the defendant suffers judgment by default, and it is for foreign money, the value can only be ascertained by a jury. *Maunsell* v. *Lord Massareene.* 452

IN TRANSITU.

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JUSTICES OF THE PEACE.

1. Justices ought to return convictions to the sessions whether appealed against or not. *The King* v. *Eaton.* 557

2. Where justices of the peace are complained of without reason, they shall have costs. *Rex* v. *Palmer and Baine.* 743

3. A justice of peace, who has prosecuted a gaoler to conviction for suffering a prisoner to escape, committed by him on a charge of felony, is not entitled to the costs of the conviction under the 5th *W.* & *M.* c. 11. s. 3. *The King* v. *Sharpness.* *Ibid.*

LANDLORD AND TENANT.

1. A tenant from year to year of a house, at a yearly rent, became a bankrupt in the middle of the year, and his assignees entered and kept possession for the remainder of the year; and the Court held that the lessor could not maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving *their special instance and request* for the bankrupt to occupy during the time that elapsed before the bankruptcy. *Nash* v. *Tatlock* et al. Assignees of Liddard. 205

See also BANKRUPT, No. 50.

LAND-TAX.

1. The Court will not grant a *certiorari* to remove the assessment of the land tax. But if an information be moved for against he commissioners of the land tax, the Court will

admit an atteſted copy of the aſſeſſment as evidence, inſtead of the original. *The King* v. *King* 54

2. The land tax is not to be deducted out of the two years' value, payable as an arbitrary fine for admiſſion to a copyhold eſtate. *Grant* v. *Aſtle.* 644

LEASE.

1. If a leaſe contain a proviſo that the landlord ſhall re-enter on the tenant committing any act of bankruptcy, whereon a commiſſion ſhall iſſue, and the tenant does become bankrupt, his aſſignees are not intitled to hold the premiſes againſt the landlord. Roe ex dim. *Hunter* v. *Gallierc.* 37

2. The bankruptcy of the leſſee is not a bar to an action of covenant brought againſt him. *Mills* v. *Auriol.* 247

LEET.

1. A *certiorari* lies to remove a preſentment in a court leet; and when removed, the preſentment is traverſable in B. R. *Rex* v. *James Koupell.* 53

2. But the Court will not grant a *certiorari* to remove the record and proceedings out of a court leet, in order to enquire into the propriety of an amerciament, where the fine has been eſtreated, and paid. *The King* v. *Heaton.* 532

See alſo CONSTABLE. No. 1.

LEVANT and COUCHANT.

What—ſee COMMON, No. 4, 6.

LIEN.

1. If a trader becomes a bankrupt, being under acceptances to a large amount, in favour of another; and that perſon, in whoſe favour the bills have been accepted (not knowing of the bankruptcy), ſend a parcel of goods, for the ſpecific purpoſe of enabling the bankrupt to diſcharge the acceptances, which parcel is taken by the aſſignees; the perſon who ſent ſuch goods, having paid the bankrupt's acceptances, may recover back the goods ſo ſent after the bankruptcy; on the ground that they were ſent for the particular purpoſe of paying thoſe acceptances, and that, as that purpoſe was not anſwered, the property in the goods, &c. remained in him. *Tooke* v. *Hollingworth.* 112

2. Alſo bills remitted to a factor or banker, while unpaid, are in the nature of goods unſold; and if the factor becomes bankrupt, muſt be returned to the principal, ſubject to ſuch lien as the factor may have thereon. *Zin* v. *Walker.* 125

3. Where a bankrupt is in poſſeſſion of the goods of another, *bona fide* with the conſent of the owner at the time of the bankruptcy, *for a ſpecific purpoſe*, beyond which he has not the right of diſpoſition or alteration, that is not ſuch a poſſeſſion as entitles the aſſignees to recover the value of them under the 21 *Jac.* 1. c. 19. ſ. 11. *Collins* v. *Forbes.* 131

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LIMITATIONS, STATUTE OF.

1. A debt at law notwithſtanding the ſtatute of limitations incurred will ſupport a commiſſion of bankruptcy. *Quantock* v. *England.* 76

LONDON.

1. A *feme covert* cannot ſue without her huſband as a ſole trader by the cuſtom of London in the ſuperior courts at Weſtminſter. *Caudell* v. *Shaw.* 327

See alſo BANKRUPT, No. 1.

MANDAMUS.

1. *Lis pendens* is not a good return to a mandamus to ſwear in churchwardens, though accompanied with very ſpecial circumſtances. *Rex* v. *Doctor Harris.* 559

2. If the lord of a manor refuſe to admit a perſon to whom a copyhold is ſurrendered, on account of a diſagreement reſpecting the fine to be paid, the Court will grant a *mandamus* to compel the lord to admit without examining the right to the fine. *The King* v. *the Lord of the Manor of Hend n,* and

and *Richard Troward*, the ſteward of the manor. 642

3. But the Court will not grant a *mandamus* to admit a copyholder, claiming by deſcent. *The King* v. *Rennett*. *Ibid.*

MARRIAGE ACT.

1. Baſtards are within the meaning of the marriage-act, 26 *Geo.* 2. c. 33. which requires the conſent of the father, guardian, or mother, to the marriage of perſons under age, who are not married by banns. *The King* v. *the Inhabitants of Lodnett*. 332

MASTER AND SERVANT.

1. If a *feme covert*, without any authority from her huſband, contract with a ſervant by deed, the ſervant having performed the ſervice ſtipulated, may maintain aſſumpſit againſt the huſband. *White* v. *Cuyler*. 295

MEASURES.

See CORN.

MUTUAL CREDIT.

1. Goods were ſold to the defendant on the expreſs condition, that he ſhould not pay for them till certain bonds were diſcharged by a bankrupt; thoſe bonds were not diſcharged by him, and the defendant was obliged to ſatisfy them, held that the aſſignees could not maintain their action for the goods. *Dobſon* v. *Lockhart*. 109

2. Alſo a creditor may, on the event of his debtor becoming a bankrupt, retain money come to his hands where mutual credit has been given; though his debt is not payable till a future day, and ſuch retainer is contrary to the agreement between the parties. *Atkinſon* et al. v. *Elliot* et al. 111

NEW TRIAL.

See COSTS, No. 28, 29, 30, 31, 32.

NOTICE.

See BILLS OF EXCHEQUER, No. 29, 30, 34, 35, 36, 37, 38, 39, 40.

CUSTOMS AND EXCISE, No. 18, 19.

OFFICERS.

1. An officer appointed by government, treating as an agent for the public, is not liable to be ſued upon *contract* made by him in that capacity. *Macheath* v. *Haldimand*. 600—*Unwin* v. *Wolſely*. 603

OVERSEER.

See BANKRUPT, No. 135.

PARLIAMENT.

See BRIBERY.

PARTNERS.

1. If one of two partners become bankrupts, the ſolvent partner may, if for a valuable conſideration and without fraud, diſpoſe of the partnerſhip effects; and if he afterwards fail, the aſſignees under a joint commiſſion againſt both cannot maintain trover againſt the *bonâ fide* vendor of ſuch partnerſhip effects. *Rex* v. *Hanbury*. 103

2. Partners in a ſhip and cargo, by diſcharging the notes of one who becomes a bankrupt, cannot ſtand in his place for any ſhare of his profits. *Smith* v. *De Silva*. 157

3. If a bill or note be made payable to ſeveral perſons *who are not in copartnerſhip*, the indorſement muſt be by all of them. *Carvick* v. *Vickery*. 397

PAYMENT.

1. If the ſeller of goods take notes or bills for them, without agreeing to run the riſk of the notes being paid, and the notes turn out to be worth nothing, this will not be conſidered as payment. *Owenſon* v. *Morſe*. 421

PENSION.

1. A voluntary penſion granted to the wife by the crown during pleaſure, ſhall not exempt the huſband from being liable to be ſued by his wife's

wife's creditors, for neceſſaries.—*Thompſon* v. *Hervey*. 239

PERJURY.

1. By the ſtat. 1 *Jac.* 1. c. 15. ſ. 11. and 12. and 5 *Geo.* 2. c. 30. ſ. 29. after any perſon has been convicted on an indictment, for falſely ſwearing to a debt under a commiſſion of bankrupt (on which indictment, he is to ſuffer the puniſhment inflicted by the ſeveral ſtatutes againſt perjury), the aſſignees of the bankrupt may recover from him double the ſum ſo ſworn to, *in an action*; in which it is ſufficient to ſtate the conviction of the defendant on the indictment, without alſo alleging, that the defendant did take ſuch falſe oath. And in ſuch an action, the defendant cannot take advantage of any defect in the judgment on the indictment; that can only be done on a writ of error. *Holmes* et al. Aſſ. of Brook, a bankrupt, v. *Walſh*. 188

PLAYS AND GAMES.

See CUSTOM, No. 1.

PLEADINGS.

1. On a general plea of bankruptcy under 5 *Geo.* 2. c. 30. the plaintiff may give the condition of a bond, on which an action is brought, in evidence, to ſhew that he is not barred by the certificate. *Alſop* v. *Price*. 285

2. The defendant pleaded *puis darrein continuance*: viz. that on ſuch a day he became a bankrupt, and concluded with an averment in bar: The Court held the plea bad, becauſe the defendant had not averred that he had conformed, &c. *Paris* v. *Salkeld*. 286

3. But, in this caſe, the Court ſaid that it was not neceſſary. *Willan* v. *Geordini* *Ibid.*

4. But a plea of bankruptcy muſt ſtate that the *cauſe of action* accrued before the bankruptcy. *Charlton* v. *King*. *Ibid.*

5. A plea of bankruptcy need not be ſigned by counſel. *Leigh* qui tam v. *Monteiro*. 287

POOR.

See BASTARDS. CUSTOM, No. 2.

QUO WARRANTO.

1. The Court will not grant a *quo warranto* information, to try the validity of an election to the office of churchwarden. *The King* v. *Shepherd* et al. 560

See alſo BY-LAW. CORPORATION.

PRINTED GOODS.

See EXCISE, No. 4.

RECORDARI FACIAS LOQUELAM.

1. Where a defendant removes proceedings by *recordari facias loquelam*, from a county court into one of the ſuperior courts, and ſigns judgment of *non pros* in default of the plaintiff's appearing, he is entitled to coſts. And where by the writ each party has a day to appear in court, and the defendant may be damnified by the plaintiff's not appearing, he may appear and demand him; and if the plaintiff do not appear, the defendant is entitled to ſign judgment of *non pros*, and to have his coſts.—*Davies* v. *James*. 758

RENT.

1. If a trader, after committing an act of bankruptcy, take a ſhop, and agree to pay half a year's rent in advance, where, by the cuſtom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an aſſignment under the commiſſion, and before the year expired, may diſtrain the goods on the premiſes for half a year's rent; or if he buy the tenant's goods at the ſale under the commiſſion, he may retain the amount of the year's rent. *Tuckley* v. *Taylor*. 106

See alſo LANDLORD AND TENANT.

RESIDENCE.

1. Where reſidence is a neceſſary qualification for an election to a corporate office, an occaſional reſidence *bonâ fide* is a ſufficient legal reſidence

ence to ſatisfy the qualification required. *The King* v. *Sargent.* 739

REPLEVIN.

1. One of two defendants in replevin, cannot have his coſts upon acquittal. *Ingle* v. *Wordſworth.* 768

2. An avowant is not a plaintiff within the meaning of 3 *Hen.* 7. c. 10. ſo as to be entitled to coſts on the affirmance of a judgment in his favour upon a writ of error. *Smith* v. *Forſyth.* 769

3. Where ſome iſſues in replevin are found for the plaintiff, which entitle him to judgment, and ſome for the defendant; the defendant muſt be allowed the coſts of the iſſues found for him out of the general coſts of the verdict, unleſs the judge certify that the plaintiff had probable cauſe for pleading the matter on which thoſe iſſues are joined. *Dodd* v. *Joddrell.* 770

4. Where the plaintiff in replevin pleads ſeveral pleas in bar of an avowry, on which iſſues are joined, and one of them is found for him, which eſtabliſhes his right of action, and the others for the defendant, and the judge does not certify under ſtat. 4 *Anne*, c. 16. the defendant is entitled to the coſts, not only of the pleadings which form, but alſo of the trial of thoſe iſſues which are found in his favour. *Brooke* v. *Willet.* 71

5. By a canal act, the company were authorized to take certain lands for the purpoſes of the act, on making certain payments, either by annual rents or ſums in groſs; and the perſons from whom the land was to be taken, were empowered to diſtrain the goods of the company, even off the premiſes, in caſe of non-payment of ſuch ſums: an avowant, ſtating a diſtreſs under this act of parliament, has been held not entitled, on obtaining a verdict, to double coſts under the ſtat. 11 *Geo.* 2. c. 19. ſ. 22. *Leominſter Canal Navigation* v. *Norris and Harold.* 772

ROADS.

See CERTIORARI, No. 6.

COSTS, No. 60, 61.

SCIRE FACIAS.

1. The 8 and 9 *W.* 3. c. 11. giving coſts in all ſuits of *ſcire facias*, does not extend to a *ſcire facias* to repeal a patent proſecuted in the name of the king. *The King* v. *Miles.* 790

See alſo COSTS, No. 10.

SEIZURE.

See CUSTOMS and EXCISE, No. 4, 19.

SESSIONS.

1. The quarter-ſeſſions has a juriſdiction over conſpiracy; and it is ſufficient whether the conſpiracy be to charge a man with criminal acts, or ſuch as only may affect his reputation. *The King* v. *Riſpal.* 591

2. The juſtices at ſeſſions may appoint a committee of magiſtrates, to inſpect the ſtate of a county bridge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace, on behalf of the county; and the ſix days' notice required by 13 *Geo.* 2. c. 18. ſ. 5. before an application is made for a *certiorari* to remove proceedings by juſtices of the peace, muſt be given before making the motion for a rule to ſhew cauſe, why ſuch *certiorari* ſhould not be granted. *The King* v. *the Juſtices of Glamorganſhire.* 484

See alſo BASTARDS, No. 13.

SHERIFF.

See COSTS, No. 40.

SET-OFF.

1. The ſtatutes of ſet-off extend to the aſſignees of a bankrupt. *Ridout* v. *Brough.* 107

2. A broker with a commiſſion *del credere* may ſet off under the general iſſue, a loſs upon a policy happening before a bankruptcy, to an action by the aſſignees of the bankrupt for premiums upon various policies underwritten by him, and for which

which he has debited the broker. *Grove* v. *Dubois*. 108

3. To an action brought by the assignees of a bankrupt, for a debt due to the bankrupt's estate, the defendant cannot set off cash notes, issued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unless he shews further, that such notes came to his hands before the bankruptcy. *Dickson* et al. v. *Evans*. 190

SHIPS.

See ASSIGNMENT.
BANKRUPT, No. 71.
BILLS OF LADING.
CONSIGNMENT.

SMALL DEBTS.

See COUNTY COURT.

SMUGGLING.

See CUSTOMS and EXCISE.

SPIRITUOUS LIQUORS.

See EXCISE, No. 5, 6, 7.

SOLDIERS.

1. Justices have authority to commit a *soldier* for disobeying an order of bastardy; for he is not protected against such commitment by the *Mutiny Act*. *Rex* v. *Archer*, 339.—*Rex* v. *Bowin*. 341

SPORTS.

See CUSTOM, No. 1.

STAMPS.

1. If a bill or note is altered, after it has once issued, and after the time when it was originally payable, a new stamp is requisite, though it be done with the consent of the parties, and before its negociation. *Bowman* v. *Nichol*. 372

2. But a note given for securing the weekly allowance of a prisoner, under the Lords' act, need not be stamped. *Putman* v. *Haynes*, 373.—*Bowring* v. *Edgar*. *Ibid.*

STOCKJOBBING.

See BILLS of EXCHANGE, No. 71.
BROKERS, No. 1.

STOPPAGE IN TRANSITU.

1. The consignor may stop goods *in transitu*, before they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assign the bills of lading to a third person, for a valuable consideration, the right of the consignor, as against such assignee, is divested. *Lickbarrow* v. *Mason*. 38

2. If the consignee of goods, to whom the bill of lading is indorsed in blank, assign it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards, by an agreement between them, they become partners in the goods, by which agreement it appears, that the consignee has not been paid for them, the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods in transitu upon the insolvency of the assignee. *Salomons* v. *Nissen*. 55

3. Where goods were consigned to *A.*, and, on his becoming a bankrupt, his assignee went to the inn where they were arrived, and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt, the consignor could not afterwards stop them, because they were not then in transitu. *Ellis* v. *Hunt*. 58

4. A factor has no lien on goods for a general balance, unless they come into his actual possession; and if, in consideration of goods being consigned to him, he accept bills drawn by the consignor, and pay part of the freight after they arrive, and become insolvent before the bills are due, and before the goods get into his actual possession, the consignor may stop them in transitu. *Kinloch* v. *Craig*. 60

5. If *A.* ship goods, by the order and on the account of *B.* to be paid for at a future day, and bills of lading are

are accordingly ſigned by the maſter of the ſhip, and one of the bills is immediately tranſmitted to *B.*, who, before the arrival of the ſhip at the place of deſtination, ſells the goods, and indorſes the bill of lading to *C.*: if after the arrival of the ſhip, *part of the goods* be delivered to the agent of *C.* and then *B.* becomes bankrupt, without having paid *A.* the price of the goods; by this delivery, the *tranſitus* is at an end, as to the whole of the goods. *Slubey* v. *Heyward.* 64

6. A conſignor's right of ſtopping goods in tranſitu is not taken away, by the conſignees having partly paid for the goods. *Hodgſon* v. *Loy.* 64

See alſo ASSIGNMENT. BILLS OF LADING.

SURPLICE FEES.

1. The words, *dues, and profits*, in ſtat. 10 *Ann.* c. 11. ſ. 16. for dividing of pariſhes, includes ſurplice fees, as well as ſtrict fees. *William Sellon*, clerk, v. *Roger Parry*, clerk. 556

SURRENDER.

See COPYHOLD.

TAYLORS.

1. A by-law, founded on a cuſtom, that no ſtrange perſon, of right, ought to uſe the craft of a taylor within a city, except he be free thereof, is a good by-law. *Woolley* et al. v. *Idle.* 507

TEA.

See CUSTOMS and EXCISE, No. 2.

TENDER.

See COSTS, No. 82.
COUNTY COURT, No. 2.
CUSTOMS and EXCISE, No. 17.

TIMBER.

See ESTATE FOR LIFE.

TITHES.

See COSTS, No. 42.

TOLL.

1. The writ *de eſſendo quietum de theolonio*, is not merely prohibitory, but remedial, on which the parties may plead to iſſue on a queſtion of right. And a corporation to whom it is directed, cannot be attached for contempt, in their corporate capacity, for not returning it; but an attachment in the nature of a *pone*, is the proper remedy to compel them to appear, and the Court will not grant a trial at bar, in an iſſuable term. *The Mayor, &c. of London*, v. *King's Lynn.* 741

TRADE.

See BY-LAW.

TRAVERSE.

See COSTS, No. 47.

TRESPASS.

See ACTION, No. 1, 2, 3, 5, 11.
COSTS, No. 83.
CUSTOMS and EXCISE, No. 5, 9.

TRINITY HOUSE.

1. A younger brother of the corporation of the Trinity-Houſe is not exempt from ſerving the office of headborough. *The King* v. *Thomas Clarke.* 593

TRUSTEES.

1. Truſt effects do not paſs under an aſſignment of the bankrupt's eſtate. *Winch* v. *Keeley.* 102

VAGRANTS.

See CERTIORARI, No. 14.

VENIRE DE NOVO.

1. Where a *venire de novo* is awarded, the party ultimately ſucceeding is only entitled to the coſts of the laſt trial. *Lickbarrow* v. *Maſon.* 750

WALES.

1. A *certiorari* lies to a Welſh quarter-ſeſſions of the peace, to remove an indictment into the King's-Bench. *Rex* v. *Lewis*, 535.—*Rex* v. *Griffiths*, 536.—*Rex* v. *the Inhabitants of Bodonham.* *Ibid.*

WARRANT.

See COMMITMENT.

WINCHESTER BUSHEL.

1. It is illegal to ſell corn by any other meaſure than the Wincheſter meaſure. *The King* v. *J. Major.* 653

2. And the buyer of corn, by any other than the Wincheſter meaſure, forfeits the penalty of 40*s.* beſide the value of the corn, by ſtat. 22 & 23 *Car.* 2. c. 12. *The King* v. *J. Arnold.* 654

WINE.

See EXCISE, No. 8.

APPENDIX

TO THE

SECOND VOLUME

OF

THIS ABRIDGMENT.

Compriſing Caſes determined during the time it has been at preſs.

BANKRUPT.

Act of Bankruptcy.

IN order to conſtitute an act of bankruptcy by departing from the dwelling-houſe a creditor muſt be delayed: and it is not ſufficient (for that purpoſe) that a ſheriff's officer, who comes to levy a *fi. fa.* on the trader's effects, is refuſed admittance after the trader has left his houſe; for as far as reſpects the execution of the writ of *fieri facias*, the plaintiff's abſence from home is perfectly immaterial. The execution is in *rem.* and not *ad perſonam*, and therefore no creditor is delayed in this caſe, an actual delay is as neceſſary as the intent to delay in order to conſtitute an act of bankruptcy.

Barnard *v.* Vaughan *et al.* Hil. Ter. 39 Geo. 3. B. R. 8 *Ter. Rep.* 140.

Petitioning Creditor.

A JUDGMENT creditor who has taken his debtor in execution cannot afterwards ſue out a commiſſion of bankrupt againſt him upon the ſame debt.—For a creditor who has made his election to proceed againſt the body of his debtor, ſhall not afterwards be able by his own act to change the nature of his execution; and the Court held *Barnaby*'s caſe, 1 *Str.* 653. where it was decided that a creditor under ſuch circumſtances cannot ſue out a commiſſion of bankruptcy to be good law.—This was a caſe reſerved on the trial of an action of trover, brought to try the validity of the petitioning creditor's debt.

Cohen *v.* Cunningham *et al.* Hil. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 123.

But the Court will not on motion in a ſummary way diſcharge a defendant *out of execution*, on the ground that the plaintiff ſince charging him in execution hath ſued out a commiſſion of bankruptcy againſt him, for if the Lord Chancellor ſhould think fit to ſuperſede the commiſſion, then the Court will have diſcharged the debtor, becauſe a commiſſion

M'Maſter *v.* Kell, Tr. Ter. 38 Geo. 3. C. B. 1 *Pull. & Buſan.* 302.

miſſion has iſſued againſt him, and the Lord Chancellor will have ſuperſeded the commiſſion becauſe the party has been charged in execution. There is no inſtance of ſuch an application to a court of law; it is much fitter for the court of Chancery to interfere, ſince that court may either ſuperſede the commiſſion, or direct the bankrupt to be diſcharged out of cuſtody. A rule which had been obtained to ſhew cauſe why the defendant ſhould not be diſcharged, was therefore diſcharged on the ground of a want of juriſdiction in the Court.

Goods permitted to remain in Poſſeſſion of a Trader at a Yearly Rent.

Lingham v. Bigge *et al.* Tr. Ter. 37 Geo. 3. C.B. 1 *Pul. & Boſ.* 82.

If the furniture of a houſe be taken in execution by a creditor, and without ever being removed, be let by him to the occupier, who becomes bankrupt while in poſſeſſion of it, the aſſignees may ſeize it under the ſtat. 21 *Jac.* 1. c. 19. ſ. 11.—This was trover againſt the defendants, who were the aſſignees of *Anne Munday* a bankrupt, for all the houſehold furniture, and other articles belonging to a coffee-houſe. The bankrupt being indebted to the plaintiff, gave him a warrant of attorney for 800*l.* under which he entered up judgment, and took in execution the goods in queſtion. They were valued by the ſheriff at 337*l.* 13*s.* 6*d.* and thereupon a bill of ſale was made out by the ſheriff at that price, to *Thomas Lingham* the plaintiff's brother, in truſt for the plaintiff. In June, 1791, articles of agreement under ſeal were entered into between the ſaid *T. Lingham*, the plaintiff, and *Anne Munday*; by which the plaintiff let the goods to *Anne Munday*, at the yearly rent of 27*l.* for four years, and ſhe covenanted not to remove them from the coffee-houſe without the plaintiff's conſent. The deed contained a proviſo, that the plaintiff ſhould enter and take poſſeſſion on failure in the payment of rent. *Anne Munday* continued in poſſeſſion of the goods beyond the four years, and until they were ſeized under the commiſſion. EYRE, Ch. J. The caſes which fall within the ſtatute of *James* may be divided into two claſſes; 1ſt, Where goods not originally the property of the bankrupt are left in his order and diſpoſition. In *Ryall* v. *Rolle*, 1 *Atk.* 165. Lord *Hardwicke* intimates a pretty ſtrong opinion that the preamble ſhould govern the eleventh cauſe, and confine it to caſes where the bankrupt was the original owner, but in latter times (1) the ſtatute has been conſidered as a remedial act; and it has been thought, that although the bankrupt was not the original owner, yet if he had in his poſſeſſion the goods of another perſon, they fell within the ſtatute; this has formed a claſs of caſes as clearly within the 21 *Jac.* as the firſt claſs. Many caſes have certainly been taken out of this claſs by exceptions, as thoſe of factors. Though *Ryall* v. *Rolle* goes no further than I have mentioned, yet thus far it may be made uſe of as an authority here, that it was aſſumed throughout the whole diſcuſſion, both by the bench and the bar, that the words goods and chattels in the ſtatute were not to be confined to ſtock in trade or utenſils. The words were there ſuppoſed to include choſes in action, which might paſs by an act of parliament, though they could not by a bill of ſale. The caſe of an aſſignment by a bankrupt of a bond which he retains in his poſſeſſion, and conſequently of which he has the diſpoſition, ſo that he may receive the money, ſhews how the words "order and diſpoſition," and "reputed owner," are to be underſtood. They are to be underſtood thus. Being allowed to have poſſeſſion of goods under circumſtances which give the reputation of ownerſhip, brings the caſe within the ſtatute; and it is fair ſo to conſider them, becauſe every

(1) *Mace* v. *Cadell*, Cowp. 232. p. 130. ante.

man

man who can be ſaid to be the reputed owner, has incidentally the order and diſpoſition; not indeed, between the parties, but as to general appearance. It is impoſſible for the world at large to inquire what accounts may exiſt between the parties: general credit with the world is all; if the party be the reputed owner, it imports that he has the order and diſpoſition, and that he may ſell. Admitting that the words "order and diſpoſition, ſale and alteration," might refer to ſuch goods only as a party has in his ſhop, and ready to ſell to cuſtomers, yet they cannot refer to the actual ſale, as they ſeem to import; for if the goods are once ſold they are out of the power of the aſſignees. The act ſuppoſes them to remain in the poſſeſſion of the bankrupt, and becauſe they remain there the aſſignees are allowed to take them. The words therefore muſt not have that abſolute ſenſe which they ſeem to bear, but muſt have a meaning conſiſtent with the end propoſed to be attained by the ſtatute. If a man be the reputed owner of goods, and appear to have the order and diſpoſition of them, he muſt be underſtood to have taken upon himſelf the ſale, order, and diſpoſition within the meaning of this ſtatute. We muſt ſuppoſe that he has done that which the act ſuppoſes; and certainly to hold a conſtruction at this day, different from that of all the caſes on this remedial law, could not be juſtified by the mere letter of the act. The queſtion then comes to this, Can furniture be diſtinguiſhed from other goods and chattels, to which the ſtatute would extend? Now, I think it cannot, except ſo far as it may go to ſhew that this bankrupt was not the reputed owner, did not appear to have, and therefore had not the order and diſpoſition. Mrs. *Munday* had been in ſuch poſſeſſion, that no jury could have heſitated to pronounce her the reputed owner. That being admitted, I think it neceſſarily follows from her being the reputed owner, that ſhe will appear to the world to have the order and diſpoſition, ſale and alteration, &c. *She muſt clearly derive a credit from theſe appearances, and conſequently if the owner allows her to retain the property, however fair that may be between herſelf and the owner, it muſt be a fraud upon the creditors.* It has been ſuggeſted that this doctrine would go to an inconvenient length, and it was ſaid by way of inſtance, that no trader could go into a ready-furniſhed houſe, or hire horſes on a job, becauſe poſſeſſion would create a reputation of ownerſhip, and conſequently the furniture and horſes would be liable to be ſeized. I admit that poſſeſſion is always evidence of ownerſhip, and with nothing to oppoſe it, would create a reputation of it; but it is evidence which may be oppoſed, and ſo ſatisfactorily oppoſed as to deſtroy that reputation. Let us purſue this idea. A reſpectable tradeſman reſiding in his own houſe in London, takes a journey for two months to Brighton, or ſome other ſea-port, and hires a ready-furniſhed houſe; all the world would ſay, that he was the reputed owner of the furniture in the houſe in London, and not the reputed owner of that in the houſe at Brighton. So as it is notorious that people do not always drive their own coaches and horſes, poſſeſſion in ſuch a caſe is only equivocal, and too equivocal to create a reputation of ownerſhip; it would therefore be neceſſary to go into other evidence to determine of what character the poſſeſſion was. It has been ſuggeſted alſo, that moſt of the caſes are caſes of mortgage, and that they are not in their circumſtances like the preſent. But when once it is determined that a mortgagee is an owner within the ſtatute of *James*, they will be found to be the ſame in principle. Two caſes have been principally relied on at the bar; that for the defendant was *Bryſon* v. *Wylle* (1), and that for the plaintiff was *Jarman* v. *Woolloton*,

(1) *Bryſon* v. *Wylle*, H. 24 *Geo.* 3. B. R. *Cooke's Bankrupt Laws*, 234. and 1 *Pul.* & *Boſ.* 83. (*n. a.*)—In Trover for a dyer's plant. A verdict was found for the plaintiff, ſubject to the opinion of the Court upon this caſe: "That one *James Simpſon* being

v. *Woolloton*, *ante* p. 227, which laſt happened to be a caſe of furniture, and was held not to be within the ſtatute of *James*. I am unable to perceive in thoſe two caſes, or in *Collins* v. *Forbes*, *ante* p. 131, any difference in the rule of conſtruction with reſpect to the ſtatute. They are caſes where the circumſtances to which the ſtatute was applicable lead the court to different concluſions: perhaps both of them were right; but it is ſufficient to ſay, that neither of them has any thing in common with the preſent caſe: poſſibly they would not govern other caſes much nearer to them in circumſtances than this. Notwithſtanding *Bryſon* v. *Wylle*, I can ſuppoſe that a dyer may be in poſſeſſion of a plant, without being the reputed owner; I can alſo ſuppoſe caſes where a truſtee for a married woman permitting the huſband to take poſſeſſion of the goods and chattels, and to become the reputed owner to all the world, may loſe thoſe goods in conſequence. We cannot argue from the circumſtance of a dyer being in poſſeſſion of a plant, and being the reputed owner, that therefore this furniture ſhall be liable to be taken by the aſſignees; nor from the furniture being protected in *Jarman* v. *Woolloton*, that the furniture ſhall alſo be protected here. As to the caſe of *Collins* v. *Forbes*, we perfectly agree in that deciſion: becauſe *Kent*, the carpenter who was to do the work, was not, at the time he became bankrupt, in poſſeſſion of the goods which were lying in the king's yard, and were in contemplation of law in the poſſeſſion of the true owner, whoever he was. It was well obſerved by Mr. Juſtice *Buller* in *Walker* v. *Burnell*, that queſtions on the 21 *Jac.* have much more of fact than of law in

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being poſſeſſed of the dyer's plant, by an indenture dated April the 26th, 1781, made between *James Simpſon* and the plaintiff, after reciting that the plaintiff in January, 1780, ſold to *James Simpſon* a plant, &c. for 165*l.* 6*s.* 6*d.* for which ſum *Simpſon* gave the plaintiff two promiſſory-notes, dated 9th January, 1780, one for 82*l.* 13*s.* 6*d.* payable the 6th January, 1781, and the other for 82*l.* 13*s.* the remainder of the ſum, payable 6th January, 1782; and alſo reciting, that when the firſt note became due it was inconvenient for him to pay the ſame, and that he promiſed, in conſideration of the ſaid notes being given up to him, to aſſign over the plant, &c. to the plaintiff, to which the plaintiff agreed; it was witneſſed that as well in conſideration of the plaintiff's delivering up the ſaid notes, as alſo 5*s.* to *Simpſon*, paid by the plaintiff, *Simpſon* did aſſign and deliver to the plaintiff the ſaid plant, &c. to hold to the ſaid plaintiff, his executors, adminiſtrators, and aſſigns for ever. And alſo farther reciting, that it had been agreed between the parties that the plaintiff ſhould let the ſaid plant to *Simpſon* for three years, from Lady-day, 1781, *Simpſon* paying the plaintiff 8*l.* 5*s.* 6*d.* *per annum* for the uſe and occupation thereof, and obſerving the covenants reſpecting the ſame (which were covenants from *Simpſon* for paying the rent quarterly, for keeping the plant in repair, and not aſſigning it without the conſent of the plaintiff); it was agreed that if *Simpſon* ſhould make default in any of the quarterly payments, or in the performance of any of the other covenants, then the term granted ſhould ceaſe, and the ſaid *Simpſon* ſhould deliver the ſaid plant, &c. and it ſhould be lawful for the plaintiff to take immediate poſſeſſion of the ſame. There is a memorandum that *Simpſon* had put the plaintiff into poſſeſſion, by the delivering of one winch. That on the 5th July, 1783, a commiſſion of bankrupt iſſued againſt *Simpſon*, and the defendant was choſen aſſignee, who took poſſeſſion of the plant as part of the eſtate and effects of *Simpſon*." The queſtion for the opinion of the Court was, Whether this caſe was within the ſtatute of 21 *James* 1. c. 19. ſ. 11? If not, the verdict to ſtand; but if it was, to be entered for the defendant. —Lord MANSFIELD. The law has ſaid, that a trader cannot mortgage his effects, and at the ſame time keep poſſeſſion. Here he ſells and keeps poſſeſſion, and pays intereſt for the money. If this contrivance were ſuffered, it would open a door to avoid the ſtatutes, and therefore it ought not to be allowed to prevail. BULLER, J. The caſe of a banker or a factor does not come up to the preſent; for there by the courſe of trade they muſt have the goods of other people in their poſſeſſion, and therefore it does not hold out a falſe credit to the world. But none of thoſe exceptions apply.—Judgment for the defendant.

them.

them. I believe when once it is aſcertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownerſhip falſe credit ariſes; from that falſe credit ariſes the miſchief; and to that miſchief the remedy of the ſtatute applies. This ſeems a fair and ſound conſtruction of the ſtatute; and the preſent being confeſſedly a caſe of reputed ownerſhip, and the other terms of the eleventh ſection being incidental to reputed ownerſhip, we think the verdict proper.

Goods delivered over to a Factor after a ſecret Act of Bankruptcy.

Copland *et al.* aſſignees of Ginger, a bankrupt, *v.* Stein *et al.* Ea. Ter. 39 Geo. 3. B. R. 8 *Ter. Rep.* 199.

A trader after a ſecret act of bankruptcy conſigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commiſſion afterwards iſſued againſt the trader on ſuch prior act of bankruptcy, after which the factor ſold the goods and received the money; and the Court held that he was anſwerable to the aſſignees for the value of the goods.— In October, 1796, Mr. *Macfarlane*, as broker to the bankrupt, applied to the defendants to advance a ſum of money upon the credit of a quantity of ſalt, which he offered to conſign to them as factors on account of *Ginger*, which was then ſaid to be depoſited in a warehouſe rented by the bankrupt, and which had been conſigned to him by different ſhips. To induce the defendants to advance the money, and to impreſs them with a belief that the quantity of ſalt was ſufficient to cover the ſum *Macfarlane* applied for, he delivered to them a paper in the handwriting of the bankrupt, and ſigned by him as a correct account of the ſalt according to the beſt of his knowledge and belief, making it appear to amount to 439 tons and 4 buſhels. After ſome communication between the parties, the defendants agreed to advance 3550*l.* to the bankrupt on the conſignment of 350 tons of this ſalt to them for ſale on his account, upon his making a regular invoice thereof containing an authority for ſuch ſale. In conſequence of this agreement the bankrupt on the 24th of October, 1796, made out this invoice; "Invoice of 350 tons Liverpool ſalt, conſigned to Meſſrs. *Stein, Smith*, and Co. by *Richard Ginger*, to be ſold by them for his account. London, 24th of October, 1796, 350 tons Liverpool ſalt, in bulk, at 13*l.* 15*s.*—4812*l.* 10*s.* Errors excepted, *Richard Ginger*." This invoice was tranſmitted by the bankrupt to the defendants incloſed in the following letter, ſigned by the bankrupt; "Meſſrs. *Stein, Smith*, and Co. London, I beg leave to hand your invoice of 350 tons ſalt, which you will pleaſe to receive and diſpoſe of for my account, and paſs the proceeds to my credit. As I ſhall want money before the ſalt can be ſold, I will be obliged to you for acceptances of ſuch dates as can be agreed on; and I hereby promiſe to keep you free of advance" On the 29th of October, 1796, *Macfarlane*, as the bankrupt's broker, delivered the key of the warehouſe in which the ſalt was depoſited to the defendants; and on the 31ſt of that month they advanced the bankrupt by the hands of *Macfarlane* 1000*l.* and they at the ſame time delivered to him bills of exchange drawn by their houſe at Leith, and accepted by them to the amount of 2000*l.* more, which bills are as follows: viz. two bills dated 29th October, at three months date, for 500*l.* each, and five other bills of the ſame date, payable two months after, for 150*l.* 175*l.* 200*l.* 230*l.* 245*l.* making in all 2000*l.* and the defendants on the 5th of November, 1796, accepted one other bill for the bankrupt, dated the 31ſt of October, at three months, for 550*l.* more, making the whole of their advances and acceptances 3550*l.* On the 10th

of

of November, 1796, the defendants' clerk went to the warehouſe to look at the ſalt, when he found that there was not above one-fourth of the quantity mentioned in the invoice; upon the defendants being informed of this, inquiry was immediately made after the bankrupt to account for the deficiency, who not giving the defendants the ſatisfaction they required, and they conceiving that a fraud had been practiſed on them by the bankrupt and *Macfarlane*, writs were iſſued againſt them both at the ſuit of the defendants, upon which they were arreſted, and there was found upon *Macfarlane* the defendants' acceptances to the amount of 1625*l.* which were given up; and the remainder were duly paid by the defendants, making their advances on the credit of the ſalt 1925*l.* On the 25th of Auguſt, 1796, *Ginger* committed an act of bankruptcy unknown to the defendants; and he continued publicly in the management of his buſineſs until after the defendants advanced him the money and bills before mentioned. On the 12th of November, 1796, a commiſſion of bankrupt was awarded and iſſued againſt *Ginger*, under which he was declared a bankrupt on the 18th of the ſame month, and his effects aſſigned to the plaintiffs. In purſuance of an agreement entered into by the attornies for both parties, the ſalt has been ſold, and conſiſted of 76 tons and a fraction, which netted upon ſale 848*l.* 16*s.* 11*d.* which has been paid into the hands of the defendants for the uſe of thoſe who are entitled to it; AND THE QUESTION WAS, *Whether the plaintiffs or defendants were entitled to that ſum?* the verdict to be entered accordingly. The caſe was fully argued. Lord KENYON, Ch. J. A deciſion in favour of the defendants in the preſent action, would be contrary to all the bankrupt laws, and to the caſes that have been determined upon them, on the ground of relation back to the act of bankruptcy. The doctrine of relation obtains univerſally through all the bankrupt laws, except in the caſes that are particularly excepted; and this caſe does not come within either of thoſe exceptions. The argument of the defendants goes the length of aſſerting, that if a bankrupt after a ſecret act of bankruptcy ſell or mortgage his eſtate, ſuch ſale or mortgage will be valid. It is true that if no commiſſion be taken out for five years after the act of bankruptcy committed ſuch ſale would be good; there is a ſtatute (1) limitation in ſuch a caſe, but in no other caſe can ſuch a ſale be protected. In the preſent caſe the goods were delivered in October, 1796, but now it appears that the bankrupt by having committed a ſecret act of bankruptcy two months before, was incapacitated from diſpoſing of theſe goods to the prejudice of his creditors at large; this is a hard caſe on the part of the defendants, but we are compelled to decide againſt them by poſitive law, and can only ſay, *ita lex ſcripta eſt.* GROSE, J. The facts in this caſe are ſhortly theſe; the defendants after a ſecret act of bankruptcy committed by *Ginger*, received goods from the bankrupt, and advanced money on them; a commiſſion of bankrupt was afterwards taken out; the goods were then ſold, and the money is in the hands of the defendants. And the queſtion is, Whether or not this money by law belongs to the aſſignees of the bankrupt? In this caſe ſome propoſitions are clear; the goods, when they came into the hands of the defendants, belonged to the aſſignees; they were delivered to them to be ſold on the bankrupt's account without the authority of the aſſignees; in the hands of the defendants they were ſtill the goods of the aſſignees, unleſs there be any law to alter the property. After the goods were ſold, the produce of them belonged to the aſſignees, unleſs there be any law to warrant the defendants to ſell the goods without the authority of the owners, and when they had ſold them to put the money into their own pockets. As a mere naked caſe

(1) 21 Stat. 21 *Jac.* 1. c. 19. ſ. 14.

between *A.* and *B.* unmixed with the fact of bankruptcy, the law is clear; for my goods in the hands of another I may maintain trover, and for the produce of them an action for money had and received. —The question then is, Whether or not the law, either by positive words, or by the construction put upon them, enables the defendants to retain this money against the assignees? It is said that they may retain the money; 1st, As factors; 2dly, On the true construction of the stat. 1 *Jac.* 1. c. 15. or on that of the 19 *Geo.* 2. c. 32. or on the construction of both of them moulded together and considered as one law. First then, can the defendants retain this money as factors? As factors of whom? of the bankrupt; the goods were not his, but belonged to the assignees, and the defendants were not the factors of the assignees. If the defendants had received the goods before the bankruptcy of *Ginger*, there might have been a lien, and this case would have been like that of *Drinkwater* v. *Goodwin*; [see this case under the title FACTOR.] But the present case is distinguishable from that; there the factor received the goods of the bankrupt before the act of bankruptcy, and when they belonged to the bankrupt: here the goods were received by the defendants from the bankrupt after the bankruptcy, when they belonged to the assignees; and I know of no case which gives a factor a lien on goods sent to him by a person to whom the goods do not belong. Then, secondly, is this a case within the stat. 1 *Jac.* 1. c. 15. which enacts, that no debtor of the bankrupt shall be endangered for the payment of his debt to a bankrupt before he shall understand or know that he is become a bankrupt? Certainly not. Here was no payment of any debt to the bankrupt; the money advanced by the defendants was a loan to the bankrupt; it was advanced after he became a bankrupt, and the defendants were in no wise his debtors, so that this case in no respects falls within the proviso. Nor does the case come within the other statute, 19 *Geo.* 2. c. 32. The proviso in the stat. 1 *Jac.* 1. was made to protect *debtors*, this proviso was introduced for the protection of *creditors* in respect of goods really and *bonâ fide* sold to such bankrupt, in the usual and ordinary course of trade and dealing, from the repayment of such money as such creditors had really and *bonâ fide*, and in the usual and ordinary course of trade and dealing received. In this case no goods were sold to the bankrupt, nor was any money received by the defendants as creditors of the bankrupt; the goods were sent to be sold by them, but were not sold to them, and therefore this case does not come within this statute. But then we are desired to read the proviso in the stat. 1 *Jac.* 1. after the recital in the stat. 19 *Geo.* 2. It is new to read a preamble or a recital in a subsequent statute to explain a former act; and if the legislature had intended that it should be so explained in this instance, a very few words in the latter statute would have answered the purpose. However I will read the two together; the preamble in the 19 *Geo.* 2. is this: "Whereas many persons within the description of and liable "to the statutes concerning bankrupts, frequently commit secret acts "of bankruptcy unknown to their creditors and other persons, with "whom, in the course of trade, they have dealings and transactions, and "after the committing thereof continue to appear publicly, and carry "on their trade and dealings by buying and selling of goods and merchan-"dizes, drawing, accepting, and negociating bills of exchange, and pay-"ing and receiving money on account thereof, in the usual way of "trade, and in the same open and public manner as if they were sol-"vent persons, and had not become bankrupts; and whereas the per-"mitting such secret acts of bankruptcy, to avoid and defeat pay-"ments really and *bonâ fide* made in the cases and under the circum-"stances abovementioned, where the persons receiving the same had "not notice of, or were privy to, such persons having committed any "act of bankruptcy, will be a great discouragement to trade and com-"merce, and a prejudice to credit in general:" then the proviso in the

ſtat. 1 *Jac.* 1. c. 15. is, "That no debtor of the bankrupt be hereby "endangered for the payment of his debt truly and *bonâ fide*, to any "ſuch bankrupt before ſuch time as he ſhall underſtand or know that "he is become a bankrupt." But the anſwer to the argument derived from that mode of reading the ſtatutes is, that the defendants in this caſe were not debtors to the bankrupt; that it is not contended that the bankruptcy is to avoid or defeat any payments made to the bankrupt for goods, or on the acceptances of bills of exchange; it is only contended that the bankruptcy is to veſt the property of the goods in the aſſignees, and thereby avoid any right ſuppoſed to be veſted in the defendants by the bankrupt's ſelling theſe goods, and prevent the defendants having any lien upon them in conſequence of any act of the bankrupt after he became a bankrupt. LAWRENCE, J. of the ſame opinion.—Poſtea to the plaintiffs.

Rights and Privileges of a Bankrupt.

Stock *v.* Mawſon, Tr. Ter. 38 Geo. 3. C. B. 1 *Pul.* & *Beſ.* 286.

The creditors of a bankrupt entered into a deed of compoſition to receive 8*s.* in the pound in full diſcharge of their debts, and agreed to releaſe every thing beyond that to the bankrupt, and join in a petition to the chancellor to ſuperſede the commiſſion; one of the creditors having two diſtinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8*s.* in the pound on both debts, and then recovered the full value of ſome of the bills; held that the bankrupt was entitled to ſue for the money ſo obtained on the bills in an action for money had and received.—This was an action for money had and received; and the circumſtances were as follow. A commiſſion of bankrupt having iſſued againſt the plaintiff, and an aſſignment of his effects having been executed under that commiſſion, the creditors, of whom the defendant was one, entered into a deed of compoſition with the plaintiff, wherein, after reciting the commiſſion and aſſignment, they agreed to accept 8*s.* in the pound "upon the "amount of their reſpective debts, and in full diſcharge thereof," to be ſecured by the promiſſory notes of three ſureties, and in conſideration thereof "to releaſe and diſcharge the ſaid *William Stock*, his heirs, "executors, and adminiſtrators, eſtate and effects, of and from the "debts to them due and owing from him," and to join in a petition to ſuperſede the commiſſion. The deed then went on with a general releaſe "of all actions, ſuits, debts, ſums of money, accounts, reckonings, "damages, claims, and demands whatſoever, both in law and equity;" and relinquiſhed and gave up to the plaintiff, his executors, adminiſtrators, and aſſigns, "all and ſingular the ſtock in trade, houſehold goods, "plate, china, linen, and furniture, book debts, and other debts and "ſums of money due, owing, or belonging to him, from any perſon "or perſons whomſoever, and all bonds, bills, notes, and other ſecuri-"ties for the ſame; and all other the eſtate and effects whatſoever of "the ſaid *William Stock*, whereof or wherein he the ſaid *William Stock*, "or any perſon or perſons in truſt for him or for his uſe, was or were "ſeiſed, or poſſeſſed, or intereſted on the day of the date, and iſſuing "forth of the ſaid commiſſion, and on any day ſince, and all benefit "and advantage whatſoever to be made, had, or derived thereby or "therefrom." At the time when this deed was executed the plaintiff was indebted to the defendant in two different ſums of money, on two different accounts, viz. 1113*l.* 19*s.* 5*d.* and 1107*l.* 5*s.* 5*d.* for ſecuring the latter of which he had given the defendant bills to the full amount. The whole 2221*l.* 4*s.* 10*d.* was proved, and a dividend of 8*s.* in the pound received by the defendant on that ſum; after which he called upon the acceptors of the bills and obtained on one of them 20*s.* in the pound, and different ſums upon the others, conſidering himſelf indeed

deed as a truſtee for the plaintiff, to the amount of all which he received above 12*s.* in the pound on any of the bills, but retaining that ſum for which the preſent action was brought. EYRE, CH. J. This caſe has been argued on an analogy which does not in fact exiſt; viz. between the effect of this deed, and the proceedings under a commiſſion of bankruptcy, though a commiſſion happened to be the foundation of the agreement. A commiſſion is a tranſaction between creditors only, the eſtate of the bankrupt is completely taken out of him, and he has no intereſt but in the actual ſurplus of that eſtate after all debts paid: here, on the other hand, *the inſolvent had an intereſt in every thing beyond* 8*s. in the pound.* It is on the ground of uncertainty that the rule has been allowed to prevail, that a bill-holder may prove againſt every body who is a party to the bill, for until the dividends are aſcertained, it is impoſſible to know what ſatisfaction he will have. *But here a certain liquidated ſum is given, and the creditor thinks it for his intereſt to conſider the whole as the debt of the drawer, and to accept* 8*s. in the pound as a ſatisfaction:* this is the ſubſtance of the inſtrument; *by this the debt is diſcharged and gone, and the effects are abſolutely releaſed.* Suppoſe that the plaintiff had paid 20*s.* in the pound, there can be no doubt, but that he would have become the purchaſer of the bills, and would be entitled to take them out of the hands of the holder, and uſe them according to the relation in which he might ſtand to the acceptor. If it be ſo on payment of 20*s.* in the pound, can we diſtinguiſh the preſent caſe from that? The creditor has thought fit to accept 8*s.* in the pound in lieu of 20*s.* and though this could not be pleaded on a parol agreement, yet on a deed it may, and the diſcharge is as effectual as if 20*s.* in money had been paid. BULLER, J. Theſe were part of the bills which by agreement the defendant was to reſtore; they came into his hands from *Stock*, and were to be delivered back to him, on payment of 8*s.* in the pound. Whether an agreement by parol to accept a ſmaller ſum in ſatisfaction of a larger can be pleaded or not, I do not know: it was formerly conſidered that it could not, and was ſo decided in *Coke* (1). I think, however, that there are ſome late caſes to the contrary, and one in particular in Lord *Mansfield's* time, who ſaid, that if a party choſe to take a ſmaller ſum, why ſhould he not do it? There may be circumſtances under which ſuch an agreement might not only be fair but advantageous; it may be of more importance to a man to take 10*s.* to-day, than 20*s.* to-morrow. Suppoſing (as we muſt), that theſe bills were drawn for value, until the acceptors pay them they are indebted to the drawer to their amount, and if *Stock* pay 8*s.* in the pound in ſatisfaction of his debt, is he not to have the bills in order to recover from the acceptors? If indeed they were accommodation bills only, then, unleſs they are to be delivered up to the plaintiff, the acceptors will be bound to pay, and will have an action againſt *Stock*, who will thus be called upon for more than 8*s.* in the pound. Whichever way the caſe be ſtated, the defendant has received more than 8*s.* in the pound. HEATH, J. A queſtion has been made whether this action will lie for money had and received to the uſe of the plaintiff. Now what is a bill of exchange? It is nothing but an order on the drawee to pay ſo much out of the effects of the drawer in his hands, and the acceptance is evidence in law that the acceptor has ſuch effects; if therefore a perſon receives any thing out of thoſe effects, he receives what belongs to the drawer who may recover it in this form of action. ROOKE, J. of the ſame opinion.—Poſtea to the plaintiff.

(1) *Pinnel's* caſe, 5 *Co.* 117. where it was held that payment of a leſſer ſum at the time and place mentioned in the condition cannot be a ſatisfaction for a greater; but if paid before the day or at another place it may. *Vide* alſo *Cumber* v. *Wane*, *Str.* 426. See alſo *James* v. *David*, *ante* vol. I. p. 223. and *Lynn* v. *Bruce*, *ante* vol. I. p. 308.

BARON AND FEME.

Cox v. Kitchin, Mic. Ter. 39 Geo. 3. C. B. 1 *Pul.* & *Bof.* 338.

IT ſeems that a woman living apart from her huſband in a ſtate of adultery, is liable on her own contracts, though ſhe has no ſeparate maintenance.—*Indebitatus aſſumpſit*, for goods ſold and delivered, and work and labour done. Plea, general iſſue. On the trial of the cauſe it appeared, that the defendant was the wife of one *Wells*, who was then living, but that for the laſt four or five years ſhe had gone by the name of *Kitchin*, having lived during that time as miſtreſs with a perſon of that name (1); that ſhe kept an hotel, and that the action was brought by the plaintiff as a carpenter, for materials found, and work done, in fitting up the hotel. The judge directed the jury, in caſe they ſhould be of opinion that the defendant was living in a ſtate of open adultery at the time of the contract made, to find a verdict for the plaintiff, for as the huſband under thoſe circumſtances would not then be liable, he thought that the wife muſt be liable herſelf. A verdict was accordingly found for the plaintiff, but no point was ſaved for the opinion of the Court. It was moved for a rule to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a new trial had on the authority of *Gilchriſt* v. *Brown*, 4 *T. R.* 766. and p. 302. *ante*. BULLER, J. Where the judge at *Niſi Prius* has thought fit to ſave a point, the Court has been in the habit of conſidering itſelf in the ſituation of a judge, at the time of the objection raiſed. But this caſe comes before us without any point ſaved, and therefore we muſt look to the general juſtice of the caſe before we interpoſe by granting a new trial; nor is it neceſſary that we ſhould nicely examine whether the defendant be ſtrictly liable in point of law. The leading reported deciſion on the ſubject of granting new trials is that of the Ducheſs of *Mazarine* (2). There can be no doubt but that was the caſe of a verdict againſt law: yet the Court ſaid, that as the juſtice and conſcience of the caſe were clearly with the verdict, they would not interpoſe. Here it is perfectly clear, that the huſband was not liable; that point was ſolemnly decided in the court of King's Bench, in a caſe which was tried before me at Taunton (3); there it appeared that the wife had been turned out of doors by her huſband, and afterwards committed adultery, but before the cauſe of action accrued, had ceaſed to live in a ſtate of adultery, and had offered to return; and the Court held, that in conſequence of the woman having once gone off with an adulterer, the huſband was diſcharged for ever. Here, therefore, the huſband is not liable; and if the wife be not, ſhe ſtands in a moſt miſerable condition. How is ſhe to find the means of ſupporting herſelf? How is ſhe to procure even a joint of meat for her daily ſubſiſtance? She can obtain no credit, unleſs ſhe be liable for her debt; her ſituation would be melancholy in the extreme. But whether ſhe be ſtrictly liable or not, it appears that ſhe has lived as a *feme ſole*; that ſhe has repreſented herſelf as ſuch, and has obtained credit under that character. The defence therefore is diſhoneſt and unconſcientious, and on that ground I think that the Court ought not to interpoſe. HEATH, J. On the laſt point I agree with my brother *Buller*,

(1) In *Norwood* v. *Stevenſon*, *T.* 11 & 12 *Geo.* 2. B. R. *Bull. N. P.* 136. and in *Hudſon* v. *Brent*, ſittings after *Hil. T.* 26 *Geo.* 3. *coram* Lord *Mansfield*, *Eſp. N. P.* 124. it was held that if a man cohabits with a woman, allows her to aſſume his name, and paſſes her to the world as his wife, though in fact he is not married to her, yet he is liable to her contracts for neceſſaries.

(2) 1 *Salk.* 116. 2 *Salk.* 646.

(3) *Govier* v. *Hancock*, 6 *T. R.* 603. and p. 291 *ante*.

viz.

viz. that as the defendant has lived and contracted as a *feme ſole*, ſhe ought to be liable for her debts. ROOKE, J. of the ſame opinion.—Rule refuſed.

De Gaillon v. Victoire Harel L'Aigle, Mic. Ter. 39 Geo. 3. C. B. 1 *Pul.* & *Boſ.* 357.

If the huſband reſide abroad, and the wife trade and obtain credit in this country as a *feme ſole*, ſhe is liable for her own debts (1).—*Indebitatus aſſumpſit.* The declaration contained the common money counts. Plea: That the defendant, before and at the time of the making the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, was and from thence hitherto hath been, and ſtill is, the wife of, and married to, one *John Martin Harel L'Aigle*, and which ſaid *J. M. H. L'Aigle* is now living, to wit, at *Weſtminſter*, &c. Replication: That before and at the time of making the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, and from thence hitherto, the ſaid *John Martin Harel L'Aigle* lived and reſided in parts beyond the ſeas out of this kingdom, to wit, at Hamburgh; and that during all that time the ſaid *Victoire Harel L'Aigle* lived in this kingdom, ſeparate and apart from the ſaid *John Martin Harel L'Aigle*, and followed and carried on the trade and buſineſs of a merchant as a ſingle woman, and a ſole trader, to wit, at Weſtminſter, &c. and that the plaintiff did not give any credit to the ſaid *John Martin Harel L'Aigle*, but traded and dealt with the ſaid *Victoire Harel* as a *feme ſole*, and on her ſole credit; and that the ſaid *Victoire Harel* made the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned as ſuch *feme ſole* as aforeſaid. And this, &c. wherefore, &c. To this there was a general demurrer and joinder. BULLER, J. In Lady *Belknap's* caſe (2), the huſband was baniſhed, but it is not ſtated whether he was baniſhed for one year, or for five years, or for life (3); it was held ſufficient that he was in baniſhment at the time when Lady *Belknap's* contract was made; and I can ſee but one principle on which the caſe could have been decided; viz. that the rights known to exiſt in law between huſband and wife were not interfered with, by allowing the wife to be taken in execution: as the huſband was baniſhed (though it be not ſtated whether for life or not), the matrimonial rights during his baniſhment were at leaſt ſuſpended. In later times the caſes have gone further. In *Sparrow* v. *Carruthers* (4), it was ſhewn in anſwer to evidence of coverture that the huſband was tranſported for ſeven years only, and after that time was expired he had a right to return, and demand the comfort of his wife, even if ſhe were in gaol; yet the huſband being abroad and not capable of enjoying the matrimonial rights, it was held that the diſability of the wife was ſuſpended. In thoſe caſes the huſband was ſent out of the country for his crimes, whereas here the huſband has voluntarily abandoned his wife, and, for any thing that appears, never was in England, and perhaps never may come here. The wife has traded as a *feme ſole*, has obtained credit as ſuch, and ought to be liable for her debts. HEATH, J. and ROOK, J. of the ſame opinion.—Judgment for the plaintiff.

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(1) Vide *ante*, p. 308.

(2) 2 *Hen.* 4. 7. a. Vide alſo the caſe of Lady *Maltravers*, 10 *Ed.* 3. 53. *Sybell Belknap's* caſe, 1 *Hen.* 4. 1. a. *Margery Weyland's* caſe, 29 *Ed.* 1. *Ryley. Plac. Parl.* 66. *Deerley* v. *Ducheſs of Mazarine*, *Salk.* 116. and 646. *Ld. Raym.* 147. S. C. *Comb.* 402. S. C. and *Counteſs of Portland* v. *Prodgers*, 2 *Vern.* 104.

(3) It appears by the Year Book, 1 *Hen.* 4. 1. a. that *Belknap* was baniſhed to Gaſcony, there to remain till he obtained the king's favour; which Sir *Edward Coke* conſiders as a baniſhment for ever. *Co. Lit.* 133. a. and adds, that if the huſband by act of parliament have judgment to be baniſhed but for a time, which ſome call relegation, that is no civil death. *Vid. tam. Hargrave's* note, 209.

(4) Cited in *Lean* v. *Shutz*, 2 *Bl.* 1197. and in *Corbett* v *Poelnitz*, 1 *T. R.* 7. *ante*, p. 301 and 296.

CERTIORARI.

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The King *v.* Dunn, Ea. Ter. 29 Geo. 3. B. R. 8 *Ter. Rep.* 217.

The 5 *Geo.* 2. c. 19. ſ. 2. requiring the party removing a conviction by a magiſtrate into B. R. to enter into a recognizance with two ſureties in 50*l.* conditioned to proſecute the writ with effect, &c. is not complied with by the party and his two ſureties entering into a recognizance in 25*l.* each, but it muſt be in the entire ſum of 50*l.*—The defendant had been convicted for uſing engines to kill game under the 5 *Ann.* c. 14.; the 2d ſection of which provides, that the proceedings ſhall not be removed by *certiorari*, unleſs the party convicted ſhall before the allowance of ſuch *certiorari* become bound to the proſecutor in 50*l.* with ſuch ſufficient ſureties as the convicting magiſtrate ſhall think fit, with condition to pay to the proſecutor within fourteen days after ſuch conviction, or *procedendo* granted, his full coſts, &c. The defendant intending to remove the conviction into this Court by *certiorari*, obtained the writ laſt term returnable immediately, and entered into a recognizance with two ſureties, each in 25*l.* before another magiſtrate, and delivered ſuch recognizance with the *certiorari* to the magiſtrate who had convicted him (1). THE COURT were clearly of opinion, that there ought to have been a ſingle recognizance of the defendant and two ſureties in 50*l.* and that the recognizance taken in 25*l.* each was not a ſufficient compliance with the act of parliament. IT WAS THEN CONTENDED, that the writ was *functus officio*, and no further proceedings could be had upon it, and that no other writ could now be ſued out, as the time was expired, which is ſix months after the conviction, by 13 *Geo.* 2. c. 18. ſ. 5. SED PER CURIAM, The writ of *certiorari* itſelf was properly iſſued, but we cannot proceed upon it till it has been regularly returned to us; and the party ſuing out the writ has no right to call upon the magiſtrate to allow and return it, until he has entered into a proper recognizance ſuch as the ſtatute requires, Here it appears that no ſuch recognizance has been entered into, and therefore we cannot compel the magiſtrate to make a return to the writ. We cannot however quaſh the writ or take any further notice of it till it has been properly allowed and returned.—Rule diſcharged. On a ſubſequent day, a recognizance purſuant to the ſtatute of the 5 *Geo.* 2. c. 19. ſ. 2. was entered into, and returned with the conviction into this Court.

CUSTOM.

Parkin *v.* Radcliff, Tr. Ter. 38 Geo. 3. C. B. 1 *Pul. & Baſ.* 282.

It ſeems that a cuſtom for the homage to aſſeſs a compenſation in lieu of a heriot, to be paid by an in-coming copyholder on ſurrender or alienation, is not good.—Replevin of a cow. Avowries. 1ſt, For that the ſaid cow at the time of taking the ſame, was the property of the defendant. 2d, For that the place in which, &c. was parcel of a certain tenement, ſituate in the townſhip and manor of Marſden, and held of that manor, of which manor the defendant at the time of the taking

(1) This method was taken with a view to comply with the requiſites of the 5 *Geo.* 2. c. 19. ſ. 2. which enacts "that no *certiorari* ſhall be allowed to remove any judgment or order *(upon appeals to ſeſſions)*, unleſs the party proſecuting ſuch *certiorari*, before the allowance thereof, ſhall enter into a recognizance with ſufficient ſureties before a juſtice of the peace of the county or place, or before the juſtices at their quarter-ſeſſions where ſuch judgment or order ſhall have been given, or before one of the judges of B. R. in the ſum of 50*l.* with condition to proſecute the ſame at his own coſts with effect, &c.

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was lord, and becauſe a heriot, that is to ſay, the beſt beaſt of the plaintiff, was due, and not delivered to the defendant for the ſaid tenement, the defendant well avowed, &c. 3d, For that the place in which, &c. was parcel of a certain cuſtomary tenement ſituate in the townſhip and manor of Marſden, within which manor from time whereof, &c. there had been divers cuſtomary tenements demiſed and demiſeable by copy of the court rolls of the manor, by the lord of the manor and his ſteward for the time being, to any perſons willing to take the ſame in fee-ſimple, or otherwiſe at the will of the lord according to the cuſtom of the manor; and that within the manor, there was a certain ancient cuſtom, that the lord had been uſed and accuſtomed *to take and have, upon the admiſſion of every cuſtomary tenant of the manor*, to every ſuch cuſtomary tenement to which ſuch tenant had been admitted, upon the ſurrender or alienation of any former tenant of ſuch cuſtomary tenement, *the beſt chattel, alive or dead*, of ſuch tenant ſo admitted, *for and in the name of a heriot*; that the tenement of which the place in which, &c. was parcel, was from time whereof, &c. parcel of the ſaid manor, and a cuſtomary tenement; that the defendant was lord of the manor; that in 1786, one *J. H.* had been admitted tenant of the ſaid cuſtomary tenement; that in 1792, *J. H.* ſurrendered into the hands of the defendant to the uſe of the plaintiff and his heirs; that the plaintiff was admitted and entered, and was ſtill ſeized thereof; and becauſe at the time when he was ſo admitted, and from thence until and at the ſame time when, &c. he was poſſeſſed of the ſaid cow as of his own proper cow, the defendant well *avowed the taking the ſaid cow as the beſt living chattel* at the time of the plaintiff's admiſſion, for and in the name of a heriot; and this, &c. wherefore, &c. 4th, The ſame as the laſt, only ſtating the cuſtom for the landlord to take "the beſt beaſt," inſtead of "the beſt chattel alive or dead." Pleas in bar. 1ſt, Iſſue on the firſt avowry. 2d, That the heriot was not due as alleged in the ſecond avowry, and iſſue thereon. 3d, Traverſe of the cuſtom in the third avowry. 4th, Traverſe of the cuſtom in the laſt avowry. 5th, That in the ſaid manor in the third avowry mentioned there had been from time whereof, &c. a certain other ancient cuſtom, that is to ſay, that at the court baron of the lord of the ſaid manor for the time being, held in and for the ſaid manor, *the homage* of the ſaid court baron from time whereof, &c. *had been uſed and accuſtomed to aſſeſs upon their oaths a reaſonable ſum of money to be paid upon the admiſſion of every cuſtomary tenant, to any cuſtomary tenement to which ſuch tenant had been admitted*, upon the ſurrender or alienation of any former tenant, after ſuch his admiſſion, *in lieu of ſuch heriot* by the ſaid cuſtom in the ſaid avowry claimed, and which ſame ſum of money ſo aſſeſſed ought to be paid to the lord of the manor by ſuch cuſtomary tenant, and ought to be accepted by ſuch lord in lieu of ſuch heriot by the ſaid cuſtom in the ſaid avowry claimed. 6th, To the laſt avowry the ſame cuſtom as in the preceding plea. 7th, To the third avowry, that within the ſaid manor there was another cuſtom that every cuſtomary tenant upon his admiſſion ſhould pay to the lord, in lieu of ſuch heriot by the ſaid avowry claimed, ſuch reaſonable ſum of money as ſhould be agreed upon between ſuch lord and cuſtomary tenant; and if they ſhould diſagree about the ſame, then ſuch reaſonable ſum as ſhould be aſſeſſed by the court baron at the homage; and that when the ſaid ſum of money ſo agreed upon or aſſeſſed had remained unpaid after reaſonable requeſt and demand, the lord of the manor for the time being, from time whereof, &c. had been uſed and accuſtomed to take a reaſonable diſtreſs for the ſame. 8th, The ſame plea to the laſt avowry. Replication tendering iſſue on the traverſes in the third and fourth pleas, and demurring to the fifth, ſixth, ſeventh, and eighth. Rejoinder joining in iſſue and demurrer. EYRE, CH. J. The landlord pleads a cuſtom to have the beſt live or dead chattel as a heriot; the tenant anſwers that he is not entitled to the beſt live or dead chattel, but to a ſum of money

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by way of compenſation. This is pleaded two ways, firſt, as a ſum of money to be aſſeſſed abſolutely by the homage; ſecondly, as a ſum to be agreed upon by the landlord and tenant, and on failure of an agreement then to be aſſeſſed by the homage. Either of theſe pleas is an abſolute denial of the cuſtom that the lord ſhould have the beſt live or dead chattel. This compenſation is pleaded to be in lieu of a heriot; but ſince it is ſtated not to depend upon the will either of lord or tenant, but to take place in all caſes, it cannot be in lieu; it ought therefore to have been ſtated in the name of a heriot, and as an inducement to a traverſe. If the plaintiff had ſaid, true there is ſuch a cuſtom, but if the tenant prefer to pay a ſum of money in lieu, then he ſhall pay ſuch a ſum as the parties ſhall agree upon, that would have been a modification of the cuſtom, and the money would have come in lieu of the original right of the landlord, but here the origininal right is ſtated in two contradictory ways (1). BULLER, J. I am not quite clear that the cuſtoms ſtated on theſe pleas may not ſtand together, as well as thoſe in *Kenchin* v. *Knight* (2). No anſwer, however, has been given to the argument advanced againſt the goodneſs of the cuſtom ſet up by the pleas in bar, viz. that there is no rule to direct the jury in aſſeſſing the amount of the compenſation. I think the cuſtom bad. HEATH, J. All the members of the homage are liable to pay this compenſation, and are therefore intereſted in the aſſeſſment. Suppoſe a cuſtom that the pariſhioners of a certain pariſh ſhould aſſeſs a compenſation to be paid to the rector in lieu of tithes; it would be void as unreaſonable and uncertain. ROOKE, J. I have not the ſame difficulty with reſpect to the cuſtom. A heriot is not due of common right as tithes are, but is the mere creature of cuſtom. The lord has no right but by cuſtom, which is the life of copyhold. This is a claim of the firſt impreſſion, for the lord does not claim from the out-going tenant, but from the in-coming tenant, who is to have his beſt beaſt taken from him: and yet I conceive that it may be good and reaſonable that the in-coming tenant ſhould pay ſuch a ſum of money by way of acknowledgment to the landlord, as the homage ſhall aſſeſs. However, I incline to think, that the plea in bar is not well pleaded. *The Court* ſaid, that as they were all of opinion, though on different grounds, that the demurrer muſt prevail, they ſhould give —Judgment for the defendant.

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(1) Vide *Bland* v. *Moſely*, cit. 9. *Rep.* 58. *Spooner* v. *Day* et al. *Cro. Car.* 432 and *Murgatroid* v. *Law*, *Carth.* 117.

(2) 1 *Bl.* 49. 1 *Wilſ.* 253. B.R.



THE END OF THE SECOND VOLUME.